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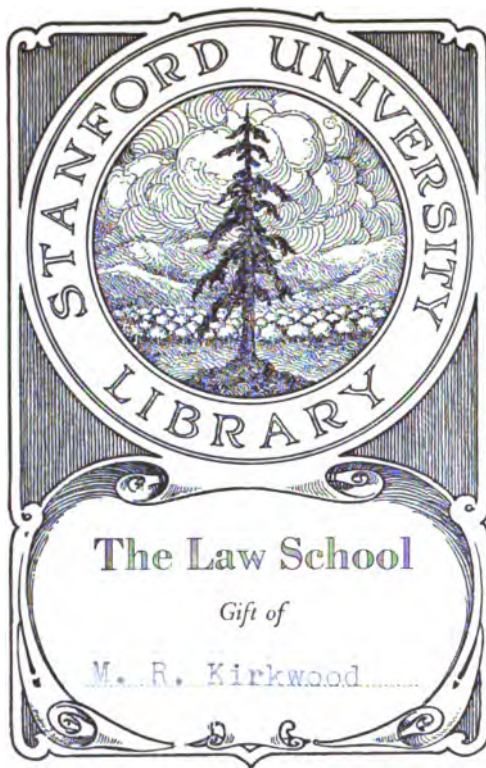
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~~Jan~~ Feb. 16, 1909.

THE
AMERICAN LAW
OF
REAL PROPERTY.

BY
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OF REAL PROPERTY IN THE UNIVERSITY OF THE
CITY OF NEW YORK.

REVISED AND ENLARGED BY
EDW. J. WHITE,
AUTHOR OF "MINES AND MINING REMEDIES," ETC.

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PREFACE TO FIRST EDITION

In presenting to the profession a new work on the American Law of Real Property, the author does not deem an apology necessary, although it may be appropriate to state briefly his object and the scope of the work. The experience of the author, both as a student and as an instructor in this branch of the law, has led him to believe that students of the law generally look upon the law of Real Property as extremely technical, arbitrary and unreasonable. Believing that all law is founded upon reason, and is developed by forces, which are not produced or even controlled by the arbitrary will of the legislator, and feeling confident that a logical or historical reason could be found for every principle of the law of Real Property, the author has made that subject the object of his special study, and this volume is given to the profession as the result of his investigations, with the hope that it might aid in stripping this branch of the law of its harsh and uninviting dress.

In one sense, this book cannot be considered exhaustive, for volumes can be written on the subject without exhausting it. But it is thought that, in another sense, the book may be considered as reasonably exhaustive, in that it contains the enunciation of all those principles which are necessary to a broad and comprehensive knowledge of the subject. Instead of filling these pages with numerous citations of the facts of particular cases, and leaving to the student the discovery of the general principles, which underlie the cases,

these principles are presented in a logical and systematic order, with a statement of the rational or historical source of each, while copious references to decided cases and standard treatises will enable the student to pursue his investigations into all the ramifications of the subject. It is hoped that this plan of treatment will give to the work a peculiar value as a text-book for students, while it will furnish to practitioners a book of ready reference.

Free use has been made of the researches of other writers, and references to their works will be found on almost every page; but the author considers it necessary to make a special acknowledgment of his indebtedness to the treatises of Mr. Williams and Professor Washburn for the valuable assistance which he has derived from them.

In commending this work to the favorable consideration of an enlightened profession, the author trusts that it will not be adjudged to be without merit.

C. G. T.

University of the State of Missouri, Law Department.

November 1st, 1883.

PREFACE TO SECOND EDITION

The author desires in the issue of this second edition to manifest his appreciation of the good will of the profession towards his literary efforts in general, and particularly toward the first edition of this book during the nine years of its existence, by making important additions to both text and references, and thereby materially increasing the value of the book. The entire text has been carefully revised and additions made whenever they have been deemed necessary and possible, without affecting its value as a concise and compact statement of the fundamental principles of the law of real property. Very many new cases have been cited in support of the propositions of law throughout the ramifications of the subject; and almost all of the cases which have been decided by the American Courts of last resort in the intervening years have been cited, which involve the discussion of questions of law in relation to the limitations of estates by deed or by will and the rights of parties therein. It would have been impossible to have cited all the new cases relating to every subject discussed and contained in this book without making the new edition too cumbersome: and for this reason the new citations in the other branches of the subject,—which are discussed in detail in other works,—have been limited to those cases which involve material modifications of *existing laws*. Cases which simply confirm points of law *already settled* and determined have not in these instances

been added to the notes. After all it is questionable whether the unlimited citation of cases in any case adds materially to the value of an elementary text-book, however necessary it may be to a digest of adjudicated cases.

C. G. T.

University of the City of New York,

July 1, 1892.

PREFACE TO THIRD EDITION

'As a student under the learned author of this work, who so thoroughly understood the subject of these pages and contributed, both through the medium of this book and by his life's work, to the scientific treatment and elucidation of this branch of the law, the editor of this edition long since learned to respect the distinguished ability of the author and his systematic treatment of the principles of the law of real property.

The fact that his work has been generally regarded by the bench and bar as a recognized authority upon the law of real property, since its appearance, and that it has been so extensively used as an elementary text-book, is sufficient evidence of the merit of the work. These considerations prompted the editor of this edition to make but few alterations in the text.

The small space devoted, in the previous editions, to the subject of *Fixtures*, and the absence of a discussion of the more recent legislation in the United States upon *Title Registration*, and the relative importance of these subjects, suggested to the publisher the advisability of a separate treatment of these titles. This is the basis of the editor's apology to the profession for the two additional chapters added to the text of the previous editions. Some of the more recent decisions seemed to justify the few other additions to and changes in the text that have been made.

Most of the old, well considered cases, cited in the previous

editions, have been retained, and it was the intention to cite such of the more recent decisions as ought to be cited in a text-book of the size and character of this one.

The work of revision was pursued with a high regard for the usefulness of the original text and a desire to avoid all alterations therein that might detract therefrom. The editor trusts he has performed his task in a manner that would meet with the approval of his preceptor and friend, the author, feeling confident, if this were true, of the approbation of the profession.

E. J. W.

Aurora, Mo., June, 1906.

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THE LAW OF REAL PROPERTY.

PART. I.

CHAPTER I.

REAL PROPERTY.

- SECTION
1. What is real property.
 2. What is land.
 3. Elements composing.
 4. Double ownership in land.
 5. Incidents of dual ownership.
 6. Lands, tenements and hereditaments.
 7. Emblements.
 8. Trees.

§ 1. What is real property.— In the English common law, property is divided into two classes, real and personal. Real property is such as has the characteristic of immobility or permanency of location, as lands and rights issuing out of land.¹ Personal property is every species of property which

¹ The simple, yet expressive, definition of the text is best appreciated, after comparison with other definitions of different authorities upon the subject. (Editor.) While technically true that real property, or real estate, as applied in the law, is usually limited, in the legal acceptance of the term, to estates in fee, or for life in land only, a mere description of the *estate* which may exist therein is not sufficiently broad to define the term "real property." See 3 Kent's Com. (12 ed.) 401, p. 529.

does not have the above mentioned characteristic. Some proprietary right or dominion, sufficient to predicate ownership, or property thereof, is just as essential as a thing of fixed or permanent situs, to constitute real property, and while undiscovered and unclaimed territory would come within the definition of the term land, it could not be considered real property within the legal signification of the term, for it would lack the attribute of ownership, or an estate therein, until some right attached thereto.² Hence it is that real estate is the ownership of land, or property of a fixed, permanent situs, as distinguished from movable property, which accompanies the person of the owner.³ The term "real estate," when used in its strict technical sense, includes all estates for life or for a greater period, but does not include leasehold and other inferior estates.⁴

§ 2. What is land.—All real property or things real, are said to be comprehended under the terms, *lands, tenements, and hereditaments*. Land is the soil of the earth, and includes everything erected upon its surface, or which is buried beneath it. It extends in theory indefinitely upward, *usque ad cælum*, and downward, *usque ad orcum*. Under the term

² A meteorite, though not buried in the soil, constitutes real estate, in the absence of proof of severance, and belongs to the owner of the soil, according to the decision of the Oregon Supreme Court, in *Oregon Iron Co. v. Hughes*, 81 Pac. Rep. 572. For development of the English law and earliest use of the term "ownership," see 2 Pollock & Maitland, *Hist. Eng. Law*, 151. "The right of indefinite user is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.'" *Eaton v. Boston, etc., R. Co.*, 51 N. H. 504; *Finch's Sel. Cas. Law Prop. in Land*, 1; *Wynehamer v. People*, 13 N. Y. 378; 1 Bl. Com. 138; 2 Austin's *Jur.* (3 ed.) 217.

³ The legal situs of personal property follows the domicile of the owner and the actual situs is only effected by transfers operating through the law itself. *Yost v. Graham*, 50 W. Va. 199; 40 S. E. Rep. 361.

⁴ *Co. Litt.* 19, 20; *Westervelt v. People*, 20 Wend. 416; *Murry v. Hallett*, 2 Cowen, 497; 3 Kent's *Com.* (12 ed.) 401, p. 529.

land, therefore, are included the buildings, made so under the doctrine of accession, and the trees and other things growing upon the land, under the doctrine of acquisition by production, as well as the minerals which may be embedded in the earth.⁵ If water runs over the land, the ownership of the land gives a right to the use of the water, but does not create therein a permanent right of property. The property consists in the use.⁶ A grant of lands, therefore, without any qualification, conveys not only the soil but everything else which is attached to it, or which constitutes a part of it, the buildings, mines, trees, growing crops, etc. Even trees which have been cut, and are lying upon the land, have been said to pass with the land.⁷ On the other hand, it has been

⁵ 2 Bla. Com. 17-19; Co. Lit. 4g; 1 Washburn on Real Prop. 3, 4; Williams on Real Prop. 14.

⁶ But whether ice, formed upon a stream or pond, belongs to the owner of the soil, is a doubtful question. If it is an artificial stream, it seems settled that the owner of the bed has a right of property in the ice. *Mill River Co. v. Smith*, 34 Conn. 462; *Paine v. Woods*, 108 Mass. 173. And the same position has been sustained in Indiana in respect to a natural stream. *State v. Pottmyer*, 33 Ind. 402. In Massachusetts, ice formed on a natural stream seems to be common property to all who have the right to go upon the stream. *Paine v. Wood*, *supra*; *Inhab. of W. Roxbury v. Stoddard*, 7 Allen, 158. In many of the Western states, the right to running water, by legislation, is declared a right in real property. This is true in Montana. *Barkley v. Tieleke*, 2 Mont. 59; *Burnham v. Freeman*, 11 Colo. 601. See Colo. Act 1893, p. 298. And for discussion of the right to running water on the public domain and a history of the Federal legislation on the subject, see *Titcomb v. Kirk*, 57 Cal. 288. The right of a riparian proprietor of a non-navigable stream to the undiminished flow of the water, is held, in New York, to be inseparably annexed to the soil and a part of the land itself, and not a mere easement or appurtenance. *Pine v. New York*, 103 Fed. Rep. 337; *Smith v. Rochester*, 92 N. Y. 463.

⁷ *Brackett v. Goddard*, 54 Me. 513; *Isham v. Morgan*, 9 Conn. 374; *Hilton v. Gilman*, 17 Me. 263; *Baker v. Jordan*, 3 Ohio, 438. But if timber on land is cut by a licensee or lessee, a subsequent conveyance of the land would not effect the title of the licensee or lessee in the timber, for a severance of the timber from the freehold would so far change its character to personal property as to prevent it from passing

held that a grant of a mill included the contiguous land which had been used with the mill, and which was necessary to such use; and the grant of a house passed the land upon which it is built.⁸ But the land must be both contiguous and necessary to the enjoyment of the building which has been specifically conveyed, in order that it too might pass under the grant. Thus the grant of a hotel "and the land adjoining it," was held not to include an island in the rear of the hotel, but which was separated from it by a river large enough for a mill stream.⁹ Manure made upon a farm is generally considered in this country to be a part of the realty and to pass with the grant of the land.¹⁰ So, also, has the rolling stock of a railroad been considered a part of the realty, and to pass with a conveyance of the road without any special description of the same.¹¹

in a conveyance of the realty. *Price v. Madison* (S. D.), 95 N. W. Rep. 933.

⁸ *Gear v. Burnham*, 37 Conn. 229; *Esty v. Currier*, 98 Mass. 501; *Roe v. Strong*, 149 N. Y. 316 (23 N. E. 743); *Marmouth v. Plimpton*, 77 Me. 556.

⁹ *Miller v. Mann*, 55 Vt. 475.

¹⁰ *Goodrich v. Jones*, 2 Hill, 142; *Parsons v. Camp*, 11 Conn. 525; *Perry v. Carr*, 44 N. H. 122; *Daniels v. Pond*, 31 Pick. 367. Manure from fodder, fed by a tenant, and not raised on the leased land, belongs to the tenant and not the owner of the land. *Pickering v. Moore*, 67 N. H. 533; 32 Atl. Rep. 828; 31 L. R. A. 698.

¹¹ *Minnesota v. St. Paul R. R.*, 2 Wall. 644; *Farmers' Loan, etc., Co. v. Hendrickson*, 25 Barb. 493; *Palmer v. Forbes*, 23 Ill. 300; *State v. Northern R. R. Co.*, 18 Md. 193. While it is no doubt true that rolling stock of a railroad may be treated as real estate, by legislative act, for purposes of taxation (*Louisville & N. R. Co. v. State*, 25 Ind. 177; *Denver & R. G. Co. v. Church*, 17 Colo. 1; 28 Pac. Rep. 468; 48 Am. & Eng. R. Cas. 627; *Shawnee Co. Com. v. Topeka Equip. Co.*, 26 Kan. 363; *Wilmington & W. R. Co. v. Alsbrook*, 110 N. C. 137, 437; 14 S. E. Rep. 652, 1007), such property is not generally regarded as "fixture" between mortgagor and mortgagee (*Speiden v. Parker*, 46 N. J. Eq. 292, 19 Atl. Rep. 21), but is a chattel, and remains so, after being placed on the track, for operation (*Williamson v. N. J. Southern R. Co.*, 29 N. J. Eq. 311; 15 Amer. Ry. Rep. 572; *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 44; *Neilson v. Iowa Eastern R. Co.*, 51 Iowa,

§ 3. Elements composing.—The term “land,” in its broadest sense, includes not only all substances comprising part of the solid body of the earth, but all fluids and gases, metallic and non-metallic substances, located beneath the surface of the soil, as well as the soil and subsoil upon and immediately beneath the surface of the earth,¹² and the erections on the surface, of a permanent and fixed character. The solid, crystalline bodies, forming part of the substance of the earth and the liquids and gases, which do not possess a definite geometric form, that are put to commercial uses, because of their value to mankind, are generally denominated “minerals,” to distinguish them from the soil and subsoil and other elements of the term “land,” possessing no peculiar value.¹³ As long as such substances retain their natural place in the earth, they are included within the legal meaning of the term “land” and are a part of the realty and pass by a grant of the land, as such;¹⁴ but when once such substances are severed from the soil in which they are naturally found, they lose their character as real estate and are considered personal property.¹⁵

184, 714). And the better opinion is that the rolling stock of a railroad is personalty. (*Randall v. Elwell*, 52 N. Y. 52, s. c. 11 Am. Rep. 747; *Hoyle v. Plattsburg, etc., R. R.*, 54 N. Y. 314, s. c. 13 Am. Rep. 595.)

“Land includes whatever is parcel of the terrestrial globe, or is permanently affixed to such parcel.” *Tiffany*, Real Prop. Sec. 4, p. 6; Co. Litt. 4a. “The term embraces the bare granite of the loftiest mountains, as well as the deepest hidden diamonds and metallic and non-metallic ores.” *Midland R. Co. v. Checkley*, L. R. 4 Eq. 19; *Earl of Ross v. Wainman*, 14 M. & W. 859; 2 Exch. 800; 15 L. J. Exch. 67; *McLaughlin v. Powell*, 50 Cal. 64; *Dark v. Johnson*, 55 Pa. St. 164.

¹² Soil and sub-soil are distinguished from “minerals,” in *Eardley v. Granville*, 3 Ch. D. 826. See, also, *Midland R. Co. v. Haunchwood Co.*, 20 Ch. D. 555; *MacSwinney*, on Mines, p. 18.

¹⁴ Land includes the term mineral. *Shep. Touch.* 90; *Newcoln v. Coulson*, 5 Ch. D. 142; *McDonald v. McKinty*, 10 Ir. L. R. 514; *Loosemore v. Tiverton R. Co.*, 22 Ch. D. 43.

¹⁵ *Grubb v. Bayard*, 2 Wall Jr. 81; *Green v. Ashland Iron Co.*, 62 Pa. St. 97; *Forbes v. Gracey Con. Vir. Min. Co.*, 94 U. S. 762; 24 L. Ed. 313; *Burns v. Clark*, 133 Cal. 634.

§ 4. **Double ownership in lands.**—Technically, the law knows no double ownership in lands, or in any other kind of property. But, since land is made up of composite elements, the soil itself, the trees, and other products and annexations upon it, and the minerals and other deposits under it, it may be divided up into these elements, so that one man may own the trees and erections, another the surface, and a third a mine beneath. A sale of the trees, if it satisfies the requirements of the Statute of Frauds, by being in writing, gives to the vendee a right of property in the standing trees, with the right to enter upon the land for the purpose of cutting and transporting them.¹⁶ But if the contract be executory, and not in the nature of a deed, then no title to the standing trees passes to the vendee. He simply has a license to come upon the land and cut them.¹⁷ So there may be a separate right of property in a house,¹⁸ or a room, or in a mine.¹⁹

¹⁶ *Carrington v. Roots*, 2 M. & W. 248; *Warren v. Leland*, 2 Barb. 613; *Pattison's Appeal*, 61 Pa. 297; *Whipple v. Foot*, 2 Johns. 423; *Green v. Armstrong*; 1 Denio, 550; *McGregor v. Brown*, 10 N. Y. 117; *Drake v. Wells*, 11 Allen 144; *Clap v. Diaper*, 4 Mass. 266; *Kingsley v. Holbrook*, 45 N. H. 319; *Gardner Mfg. Co. v. Heald*, 5 Greenl. 381; *Drake v. Wells*, 11 Allen 144; *Knotts v. Hydrick*, 12 Rich 314; *Westcott v. Delano*, 20 Wis. 516; *Rich v. Zeilsdorf*, 22 Wis. 544; see *post*, Sec. 563.

¹⁷ *Drake v. Wells*, 11 Allen, 142; *Douglass v. Shumway*, 13 Gray, 502; *Clark v. Way*, 11 Rich. 621; *Nettleton v. Sikes*, 8 Metc. 35. See *post*, Sec. 563.

¹⁸ *Harris v. Ryding*, 5 M. & W. 60; *Stoughton v. Lee*, 1 Taunt. 402; *Stockwell v. Hunter*, 11 Metc. 448; *Adams v. Briggs*, 7 Cush. 361; *Canfield v. Ford*, 28 Barb. 336. In the recent case of *Madison v. Madison* (206 Ill. 534, 69 N. E. Rep. 625), an interesting question over the different elements and ownership in lands arose. The owner of a two-story building made a deed, without limitation, to the owner of the second story and the court held the grantee acquired a tangible interest in real estate thereby.

¹⁹ *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 9; *Proprietors v. Lowell*, 1 Metc. 538; *Otis v. Smith*, 9 Pick. 293; *Shades v. McCormick*, 4 Iowa, 375; *Cheeseborough v. Green*, 10 Conn. 318; *Green v. Putnam*, 8 Cush. 21; *Caldwell v. Fulton*, 31 Pa. 475; *Clement v. Youngmann*, 40 Pa. St.

§ 5. **Incidents of dual ownership.**—Formerly, when one owned the surface of the earth, he was held, in law, to own an estate which extended to the center of the earth, but now the surface of the land may be separated, by a distinct title, from the different strata underneath it and there may be as many owners as there are strata.²⁰ Not only may there be separate titles to the elements that compose the soil, but there may be distinct ownership in the different descriptions of minerals, or in different deposits or strata of the same kind of mineral.²¹ For instance, one person may own the iron ore and another the lead, contained in the same tract of land, and a third party can own one section or stratum of coal and a fourth hold the title to another distinct seam of the same mineral, while neither may possess the title to the surface of the land.²²

§ 6. **“Lands, tenements, and hereditaments.”**—What is included under the term lands, has been discussed in the preceding pages. *Tenements* are those things which can be HOLDEN. It is a word derived from the feudal system, and signifies anything which is held in tenure.²³ Hereditament

344; *Zinc Co. v. Franklinite Co.*, 13 N. J. 322; *Wardell v. Watson*, 93 Mo. 107; *Coal Co. v. Mellon*, 152 Pa. St. 286; *Lillibridge v. Coal Co.*, 143 Pa. St. 293; *Kirk v. Mattier*, 140 Mo. 23.

²⁰ *Lillibridge v. Coal Co.*, 143 Pa. St. 293; *Coal Co. v. Mellon*, 152 Pa. St. 286; *Kirk v. Mattier*, 140 Mo. 23.

²¹ *Caldwell v. Copeland*, 37 Pa. St. 1; *Kier v. Peterson*, 41 Pa. St. 5; *Barden v. Northern Pac. Co.*, 154 U. S. 288; *Williams v. Gibson*, 84 Ala. 228; *Higgins v. Cal. Pet. Co.*, 109 Cal. 304; *Silva v. Rankin*, 80 Ga. 79; *Wilms v. Jess*, 94 Ill. 464; *Rogers v. Cox*, 96 Ind. 157; *Mickle v. Douglas*, 75 Iowa 78; *Hartford Co. v. Cambria Co.*, 93 Mich. 93.

²² *Butte Mining Co. v. Sloane*, 16 Mont. 97; *Hawkins v. Pepper*, 117 N. C. 407; *Burgner v. Humphrey*, 41 Ohio St. 340; *Pringle v. Coal Co.*, 172 Pa. St. 438; *Lee v. Baumgardner*, 86 Va. 315; *Blanchard & Weeks Ld. Cas.*, p. 33. There may be separate distinct estates in different persons in the surface of land and oil and other minerals in it. *Peterson v. Hall (W. Va.)*, 50 S. E. Rep. 603.

²³ Tenement is said to be a more comprehensive term than land, which

is any property which is heritable. Hereditaments are of two kinds, corporeal, that is, everything of a substantial nature, such as lands, houses, mines, etc.; incorporeal, or those species of real property, which are not tangible, and are more properly rights in, than rights to, or of, real property.²⁴ The Roman *jura in re aliena*, comprise to some extent this class of rights of property.

§ 7. **Emblements.**—If growing crops are planted by the owner of the soil, they form a part of the realty. But if they are planted by a tenant, holding under the owner, then they are personalty as regards the owner, at least during the continuance of the tenancy, but as a rule, realty in respect to all others. Whether he has a right to the growing crops, after the termination of his lease, depends upon the certainty or uncertainty of its duration. This right is called emblements. When the termination of the estate depends upon an uncertainty, the tenant or his personal representatives will have emblements, coupled with the right of entry for the purpose of working the crops, until they are ripe for harvesting.²⁵ This subject will be specially noticed in discussing the characteristics of the different estates.

it includes, as well as incorporeal property. 2 Pollock & Maitland Hist. Eng. Law 148; Co. Litt. 18a; 2 Bl. Com. 17.

²⁴ While "hereditament" is broader than tenement, as including whatever, in the absence of testamentary disposition, may descend to the heir. Tiffany, Real Prop. Sec. 4, p. 7; 2 Bl. Com. 17; Co. Litt. 6a.

²⁵ *Holbrook v. Green* (1903), 98 Me. 171, 56 Atl. Rep. 659. A mortgagee of land cannot recover from the mortgagor for crops grown and actually severed from the land before the entry by the mortgagee. *Hinton v. Walston*, 115 N. C. 7; 20 S. E. Rep. 164. A crop planted by a tenant for years, after a decree foreclosing a mortgage on the land, belongs to the tenant, if he was permitted to retain possession until the maturity of the crop. *Munday v. O'Neal* (Neb.), 63 N. W. Rep. 32. But a purchaser under a mortgage sale, becomes the owner of all crops unsevered at the time of the sale, although not as to crops severed before the sale. *Watson v. Menter*, 59 Mo. App. 387. Crops raised on leased premises, after severance, although not harvested, become personalty and do not pass to the incoming tenant or revert to the land-

§ 8. *Trees.*—As we have seen above, trees constitute a part of the realty, being a product of the soil which is not planted annually. If the trunk of a tree is wholly within the boundaries of one man's land, the entire tree belongs to him, even though the branches and roots may find their way into the land of the adjoining owner. The adjoining owner need not endure this trespass, but may cut off such projecting roots and branches. If the tree stands upon the boundary line, so that a part of the tree is on either side, the tree is then the joint property of both, and neither can remove or injure it without the consent of the other.²⁶ And while there can be a separate property in growing trees, the same as in minerals beneath the surface,²⁷ so long as the title to the trees is in the surface owner, they form a part and parcel of the realty and the mere fact that a contract of sale has been executed for the growing timber on a tract of land, would not pass the title to the trees, but they would retain the character of land, to such an extent as to be taxable only as a portion of the realty and not as a separate entity, until an actual conveyance had been made.²⁸

lord, as a part of the realty. *Meffert v. Dyer* (Mo. App. 1904), 81 S. W. Rep. 643.

²⁶ *Masters v. Pollie*, 2 Roll. Rep. 141; *Hutchings v. King*, 1 Wall. 59; *Holder v. Coates*, 1 Mees. & W. 112; *Skinner v. Wilder*, 38 Vt. 115; *Dubois v. Beaver*, 25 N. Y. 123; *Hoffman v. Armstrong*, 48 N. Y. 201; 3 Kent's Com. 437. It was recently held, in Iowa, that trees on the boundary line between two adjoining tracts were the common property of both landowners, but that either could cut the branches at the line and dig out the roots penetrating his land. *Harndon v. Stultz* (1904), 100 N. W. Rep. 329.

²⁷ *Kirk v. Mattier*, 140 Mo. 23.

²⁸ *Williams v. Triche*, 107 La. 92, 31 So. Rep. 926. Where growing trees or timber is taken under eminent domain, or condemnation proceedings, the damages to which the one entitled to the timber, who purchased it from the owner, is the value of the trees on the stump, with interest on the same, from the time of the appropriation. *Turner v. State*, 73 N. Y. S. 372, 67 App. Div. 393.

CHAPTER II.

FIXTURES.

SECTION 9. General doctrine of.

10. Nature and definition of.
11. Tests for determining what are.
12. Identity and subsequent use of chattel.
13. Between what parties the question may arise.
14. Constructive annexation.
15. Temporary annexation.
16. Questions of, between landlord and tenant.
17. Fixtures erected by licensee.
18. Time for removal of fixtures.

§ 9. General doctrine of.— The general rule of law is that a permanent annexation to the soil of a thing, in itself personal, makes it a part of the realty. And the rule applies, in some cases, even where the thing annexed is the personal property of another. Thus, if a stranger erects a building upon the land of another, having no estate therein, the building becomes the property of the owner of the soil. And this happens at common law, notwithstanding the stranger acts under a mistaken claim of title.¹ But if such erection is in pursuance of a license granted by the owner of the soil, then the annexation will not make the building or other structure a part of the realty. A conveyance of the land will not transfer the structure with it, but will operate as a revocation of the license, and compel the owner, within a reasonable time after such revocation, to remove

¹ Osgood v. Howard, 6 Greenl. 452; Aldrich v. Parsons, 6 N. Y. 555; Dame v. Dame, 38 N. H. 429; Ogden v. Stock, 34 Ill. 522; Rogers v. Woodbury, 15 Pick. 156; Webster v. Potter, 105 Mass. 416.

the structure or lose his right of property therein.² But where the person erecting the structure is the owner of the soil, or has an interest in the land, then it is more difficult to determine from the various circumstances under which the question may arise, when the annexation is sufficiently permanent in its character, in order to merge the thing attached into the realty. This subject is known as the law of fixtures.

§ 10. Nature and definition of.—{Fixtures are those things, which, personal in their nature, become realty by reason of their annexation to the soil, such annexation being made by some one having an interest in the soil.³} They are re-

² *Tapley v. Smith*, 18 Me. 12; *Russell v. Richards*, 10 Me. 429; *Keyser v. School District*, 35 N. H. 480; *Antoni v. Belknap*, 102 Mass. 200; *Kutter v. Smith*, 2 Wall. 491; *O'Brien v. Kustener*, 27 Mich. 292; *Ham v. Kendall*, 111 Mass. 298; *Goodman v. Hannibal & St. Joseph R. R.*, 45 Mo. 33; *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206; *Curtis v. Leasia*, 44 N. W. Rep. 500; *Keating Implement Co. & Machine Co. v. Power Co.*, 74 Tex. 605; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. Rep. 634; *Pope v. Skinkle*, 45 N. J. L. 39; *Rowland v. Anderson*, 33 Kan. 264; *Ingalls v. St. Paul, etc., R. R. Co.*, 40 N. W. Rep. 524, 39 Minn. 479. A leather belt, used to transmit power from a stationary engine to a main shaft, for the operation of the machinery of a marble mill, is held, in Vermont, to be a part of the realty and is not subject to attachment and removal as personal property. *Friedley v. Giddings*, 119 Fed. Rep. 438, 128 Fed. Rep. 355, 63 C. C. A. 85, 65 L. R. A. 327.

³ Mr. Ewell does not limit the term to articles of a chattel nature only, but defines a fixture as "any annexation or addition which has been affixed to, or planted in, the soil of the land." Ewell, *Fixt.* 1; *Climie v. Wood*, L. R. 3 Exch. 257, 37 L. J. (N. S.) Exch. 158; L. R. 4 Exch. 328. Unless the article annexed entirely loses its identity in the manner of the annexation (*Woodruff v. Adams*, 37 Conn. 233; *Lansing Engine Works v. Walker*, 91 Mich. 409), the chattel must usually be annexed by the owner of the land, or with his consent. *General Elec. Co. v. Equipment Co.*, 57 N. J. Eq. 460; *Gill v. De Armand*, 90 Mich. 425. It is held, in Canada, that for personal property permanently placed on land and incorporated therewith, to become a fixture, the ownership both of the land and personal property, must be vested in the same person. *Leonard v. Williard*, Rap. Jud. Que. 23 C. S. 482. This is also the rule, in Louisiana. *Hibernia Nat. Bank v. Sarah Planting & Refining Co.*, 107 La. 650, 31 So. Rep. 1031.

movable or not, according to the circumstances of each case. In the first place, the attachment must be of a permanent and legal character. If there is no attachment or annexation, the thing remains personal property. But the annexation may be *actual* or *constructive*. Actual annexation is where the thing is annexed by actual attachment to the soil, as a house built upon a brick foundation, or fences with posts embedded in the soil. Constructive annexation is where the thing is fitted for use in connection with the premises, and is more or less necessary to their enjoyment, but it is not firmly attached. Such, for example, are keys, movable window blinds, doors, etc. In the second place, since the thing assumes the character of a fixture, because of its annexation to the soil, it must follow, that if there can be a legal severance it will re-assume the character of personal property and cease to be a fixture. The right to remove fixtures depends upon the intention of the parties as manifested by the character of the annexation and the effect of severance upon the land, and the relation of the person making the removal to the fixture and to the land.

§ 11. **Tests for determining what are.**—In determining whether a given article annexed to the realty, does, or does not become a fixture, the judicial tests are usually said to be: (1) the intention with which the annexation was made; (2) the physical character of the annexation, and (3) the adaptability of the article to the uses for which the realty is put.⁴ While different courts, because of the peculiar facts of a given case, may give undue prominence to one or the other of these tests, in determining the question, it is usually necessary to consider them all, to reach a proper solution, in

⁴ State Bank v. Perceval, 65 Mo. 683; McRea v. Nat. Bank, 66 N. Y. 489; Hopewell Mills v. Staunton Bank, 150 Mass. 519; 15 Amer. St. Rep. 235; Manwaring v. Jennison, 61 Mich. 117; Finfield v. National Bank, 148 Ill. 163, 39 Amer. St. Rep. 166, 13 Amer. & Eng. Enc. Law (2 ed.) 593.

every case. The physical character of the annexation to the land is not, alone, sufficient to determine whether an annexed chattel has become real estate, but concurring with such physical annexation, in order to effect a merger of the chattel into the realty, there must have existed an intention, on the part of the party attaching it to the realty, of making it a permanent accession to the land and an adaptability, of the chattel, for the use to which that part of the realty to which it is annexed, is put.⁵ Keeping in mind these tests, and the underlying principles that where an object is so attached to the land, as to become a part thereof, it goes to the heir, and where, from its nature and purpose, it was clearly not intended that it should form a part of the realty, but was only attached for temporary purposes of enjoyment, it is removable and goes to the executor, there will be little difficulty in determining all questions of fixtures, whether between landlord and tenant, or tenant for life and remainderman, for any apparant change in the law, in this regard, is not in the principles themselves, but arises from their application, under changed conditions of life and habits.⁶

⁵ In a late New Jersey case it is held, that in order to transmute chattels into realty, it must appear, First, that the chattels were actually annexed to the real estate, or something appurtenant thereto; second, that they were applied to the use to which that part of the realty to which they were connected was appropriated; and, third, that they were annexed with the intention to make them a permanent annexation to the freehold. *Atlantic S. D. T. Co. v. Atl. City L. Co.*, 64 N. J. Eq. 140, 53 Atl. Rep. 212. The physical character of the annexation of a chattel to land does not, alone, determine the question of whether or not the chattel becomes real estate. To effect a merger of a chattel into realty there must be an actual physical annexation; an adaptability for use with that part of the realty to which it is annexed and an intention, deducible from all the circumstances, by the party annexing, to make it a permanent accession. *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. Rep. 940.

⁶ *Leigh v. Taylor*, 71 Law J. Ch. 272 (1902), App. Cas. 157, 86 Law T. 239; 50 Weekly Rep. 623.

§ 12. **Identity and subsequent use of chattel.**—Illustrative of the tests by which personal property, annexed to the real estate, may or may not become a fixture and so far have its character changed as to be converted from personalty, into real estate, provided the nature of the property is such that it will not retain its original character and fitness for subsequent use as personalty, and the intention and mode of the annexation are such as to evidence an intention that it should become real estate, is the recent case, where it was attempted to change the character of a hotel building, annexed to the land and conveyed as a part of it, by a subsequent agreement that it should be considered personalty, which the Court held could not be done,⁷ and another case, where water pipes and meters—although annexed to the real estate by the owner, who subsequently made a deed of the land to which they were annexed, granting all “rights, privileges and appurtenances” to the land belonging—were held not to become a part of the real estate, as such property did not lose its character of personalty, nor was its identity so changed that it lost its original fitness for use, on being removed from the realty.⁸

§ 13. **Between what parties the question may arise.**—Where the person who erected the fixture has a permanent

⁷ *Beeler v. Mercantile Co.* (Idaho, 1902), 70 Pac. Rep. 943.

⁸ *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. Rep. 1019. See, also, *Dunsmire v. Port Angeles Water, etc., Co.*, 63 Pac. Rep. 1095. In a recent Arizona case, a log fence, erected to enclose a tract of Government land, which, by mistake, was built on an adjoining tract, acquired from the Government by another person, was held to pass as an incident of the realty and was not the subject of removal, as a trade fixture. *Hereford v. Pusch* (1902), 68 Pac. Rep. 794. And, in Montana, it is held that a stockholder who adds to an opera house, a drop curtain, chairs, stage appliances and articles to be used in connection with the opera house, owned by a corporation, loses title thereto and the articles become fixtures to the extent of passing, with an execution sale of the opera house, to a purchaser thereof. *Murray v. Bender*, 125 Fed. Rep. 705, 60 C. C. A. 473, 63 L. R. A. 783.

estate in the land, such as a fee, the legal maxim *quidquid plantatur solo solo cedit*, applies to the fullest extent, qualified only by the rule that the annexation must be of a permanent character. The question, as to the right to remove such a fixture, may arise between (1) heirs and the executor; (2) vendor and vendee; (3) mortgagor and mortgagee; (4) life tenant and remainderman; (5) landlord and tenant, and, (6) licensor and licensee.⁹ In all these cases, the general rule is, that all annexations of a permanent character pass with the realty respectively to the heir, vendee, mortgagee, remainderman, landlord, and licensor and cannot be removed by the executor, vendor, mortgagor, life tenant, tenant, or licensee. Such is the rule, even though the severance might be made without any material injury to the freehold. But the permanent or temporary character of the annexation often presents some difficult questions. It seems that the manner of fastening offers, in most cases, the true solution. If the fastening is firm and secure, then it gives permanency to the annexation, and makes the thing attached an immovable fixture. Such would be engines, boilers, dye-kettles, cotton-gins, and all other kinds of machinery which are firmly attached to the building by rods and bolts passing through the joists and timber, gas fixtures and water-works, as well as houses and other buildings, erected upon a firm foundation. Such fixtures would, as between the parties named, constitute a part of the realty, and pass with it.⁹ But the permanency of the annexation does

⁹ *Hill v. Sewald*, 53 Pa. St. 274; *Voorhies v. Freeman*, 2 Watts & S. 116; *Union Bank v. Emerson*, 15 Mass. 159; *Noble v. Butterworth*, 19 Pick. 314; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 937; *Quinby v. Manhattan Cloth, etc., Co.*, 24 N. J. Eq. 260; *Parsons v. Copeland*, 38 Me. 537; *Lavenson v. Standard Soap Co.*, 80 Cal. 245; *Speiden v. Parker*, 46 N. J. Eq. 292; *Horne v. Smith*, 105 N. C. 322; *Doughty v. Owen* (N. J.), 19 Atl. Rep. 540; *Langdon v. Buchanan*, 62 N. H. 657; *Hacket v. Amsden*, 57 Vt. 432; *Brass Foundry, etc., Works v. Gallentine*, 99 Ind. 525; *Dudley v. Hurst* (Md.), 8 Atl. Rep. 901; *Kisterbock v. Laning* (Pa.), 7 Atl. Rep. 596, note; *Scheifele v. Schmitz*, 42 N. J. Eq.

not always determine the fixture to be irremovable. While such permanency of annexation presumptively denies the right of removal of the fixture as between the parties just named, this is so only because the permanent character of the interest in the land of the party who makes the annexation established, in conjunction with the permanent character of the annexation, an intention on his part to make it permanently an appurtenant of the land. It is in every case a question of intent. And if in any case, even as between the parties named, the contrary intention is clearly established, the fixture will be removable, notwithstanding the annexation was permanent in character, provided, always, that the removal can be made without any permanent material damage to the estate.¹⁰ Thus the intention to make a permanent fixture, which rests upon the security of the annexation, will always be rebutted, and the contrary intention established, where the owner of the land, to which the fixture was attached, had executed a chattel mortgage over the thing, either contemporaneously with or prior to its attachment to the land, at least so far as to give priority of

700; *s. c.* 11 Atl. Rep. 257, note; *Smyth v. Sturges*, 108 N. Y. 495; *s. c.* 15 N. E. Rep. 544; *Appeal of Williams* (Pa.), 16 Atl. Rep. 810; *s. c.* 24 W. N. C. 365; *Hill v. Munday* (Ky.), 11 S. W. Rep. 956 (stock of ice in house on land conveyed); *Burrell v. Lumber Co.*, 65 Mich. 571; *Childs v. Hurd*, 32 W. Va. 66; *Pierce v. George*, 108 Mass. 78; *Hill v. Hill*, 43 Pa. St. 521; *McRea v. Central National Bank*, 66 N. Y. 489; *Burnsides v. Twitchell*, 43 N. H. 390; *Green v. Phillips*, 26 Gratt. 752, 21 Am. Rep. 323; *Latham v. Blakely*, 70 N. C. 369; *Richardson v. Borden*, 42 Miss. 71, 2 Am. Rep. 595; *Deal v. Palmer*, 72 N. C. 582; *Stockwell v. Campbell*, 39 Conn. 362, 11 Am. Rep. 393.

¹⁰ *Manwaring v. Jennison*, 61 Mich. 117; *Carpenter v. Allen*, 150 Mass. 281; *Vail v. Weaver*, 132 Pa. St. 363; *Buzzell v. Cummings*, 61 Vt. 213; *Elliott v. Wright*, 30 Mo. App. 217; *John Van Range Co. v. Allen*, (Miss.) 7 So. Rep. 499; *Foster v. Prentiss*, 75 Me. 279; *Hart v. Sheldon*, 34 Hun 38; *DeLacy v. Tillman*, 83 Ala. 155; *Harkey v. Cain*, 69 Tex. 146, *s. c.* 6 S. W. Rep. 637, note; *Benedict v. Marsh*, 127 Pa. St. 309; *Voorhees v. McGinniss*, 48 N. Y. 278.

lien to the chattel mortgage.¹¹ Where the right of removal is denied to the party who annexed the fixture, the fixture, in case of such unlawful removal, can be recovered, as long as it remains in the possession of the party so removing it, or of one who is not a *bona fide* purchaser. But if the fixture has been transferred to a *bona fide* purchaser for value, he acquires a good title thereto and it cannot be taken away from him. And the remedy of the owner of the land and fixture is for damages against the party who removed the fixture.¹²

§ 14. Constructive annexation.—The permanency of the annexation may be presumed from the weight and size of the object, and its suitability for use and enjoyment on the land on which it rests. Thus a statue of huge dimensions, resting with its pedestal upon a permanent foundation, and erected upon a lawn for the purpose of ornament, was held to be a part of the realty.¹³ Under the doctrine of constructive annexation, it has been held that the poles, wires and lamps erected in the street, by an electric light company, were fixtures and appurtenant to the company's

¹¹ *Carpenter v. Allen*, 150 Mass. 281; *Sword v. Low* (Ill.), 13 N. E. Rep. 826; *Miller v. Wilson*, 71 Iowa 610; *Henkle v. Dillon*, 15 Oreg. 610, *s. c.* 17 Pac. Rep. 148; see *Campbell v. Roddy*, 44 N. J. Eq. 244, *s. c.* 14 Atl. Rep. 279; *McGorrick v. Dwyer* (Iowa), 43 N. W. Rep. 215; *Binkley v. Forkner*, 117 Ind. 176, *s. c.* 19 N. E. Rep. 753, note.

¹² *Betz v. Verner*, 46 N. J. Eq. 256. Fixtures annexed to real estate by one in possession, under a contract of purchase, as against the vendor of the land, cannot be removed by the vendee, nor be seized and sold, on an execution against him, as his personal property. *Seiberling v. Miller*, 106 Ill. App. 190, 207 Ill. 443, 69 N. E. Rep. 800. The rule that ornamental fixtures are removable applies as well to life tenant and remainderman as to landlord and tenant. *In re DeFalbe*, 70 Law J. Ch. 286; (1901) 1 Ch. 523; 84 Law T. 273; 49 Weekly Rep. 455; *Ward v. Taylor*, *id.*

¹³ *Snedeker v. Waring*, 12 N. Y. 170. See, also, to same effect, *Cavis v. Beckford*, 62 N. H. 229; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519.

plant.¹⁴ Where things, though temporarily detached, are permanently used in connection with the land, they are fixtures and pass with the realty. Thus, hop-poles, stacked up in piles, rolls in an iron mill, lying loose in the mill, fencing materials, etc., were held to be fixtures, even though they were at the time detached from the soil.¹⁵

§ 15. Temporary annexation.— But where the attachment is only for the purpose of keeping the things steady, and they were not specially adapted to use upon the premises in question, the simple fastening, which may exist, will not give to them the character of permanent fixtures. Thus, looms and cording machines, fastened by screws to the floor, a large ice chest used in a tavern, and other such articles, are personal property, and will not pass with the realty to the heir, vendee or mortgagee.¹⁶ And where a house is not put upon a firm foundation, the courts are inclined to hold that it was intended to be a temporary structure, and that it can be moved.¹⁷ A great many things, such as rolls in an iron mill,

¹⁴ *Keating Implement, etc., Co. v. Power Co. (Tex.)*, 12 S. W. Rep. 489.

¹⁵ *Bishop v. Bishop*, 11 N. Y. 123; *Wadleigh v. Janvrin*, 41 N. H. 503; *Hill v. Sewald*, 53 Pa. St. 274; *Voorhies v. Freeman*, 2 Watts & S. 116; *Goodrich v. Jones*, 2 Hill 142; *Meig's Appeal*, 62 Pa. St. 28; 1 Am. Rep. 372; *McLaughlin v. Johnson*, 46 Ill. 163; *Fulton v. Norton*, 64 Me. 410; *Glidden v. Bennett*, 43 N. H. 306; *Smith v. Price*, 39 Ill. 28; *Doughty v. Owen (N. J.)*, 19 Atl. Rep. 540. It is held, in Georgia, that where a house of brick is destroyed and the brick and other material composing the house, falls on the land, they remain a part of the realty and the owner, after a conveyance of the land, cannot remove them. *Guernsey v. Phinizy*, 113 Ga. 898, 39 S. E. Rep. 402.

¹⁶ *Murdock v. Gifford*, 18 N. Y. 28; *Cresson v. Stout*, 17 Johns. 116; *Voorhies v. McGinnis*, 48 N. Y. 278; *Pierce v. George*, 108 Mass. 78, 11 Am. Rep. 310; *Blanche v. Rogers*, 26 N. J. Eq. 563; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Hill v. Sewald*, 53 Pa. St. 274; *Feimster v. Johnston*, 64 N. C. 259; *Graves v. Pierce*, 53 Mo. 423; *Long v. Cokern*, 29 Ill. App. 304, s. c. 128 Ill. 29; *Rogers v. Prattville Mfg. Co.*, 81 Ala. 483; *Walker v. Grand Rapids, etc., Co. (Wis.)*, 35 N. W. Rep. 332.

¹⁷ *Carlin v. Ritter*, 68 Md. 478.

storm doors, steps, etc., which, when actually fitted for use and attached to the premises, are held to be permanent fixtures, remain personal property until so fitted and attached, though they may be deposited upon the land.¹⁸ When the question arises between mortgagor and mortgagee, the fixture is not removable, whether it is annexed by the mortgagor or mortgagee, before or after the execution of the mortgage.¹⁹ The rule as to fixtures is the same between debtor and creditor, and the heir or vendee and the widow, in respect to the premises set out to her for dower.²⁰

§ 16. Question of, between landlord and tenant.— When the question arises between landlord and tenant, or remainderman and executor of tenant for life, in respect to the fixtures placed upon the land by the tenant for years, and for life

¹⁸ *Johnson v. Mehaffy*, 43 Pa. St. 308; *Burnside v. Twitchell*, 43 N. H. 390; *Peck v. Batchelder*, 40 Vt. 233; *Noble v. Sylvester*, 42 Vt. 146; *Miller v. Wilson*, 71 Iowa, 610.

¹⁹ *Roberts v. Dauphin Bank*, 19 Pa. St. 74; *Richardson v. Copeland*, 6 Gray 536; *Haskin v. Woodward*, 45 Pa. St. 42; *Crane v. Brigham*, 11 N. J. Eq. 30; *Voorhies v. McGinnis*, 48 N. Y. 278; *Burnside v. Twitchell*, 43 N. H. 390; *Lynde v. Rowe*, 12 Allen, 100; *Quinby v. Manhattan, etc., Co.*, 24 N. J. Eq. 260; *Cullwick v. Swindell*, L. R. 3 Eq. 249; *Foote v. Gooch*, 96 N. C. 265, s. c. 1 S. E. Rep. 525, note; *Southbridge Sav. Bank v. Mason*, 18 N. E. Rep. 406, note; *McFadden v. Allen*, 3 N. Y. S., note, s. c. 50 Hun 361. But the mortgagor may remove the fixtures erected by him, where he has, expressly or by necessary implication, reserved the right to do so. *Waterfall v. Penistone*, 6 E. & B. 876; *Crane v. Brigham*, 11 N. J. Eq. 30; *Burnside v. Twitchell*, 43 N. H. 390; *Crippen v. Morrison*, 13 Mich. 23. A chattel mortgage of the fixture executed before or contemporaneous with its annexation, will have priority over a prior mortgage of the realty. *Tift v. Horton*, 53 N. H. 377, 13 Am. Rep. 537; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Carpenter v. Allen*, 150 Mass. 281; *Sword v. Low* (Ill.), 13 N. E. Rep. 826; *Miller v. Wilson*, 71 Iowa 610; *Hankle v. Dillon*, 15 Oreg. 610, s. c. 17 Pac. Rep. 148; *Binkley v. Forkner*, 117 Ind. 176, s. c. 19 N. E. Rep. 753, note; *Campbell v. Roddy*, 44 N. J. Eq. 244; *McGorriek v. Dwyer* (Iowa), 43 N. W. Rep. 215. See also *Ropps v. Barker*, 4 Pick. 238.

²⁰ *Goddard v. Chase*, 7 Mass. 432; *Farrar v. Chanfetete*, 5 Denio 527; *Powell v. Monson Co.*, 3 Mason 459; *Hutchman's Appeal*, 27 Pa. St. 209; *Way v. Way*, 42 Conn. 52.

respectively, a more liberal rule is followed. The general rule, above alluded to, that everything permanently annexed to the soil becomes a part of the realty, and cannot be removed, still holds good.²¹ But since the tenant's interest in the land is temporary in character, the presumption of permanency resulting from the character of the annexation has, in the more important cases, to give way to a counter-presumption that the tenant did not intend to continue the annexation longer than his term; and for this reason there are certain exceptions, created in behalf of the tenant in respect to certain classes of fixtures. 'The tenant is permitted to remove a fixture, which falls within one of these classes, even though firmly affixed to the soil, provided such removal will not result in any permanent and material injury to the freehold. These are (1) trade fixtures; (2) agricultural fixtures; and (3) fixtures for domestic use and convenience. Until lately, the common-law rule was relaxed only in favor of trade fixtures, while agricultural and domestic fixtures received the same strict construction as is applied to all fixtures between the heir and executor and other classes above mentioned. The tendency of the law at the present day is to permit the tenant to remove all fixtures he may attach to the soil, which come under one of these classes, and which can be removed without permanent injury to the premises.'²²

²¹ *Elwes v. Maw*, 3 East 38; 2 Smith's Ld. Cas. 212; *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *McNally v. Connolly*, 70 Cal. 3.

²² *Capen v. Peckham*, 35 Conn. 88, s. c. 9 Am. Law Reg. (N. S.) 136; *Seeger v. Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452; 2 Smith's Ld. Cas. 278; *Merritt v. Judd*, 14 Cal. 59; *Harkness v. Sears*, 26 Ala. 493; *Wing v. Gray*, 36 Vt. 261. Where the tenant is a debtor, and he has the right to remove the fixtures, his judgment-creditor may, under an execution against personal property, levy and sever the same from the freehold. *Minshall v. Lloyd*, 2 M. & W. 450; 2 Smith's Ld. Cas. (7 ed.), 217; *O'Donnell v. Hitchcock*, 118 Mass. 401; *Overton v. Williston*, 31 Pa. St. 155; *State v. Bonham*, 18 Ind. 231. See, also, *Nigro v. Hatch* (Ariz.), 11 Pac. Rep. 177; *Kile v. Gillmer*, 114 Pa. St. 381; *Collonore v. Giltis*,

Among the fixtures erected for the purpose of trade and manufacture by a tenant, which are held to be removable by him at the termination of his tenancy, are the following: Vats and coppers of a soap boiler, cider mills and presses, buildings erected for trade, fire engines in a colliery, kettles in distilleries, store fixtures, etc.²³ But where the tenant replaces an old and worn out article, such as a furnace, which he finds attached to the building when he takes possession, with a new one, he cannot remove the latter at the termination of his tenancy.²⁴ Nursery trees are held to be such an agricultural fixture as, when planted by the tenant for the purpose of sale, to be capable of being removed.²⁵ So, also, are stoves, gas fixtures, and other articles, erected and attached to the house by the tenant for his domestic use

149 Mass. 578. All doubt as to removal of fixtures, by a tenant, is resolved in favor of the landlord (Johnson v. Wooding, 24 Ohio Cir. Ct. 608, 1902), and where the lease is silent as to the right of removal and the removal of an addition to the leased premises, built by the tenant, would amount to waste, it is not removable. Holmes v. Standard Pub. Co. (N. J. Ch. 1903), 55 Atl. Rep. 1107.

²³ Elwes v. Mawe, 3 East 38; 2 Smith's Ld. Cas. 278; Holmes v. Tremper, 20 Johns. 29; Robinson v. Shuler, 5 Cow. 323; Torrey v. Burnett, 38 N. J. L. 457, 20 Am. Rep. 421; Holbrook v. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; O'Donnell v. Hitchcock, 118 Mass. 401; Graves v. Pierce, 53 Mo. 423; Cowden v. St. John, 16 Iowa 590. See Guthrie v. Jones, 108 Mass. 191; O'Brien v. Kusterer, 27 Mich. 289; Docking v. Frazell, 38 Kan. 420; Smith v. Whitney, 147 Mass. 479; Farnsworth v. West. U. Tel. Co., 6 N. Y. Supp. 735 (telegraph wires put on poles by lessee of another company's right of way); Thorn v. Sutherland, 4 N. Y. Supp. 694.

²⁴ Hay v. Tillyer (N. J.), 14 Atl. Rep. 18.

²⁵ Penton v. Robert, 2 East 88; Miller v. Baker, 1 Mete. 27; Whitmarsh v. Walker, 1b. 313; Brooks v. Galster, 51 Barb. 196. See Jenkins v. Gething, 2 Johns. & H. 520. The tenant cannot remove manure made upon the farm. Fay v. Muzzey, 13 Gray 53; Lewis v. Jones, 17 Pa. St. 262; Ruckmann v. Outwater, 28 N. J. L. 581. *Contra* Smithwick v. Ellison, 2 Ired. 326. A blacksmith shop, attached on runners and then to the floor of a leased building, is removable by the tenant (Smyth v. Stoddard, 203 Ill. 424, 67 N. E. Rep. 980), and so is a syphon water closet, placed in an office building by a tenant. Hayford v. Wentworth (1903), 97 Me. 347, 54 Atl. Rep. 940.

and convenience.²⁶ The parties may by express agreement enlarge the tenant's power of removal of fixtures, giving him the power to remove fixtures, which independently of the agreement, the courts would hold to be irremovable. But in order that such an agreement may be enforced against the purchaser of the reversion, he must know of its existence, either actually or constructively, through its appearance in the lease.²⁷ The same general rules are held to apply to the fixtures annexed to the freehold by the mortgagee.²⁸

§ 17. **Fixtures erected by licensee.**—As between licensor and licensee, the same general rule that obtains to fixtures annexed to the land by a tenant, applies, and because of the limited and oft-times uncertain right of the licensee, which is held not to entitle him to an interest or estate in the realty, as to which his license extends,²⁹ in annexations to the land made by him, there is generally an absence of intention of permanency. A building, or other immovable property, annexed to the land by a licensee, does not, therefore become a fixture, unless the intent to part with the ownership of the

²⁶ *Beck v. Rebow*, 1 P. Wms. 94; *Lawton v. Lawton*, 3 Atk. 15; *Grymes v. Boweren*, 6 Bing. 437; *Antoni v. Belknap*, 102 Mass. 193; *Vaughen v. Haldeman*, 33 Pa. St. 522; *Hays v. Doane*, 11 N. J. Eq. 84; *Montague v. Dent*, 10 Rich. 135; *Philbrick v. Ewing*, 97 Mass. 133.

²⁷ *Stevens v. Rose* (Mich.), 37 N. W. Rep. 205.

²⁸ *Cook v. Cooper*, 18 Oreg. 142. In *Springfield Foundry & Machine Co. v. Cole* (130 Mo. 1), the rule as to the removal of fixtures between grantor and grantee and mortgagor and mortgagee, is said to be relaxed, in the case of landlord and tenant, for the encouragement of mechanical and similar pursuits and because of the temporary character of the relation existing.

²⁹ *Boone v. Stover*, 66 Mo. 430; *Chenowitch v. Granby Co.*, 74 Mo. 174; *United States v. Gratiot*, 14 Pet. (U. S.) 526; *East Jersey Co. v. Wright*, 32 N. J. Eq. 248; *Grove v. Hodges*, 55 Pa. St. 504; *Young v. Ellis*, 91 Va. 297; *Genet v. Delaware Co.*, 136 N. Y. 602; *Consolidated Co. v. Peers*, 150 Ill. 344; *Paul v. Cragnas* (Nev.), 59 Pac. Rep. 957; *Plummer v. Hillside Co.*, 160 Pa. St. 483, 20 Amer. & Eng. Enc. Law (2 ed.) 777.

personal property so annexed is clearly apparent.³⁰ Fully ~~as much importance is attached to the relation of the party making the annexation, to the land and the permanency and habitual character of the annexation, as is paid to the manner or form of the fastening.~~ When the absolute owner of land, for the better use of his land, erects property upon, or attaches it to the freehold, it will go to his heir, or pass by deed, to his grantee, and the same general rule applies between mortgagor and mortgagee, but as between landlord and tenant and licensor and licensee, this rule is relaxed, with a view to the encouragement of mechanical and agricultural pursuits.³¹

§ 18. Time for removal of fixtures.—If the tenant desires to exercise the right to remove fixtures, he must do so during his tenancy, or at least while he is in possession and holding over. If the landlord has entered and resumed possession, his right is gone, and the fixtures become the property of the landlord.³² So, also, if, at the expiration of his term, the tenant accepts a new lease, in which there is no reservation of the right to remove the fixtures erected under the first lease, the tenant's right in the fixture is lost.³³ If the term

³⁰ Salley v. Robinson, 96 Me. 474, 52 Atl. Rep. 930; Foundry & Machine Co. v. Cole, 130 Mo. 1.

³¹ Foundry & Machine Co. v. Cole, 130 Mo. 1; Thomas v. Davis, 76 Mo. 72; Brown v. Baldwin, 121 Mo. 126; Graves v. Pierce, 53 Mo. 423. And in the late case of Salley v. Robinson (96 Me. 474, 52 Atl. Rep. 930), a building erected by a licensee on land of the licensor, was held not to become a fixture, but to retain its character of personalty.

³² Stevens v. Burnham, 62 Neb. 672, 87 N. W. Rep. 546; Weston v. Woodcock, 7 M. & W. 14; Dingley v. Buffum, 57 Me. 381; Leader v. Homewood, 5 C. B. (N. S.) 546; Burk v. Hollis, 98 Mass. 55; Pugh v. Arton, L. R. 8 Eq. 626; Kutter v. Smith, 2 Wall. 491; Cromie v. Hoover, 40 Ind. 59; Dubois v. Kelly, 10 Barb. 496; Leman v. Best, 30 Ill. App. 323; Darrah v. Baird, 101 Pa. St. 265; Smith v. Park, 31 Minn. 70; Erickson v. Jones (Minn.), 35 N. W. Rep. 267; Childs v. Hurd, 32 W. Va. 66; Atkinson v. Dixon, 96 Mo. 588.

³³ Laughran v. Roes, 45 N. Y. 792, 6 Am. Rep. 173; Marks v. Ryan, 63 Cal. 107; Second Nat. Bank v. Merrill Co. (Wis.), 34 N. W. Rep.

is ~~forfeited~~ by any act of the lessee, his assignee or sublessee, has a reasonable time, after such a termination of the lease, in which to remove the fixtures.³⁴

514, note; *Carlin v. Ritter*, 63 Md. 478; *Mueller v. C. M. & St. P. Co.*, 111 Wis. 300, 87 N. W. Rep. 239.

³⁴ *Stansfield v. Portsmouth*, 4 C. B. (N. S.) 119. Trade fixtures, taken upon property by a tenant, may be removed by him, at the end of his term, and no intention of abandonment can be gathered from his acts, unless, after the expiration of his term, he leaves the fixtures on the premises. A renewal of the lease or a second lease would rebut any presumption of an abandonment. *Radey v. McCurdy*, 209 Pa. 306, 58 Atl. Rep. 558. In the case of tenants for life or at will, the rule is somewhat relaxed, and they are permitted to remove their fixtures after the expiration of their term. *Weston v. Woodcock*, *supra*; *Ombony v. Jones*, 19 N. Y. 234. And the time for removal, at any time, may be extended, by agreement of the parties. *Torrey v. Burnett*, 38 N. J. L. 457, 20 Amer. Rep. 421; *McCracken v. Hall*, 7 Ind. 30; *Van Ranseller v. Penniman*, 6 Wend. 569; *Bernheimer v. Adams*, 75 N. Y. S. 93, 70 App. Div. 114. A tenant who holds over, after the expiration of his term against the landlord's will, is so far a trespasser as to forfeit his right to remove fixtures. *Dreiske v. Lumber Co.*, 107 Ill. App. 285. A new lease, silent as to the right to remove fixtures, when accepted by a tenant, also terminates the right. *Champ Spring Co. v. Roth Tool Co.* (Mo. App. 1903), 77 S. W. Rep. 344. But see *Baker v. McClurg*, 198 Ill. 28, 64 N. E. Rep. 701, 59 L. R. A. 131. And where landlord prevents removal, see *Podlech v. Phelan*, 13 Utah 333, 44 Pac. Rep. 838.

CHAPTER III.

PRINCIPLES OF THE FEUDAL SYSTEM.

SECTION 19. What is tenure.

20. Feudal tenure.
21. Feud or Fief.
22. Subinfeudation.
23. The manor and its system of dividing up its lands.
24. Feoffment and livery of seisin.
25. Tenure in the United States.
26. Estates — Classes of.
27. Same — Estates in possession and in expectancy.
28. Joint and several estates.

§ 19. What is tenure.— It may be stated as a general rule, though controverted by eminent authority, that in any system of jurisprudence, there cannot be an absolute ownership in lands. The right of property or interest in them must always be qualified, that interest being known in the English and American law as an estate. A man can have only an estate in the land, the absolute right of property being vested in the State. An estate has, in respect to real property, the three elements, the right of possession, right of enjoyment, and right of disposition, subject to the right of the State to defeat it, and appropriate it to the public use, or for the public good. In what cases, and under what circumstances, the State can exercise this power of appropriation, and to what extent the rights of possession, enjoyment and disposition may be limited by the imposition of restrictions, depends upon the policy of each system of jurisprudence. In some States the restrictions are numerous, while in others they are few, the right of property being almost absolute in the individual. But nowhere can the private right of property be said to be

absolute. The absolute right of property being in the State, the right of ownership, which an individual may acquire, must, therefore, in theory at least, be held to be derived from the State, and the State has the right and power to stipulate the conditions and terms, upon which the land may be held by individuals. These conditions and terms, and the rights and obligations arising therefrom, constitute what is known as *tenure* or land *tenure*.

§ 20. Feudal tenure.—The English common law of real property, the source of our own law, is founded upon the doctrines of the feudal system. It is not proposed to present here a detailed account of that barbaric system; for, although it long survived the necessities of the barbaric life, which brought it into existence, it has for some time ceased to exist, and only prevailed in this country to a limited extent. But a passing notice must be given to it, in order to explain the terms and phrases, which have been handed down to us from the feudal age, and which we now find in daily application to the law of real property.¹ According to the feudal theory, all estates were derived from the king. He was called the *lord paramount*, and in him was vested the absolute right of property. As a return or compensation

¹ "The principles of the feudal system underlie all the doctrines of the common law in regard to real estate, and, wherever that law is recognized, recourse must be had to feudal principles to understand and carry out the common law. The necessity of words of limitations in deeds—the distinction between words of limitation and of purchase,—the principle that the freehold shall never be in abeyance, that a remainder must vest during the continuance of a particular estate, or *eo instanti* that it determines, that the heir cannot take as a purchaser, an estate, the freehold of which, by the same deed, is vested in the ancestor, and many more rules and principles of very great practical importance and meeting us at every turn in the American, as well as the English law of real estate, are all referable to a feudal origin." 2 Shars. Bl. Comm. 78. See *Lyle v. Richards*, 9 Serg. & R. 333, and *McCall v. Neely*, 3 Watts 71; 1 Pollock & Maitlands Hist. Eng. Law 210, 211; Digby, Hist. Real Prop. 34.

for the possession and enjoyment of the land, the owners, or, as they were called, vassals, were obligated to render the king certain services, the failure to perform which defeated the state, and caused it to revert to the lord paramount. The obligation of citizenship, apart from the obligations of a tenant of lands, was unknown to the feudal age.² It is not known positively whether the feudal system prevailed to any extent under the Saxon laws;³ but certainly it is not met with, in its thorough and complicated organization, until the conquest. Upon his accession to the throne of England, William of Normandy, either by confiscation or surrender, voluntary or involuntary, brought about the general establishment of the feudal system. The lands of those who fought under the banner of Harold at Hastings were confiscated and distributed among the Norman chiefs. And subsequently, in order to obtain the protection guaranteed to all vassals, most of the other land-owners surrendered their lands and received them back, as vassals of the king. The lands were distributed among the chiefs, both Saxon and Norman, who swore allegiance to the king, and obligated themselves to render certain services, principally military in their character. These chiefs were known as barons. They then

² 1 Washburn on Real Prop. 46, citing 3 Guizot. Hist. Civ. 108.

³ 1 Washburn on Real Prop. 38; 2 Bla. Com. 48; Co. Litt. 76 b.; 1 Spencer Eq. Jur. 9; Williams on Real Prop. 2, 3; 1 Stubbs Const. Hist. Eng. 273, 274. Mr. Hallam says: "Whether the law of feudal tenures can be said to have existed in England before the conquest, must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In tracing the history of every political institution, three things are to be considered, the *principle*, the *form*, and the *name*. The last will probably not be found in any genuine Anglo-Saxon record; of the form of the peculiar ceremonies and incidents of a regular fief, there is some, but not much, appearance. But they who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman Conquest." Hallam's Middle Ages, p. 88.

parcelled out the lands allotted to them among their adherents or vassals, who, in return therefor, performed services to their barons or lords.⁴

§ 21. **Feud or Fief.**— When land was conveyed to the tenant or vassal it was called a feud, fief or fee. It was at first only for the life of the tenant. (Under the early feudal system an estate of inheritance was unknown.) Afterwards it became customary to grant a fief or feud to a tenant and his sons, and subsequently to him and his heirs.⁵ For a long time after the conquest a vassal could not alien his land without the consent of the lord. It was a personal confidence reposed in him, and a full power of alienation would have enabled him to let an enemy of the lord into possession of his lands. A similar rule prevailed in respect to the alienation of the manor by the lord. The consent of the tenant had to be obtained.⁶ But the tenant, notwithstanding, had a restricted power of alienation, known as

§ 22. **Subinfeudation.**— The tenant could let out the land granted to him to sub-tenants, who rendered services to the tenant, while the tenant remained under obligation to the lord for the services due to him. There was then no such thing as absolute alienation. The conveyance always provided that the grantees should hold as tenants of the grantor, and render certain specified services to the grantor.⁷ But

⁴ "Homage" and "fealty," in the form of oaths of allegiance, were exacted, respectively, from the lord to the king, and from the tenant to the lord, in return for the lands allotted them, except in the case of "tenancies at will." 1 Pollock & Maitlands Hist. Eng. Law 215, 277; Digby, Hist. Real Prop. 76.

⁵ 1 Washburn on Real Prop. 40, 41, 51, 52.

⁶ 1 Washburn on Real Prop. 51; 2 Bla. Com. 57. For distinction between a "feud," or "fief" and "allodial" land, or that which was held in one's own right, without dependence, or obligation to render service, see 2 Bl. Com. 104; Co. Litt. 65; Digby, Hist. Real Prop. 13, 30.

⁷ 1 Washburn on Real Prop. 53, 54; Williams on Real Prop. 3, 4.

the doctrine of subinfeudation was abolished by the statute *Quia Emptores*, 18 Edw. I, and the tenant was given instead a free power of alienation.⁸ The purchaser was by the statute substituted in the place of the tenant in respect to the services to be rendered to the lord. But this statute, as well as the *magna charta*, only prohibited subinfeudation of the entire feud. In a grant, therefore, of a less estate than the one owned by the tenant, subinfeudation may still take place.⁹ The services, which the tenant was under obligation to render to the lord, varied in character with the tenure under which they held the land, and this brings us to the explanation of

§ 23. The manor, and the system of dividing up its lands among the tenants.—The sections or parcels, into which the land was divided, were called manors and seignories. The lord reserved such a portion of the manor land as was necessary or desirable for his own private use. The remainder was divided into four parts or parcels. One part for the tenants, from whom he expected military service in defence of himself and his lands, and therefore this land was held under *military* tenure. It was also called a *proper* feud, as distinguished from *improper* feuds, which constituted a second part of the manor lands given to tenants, who were obliged in return for the feud, to give to the lord a certain proportion of the crops, or to plough the lord's land. This

⁸ 1 Washburn on Real Prop. 54, 55.

⁹ For a common example of modern subinfeudation, see *post*, sect. 139, where an assignment is distinguished from a sublease. Until the statute, *Quia Emptores*, the tenant—but not the lord—could “alienate the whole or any part of the land, by way of subinfeudation, and the whole, though perhaps not a part of it, by way of substitution,” and by this statute, the transferee was substituted for the original tenant from whom the same service and “fealty” to the lord was required, in proportion to the quantity of land conveyed. 1 Pollock & Maitlands Hist. Eng. Law, 310, 336.

was called *socage* tenure. A third part was given to the lord's *villeins* who did the menial services upon the manor, and were a species of agricultural slave, which was quite common under the feudal system, and has existed in Russia within the memory of the present generation. The origin of the word *villein* is very doubtful, some deriving it from *villa*, a country farm. The fourth part was the *waste land*, consisting of woodland, from which the tenants were permitted to obtain their *estovers*, and of meadow land on which they fed their cattle.¹⁰ The *villeins* possessed only what were known as *copyhold estates*. The copyhold has never obtained in this country, and there will be no further mention of them. The other tenants, being freemen, were given, what were called *freehold estates*. The freehold was at least an estate for the life of the tenant, "it being considered," Mr. Blackstone says, "that the smallest interest, which was worthy of a freeman, was one which must endure during his life."¹¹ The term *feud* is properly applicable only to freeholds.

§ 24. *Feoffment and livery of seisin.*—The transaction by which a feud was conveyed to a tenant was called a *feoffment*, and the operative ceremony, *livery* or *investiture* of *seisin*. It will not be necessary to describe this ceremony in the present connection, especially since a detailed account of it is given elsewhere.¹² *Seisin* is an old legal term, which means *possession*; but since the *livery* of *seisin* was an incident only of freehold estates, it has come to have the more quali-

¹⁰ 1 Washburn on Real Prop. 45-48; Williams on Real Prop. 48, 119.

¹¹ 2 Bla. Com. 237. By the statute, 12 Car. II, c. 24 (passed in 1660), all military tenures were abolished, in England, and the freeholder became, practically, the owner of the soil. 2 Bl. Com. 76; Digby, Hist. Real Prop., c. 39; Tiffany on Real Prop. 13.

¹² Those things to which possession could not be delivered, such as incorporeal things and future estates, were conveyed only by deeds of "grant" and, at common law, were said to "lie in grant" as distinguished from property to which possession could be delivered. Shep. Touch. 228; Co. Litt. 9a. See *post*, sect. 536.

fied signification of the possession, which is given to a tenant of the freehold. The seisin, in legal contemplation, is the estate itself; and, as there can be but one seisin in fee, he who has not the seisin cannot technically be said to have the estate.¹³ There are two kinds of seisins, *seisin in fact*, and *seisin in deed* or *in law*. *Seisin in fact* is inseparable from actual possession. *Seisin in law* is that seisin or right to seisin *in fact*, which one may have, while not in actual possession. Thus if A. is tenant for years, and B. has the remainder in fee, A. has the actual possession, but no seisin, since seisin is not an incident of leaseholds. But B. has the *seisin in law*, which, when coupled with the subordinate possession of A., will be equivalent to the *seisin in fact*. But if A. is tenant for life, he takes the whole seisin in fact for the benefit of his own life estate, and in trust for B. The subject will be more fully presented, and its importance explained, in the chapter on Remainders.¹⁴

§ 25. Tenure in the United States.—In the charters of the American Colonies, it was expressly provided that the lands shall be held by the tenure of “free and common socage, and not *in capite* by knight-service.” Therefore it may be said that, at an early day, feudal tenures existed in this country to a limited extent.¹⁵ But at the present day there is little, if any, trace of them remaining in the American law of real

¹³ See *post*, sects. 494, 495.

¹⁴ See *post*, sects. 297 *et seq.*, and sects. 494, 495, 496. For derivative history of the word “seisin,” see 2 Pollock & Maitlands Hist. Eng. Law, 29. Before the Statute of Uses (27 Hen. VIII, c. 10), seisin was only held to refer to the possession of a freehold estate, but after this statute, the term was applied to all legal estates, whether in possession or remainder. Tiffany, Real Prop. Sec. 15, p. 32; 2 Pollock & Maitlands Hist. Eng. Law, 32; Goodeve, Real Prop. (3 ed.) 364; 1 Cruise’s Dig., c. 3, Sec. 34.

¹⁵ 1 Washburn on Real Prop. 63, 64; Williams on Real Prop. 6, Rawle’s note. In *Chisholm v. Georgia*, 2 Dall. 470, Ch. J., Jay says: “Every acre of land in this country was then, prior to the revolution, held mediately or immediately by grants from the crown.”

property. And so obsolete has the ancient doctrine of tenures become, that writers of eminence unhesitatingly pronounce the lands in this country to be absolutely allodial, i. e., free from the burdens of tenure.¹⁶ But all lands are held subject to the exercise of the right of *eminent domain*, the right to appropriate private lands to public uses, and subject furthermore to the right of the State to control its use, so as not to be detrimental to the public welfare.¹⁷ These restrictions upon the right of property are not feudal in their character; and since in most State Constitutions it is provided, that in the exercise of the right of eminent domain full compensation must be made to the owners of the land appropriated, the right is more properly one which the sovereignty claims in respect to everything which affects the commonwealth. But the fact, that there is no practical tenure of lands at present, does not affect the position assumed in preceding paragraphs.¹⁸ The State has the right to impose burdens, if consistent with its policy and the public welfare, although it may not exercise it. There is, however, a species of tenure, still existing and fully recognized in the United States, between tenants of particular estates and reversioners or remainder-men, and burdens are permitted to be imposed upon the tenant. Even where there are no special burdens of tenure, there is always the implied tenure which prevents the tenant from denying the title of his landlord.¹⁹

§ 26. *Estates, classes of.*—In the classification of the estates, which may be created in lands, four principal cir-

¹⁶ Van Rensselaer v. Smith, 27 Barb. 157; Cornell v. Lamb, 2 Cow. 652; Coombs v. Jackson, 2 Wend. 155; Van Rensselaer v. Hays, 19 N. Y. 91; Van Rensselaer v. Dennison, 35 N. Y. 400. Pom. Introduc. 272; 3 Kent's Com. 518.

¹⁷ 1 Washburn on Real Prop. 65; The Commonwealth v. Tewksbury, 11 Metc. 57; The Commonwealth v. Alger, 7 Cush. 92; Taylor v. Porter, 4 Hill 143; The People v. Salem, 20 Mich. 479.

¹⁸ See *ante*, sect. 19.

¹⁹ See *post*, sects. 65, 199. Gray, Perpetuities, sects. 22, 24.

cumstances tend to determine their natural subdivision: *First*, the quantity or duration of the interest; *secondly*, the quality of the interest; *thirdly*, the time of enjoyment; and *fourthly*, the number of owners. Under the head of quantity, the first division is into *freeholds* and estates *less than freehold*. Freeholds are then subdivided into *freeholds of inheritance* and *freeholds not of inheritance*. A freehold is one which is to endure for an uncertain period, which must, or at least might, last during the life of some one, it may be the grantee, grantor, or some other person.²⁰ Estates less than freehold, or *leaseholds*, are those which are limited to endure for a certain or uncertain number of years, the uncertainty, if any, being determined by the will of either or both parties. And they are subdivided into estates *for years*, *at will*, *from year to year*, and *at sufferance*. Estates under the second heading are distinguished by their qualities. Thus estates may be either *absolute* or *determinable*. A determinable estate is one which may be determined, before the natural expiration of its period of limitation by the happening of some contingency. Determinable estates are of four kinds: estate *conditional at common law* or *estate tail*, estate *upon condition*, estate *upon limitation*, and *conditional limitation*. In respect to their quality, estates are also divided into *legal* and *equitable* estates. A legal estate is one which arises under, and is recognized by the common or statutory law; an equitable estate is the product of equity jurisprudence, and is cognizable solely in courts of equity.

§ 27. Same — Estates in possession and in expectancy. — In reference to the time of enjoyment, estates are divided into two classes: estates in possession, that is, those to which the right of possession is immediate; and estates in expectancy,

²⁰ "The word, 'freehold,' always imported the whole estate of the feudatory, but varied as that varied." Butler's note, to Co. Litt. 266b. It is now generally used to denote an estate for life, as distinguished from an estate of inheritance. *Idem*.

which are to take effect in possession at some future time. Estates in this connection may also be divided into *executed* or *executory*, *vested* or *contingent*. An executed estate is one in which the right of possession is immediate. An executory estate is one which takes effect in possession at a future time. A vested estate is one to which there is a present fixed title, and concerning whose title there is no uncertainty. A contingent estate is one to which there is only a possibility of acquiring a title at some future day, upon the happening of some definite contingency. A *vested* estate may be either *executed* or *executory*. Thus an estate for life is a vested and executed estate, while a reversion or vested remainder is a *vested* and *executory* estate. An *executed* estate must, and can only, be *vested*. There cannot be an *executed contingent*, or a contingent executed, estate. But an *executory* estate may be either *vested* or *contingent*. Thus a remainder to A. after an executed estate to B., is a *vested*, *executory* estate; while a remainder to the heirs of A., A. being still alive, and therefore his heirs not yet ascertained, is an *executory contingent* estate. The law favors vested estates and the rule is that estates are held to vest at the earliest possible period, unless a contrary intention is clearly manifested in the grant.²¹ And with reference to the vesting of estates, there is a recognized distinction between the vesting of the interest and the vesting of the possession in the person entitled to the enjoyment of land. An estate is vested in possession, only when there is a right of present enjoyment; it is vested in interest, whenever there is a present fixed right of future enjoyment.²² In the case of an estate tail, at common law, transformed into a life estate or fee, by the various statutes of the United States, the posses-

²¹ Black v. Williams, 51 Hun 280, 21 N. Y. S. 263; Hilk v. Barnard (Mass.), 25 N. E. Rep. 96, 9 L. R. A. 211; Chew v. Keller, 100 Mo. 362, 13 S. W. Rep. 395; Tindall v. Tindall, 167 Mo. 218, 66 S. W. Rep. 1092.

²² Gates v. Seibert, 157 Mo. 254, 57 S. W. Rep. 1065.

sion could not vest until the death of the life tenant, but the remainder-man would be held to have an estate vested in interest, although the possession would not vest until the death of the life tenant.²³

§ 28. **Same—Joint and Several estates.**—In the fourth classification, estates are considered in respect to the number of persons in whom the right of property is vested; and from that standpoint they are divided into two classes; estates in severalty, or those owned by one person, and joint estates, which are vested in two or more persons. According to the peculiar rights which the individual co-tenants of joint estates have in them, they are subdivided into five classes: joint tenancy,²⁴ tenancy in common, tenancy in coparcenary, tenancy by the entirety, and estates in partnership. Keeping these elements in mind we deduce the following table of estates.

²³ *Utter v. Sidman*, 170 Mo. 284, 70 S. W. Rep. 702.

²⁴ The right of survivorship, in estates held in joint tenancy, only terminates with the entire estate in the survivor, where the original joint tenants retain their estate, at the time of the death of one of them. *Messing v. Messing*, 71 N. Y. S. 717, 64 App. Div. 125; *Norris v. Hall* (Mich. 1900), 82 N. W. Rep. 832.

TABLE OF ESTATES.

Classification
according to

FREE-HOLDS.	Estates of Inheritance.	Conventional Life Estates.	Estate in fee simple. Estates Tail.
		Legal Life Estates.	Estate for one's own life. Estate for the life of another. Estate for an uncertain period which may last during life. Estate tail after possibility of issue extinct.
	Estates less than Inheritance.		Estate during coverture. Curtesy. Dower. Homestead.
	Estates less than Freehold or Leaseholds.		Estate for years. Estate at will. Estate from year to year. Estate at sufferance.
quality	Estates in Severalty.		
	Joint Estates.		Joint tenancy. Tenancy in common. Tenancy in coparcenary. Tenancy in entirety. Tenancy in partnership.
	Absolute Estates.		
time of enjoyment	Determinable Estates.		Fee conditional. Estate upon limitation. Conditional limitation. Estate upon condition. Mortgages.
	Estates in Possession.		
	Estates in Expectancy.		Reversion. Remainders. Contingent uses. Springing uses. Shifting uses. Executory devises.
also	Legal Estates.		
	Equitable Estates.		Uses. Trusts. Mortgage by deposit of title deeds. Vendor's and Vendee's lien.

CHAPTER IV.

ESTATE IN FEE SIMPLE.

SECTION 29. Definition.

30. Words of limitation.
31. Statutes abolishing words of limitation.
32. The power of disposition.
33. An absolute power of disposition an incident of a fee.
34. Attempted limitation after, void.
35. Liability for debts.

§ 29. Definition.—A fee simple is a freehold estate of inheritance, free from conditions and of indefinite duration. It is the highest estate known to the law, and is absolute, so far as it is possible for one to possess an absolute right of property in lands.¹ The word *fee* without any qualifying adjective implies an unlimited estate of inheritance. Such is also the case with the term “fee simple absolute.” The three terms “fee,” “fee simple,” and “fee simple absolute,” may be used interchangeably;² the adjectives in the last two are surplusage, and are generally used for the purpose of distinguishing that class of estates from those which are called base or qualified fees.

§ 30. Words of Limitation.—The word “heirs” at common law is required to be used in limiting a fee simple, where the estate is acquired by conveyance *inter vivos*. And no equivalent words, which indicate the intention of the grantor to convey an absolute right to the property, will suffice. If the conveyance be not made to one and his heirs, the

¹ Co. Lit. 1 a. n.; 2 Bla. Com. 106; 1 Washburn on Real Prop. 76.

² 2 Bla. Com. 106; Co. Lit. 1 b.; 1 Prest. Est. 420; 1 Washburn on Real Prop. 76, 77.

grantee will take only an estate for his life, notwithstanding the estate is limited by such phrases, as "to A. forever," or "to A. and his successors," or to his *children*³ or *issue* or *assigns*, and the like. An express direction that the grantee is to have a fee simple estate, will not supply the place of the word "heirs."⁴ On the other hand where the deed indorsed on another deed conveyed all the grantor's "right, title, claim, interest, property, etc., in and to the within deed," it was held that the words of limitation in the within deed was by reference made a part of the indorsed deed of conveyance, and passed a fee simple estate to the grantee.⁵ And, although ordinarily the covenant of title to the grantee and his heirs cannot enlarge a life estate into a fee, if the estate is not specially limited in the premises or habendum of the deed, such a covenant would have the effect, by estoppel, of granting a fee simple estate, the word "heirs" having been used in the covenant.⁶ If it be shown from the context of the deed, or otherwise, that the grantor intended to convey a fee simple estate, the proper words may be added to the deed by a decree of the court in an action for the reformation of the deed.⁷ (If the estate be acquired by devise or by legislative grant, the technical word "heirs" is not necessary.) The intention to create a fee simple estate may in such cases be manifested by any other words or forms of expression.⁸ On the other hand, if the word "heirs" ap-

³ But see *Mauzy v. Mauzy*, 79 Va. 537.

⁴ Co. Lit. 8 b.; 4 Kent's Com. 6, note; *Adams v. Ross*, 30 N. J. L. 511; *Clearwater v. Rose*, 1 Blackf. 137; *Wilder v. Wheeler*, 60 N. H. 351; *Ford v. Johnson*, 41 Ohio St. 366; *Mattock v. Brown*, 103 Pa. St. 16; *Lorick v. McCreery*, 20 S. C. 424; *Truesdell v. Lehman*, 47 N. J. Eq. 218; *Oyster v. Knull*, 137 Pa. St. 448.

⁵ *Lemon v. Graham*, 131 Pa. St. 447; 25 W. N. C. 3391; see *post*, § 605.

⁶ *Winborne v. Downing*, 105 N. C. 20; see *post*, § 612.

Vickers v. Leigh, 104 N. C. 248.

⁷ *Rutherford v. Greene*, 2 Wheat. 196; *Jackson v. Housell*, 17 Johns. 281; *Godfrey v. Humphrey*, 18 Pick. 537; 2 Bla. Com. 108; 1 Washburn on Real Prop. 85. See *Long v. Paul*, 127 Pa. St. 456; *Doe v. Patten*,

appears from the context of the will to have been used by the testator as a word of purchase, it will be given that construction, and the devisee will take only a life estate, while his heirs will take a contingent remainder, notwithstanding that ordinarily the rule in *Shelley's Case* would make it a fee simple estate in the first devisee.⁹ And if the conveyance be to a corporation the word "successors" takes the place of heirs, since a corporation cannot have heirs.¹⁰ [All technical quit-claim deeds pass whatever interest the grantor has, without words of limitation, as in the case of a release from one joint tenant to another, or by a disseisee to the disseisor.¹¹ But a partition between tenants in common by mutual grants or by release would require the words of limitation. So would the release of a reversion to the tenant for life.¹² But where there is a trust imposed upon the grantee or devisee, a fee will be implied, if the trust cannot be supported or performed without a fee.¹³ And if by devise a charge is im-

(Del.), 16 Atl. Rep. 558; *Nolan v. Chambers*, 84 Ky. 576; *Craig v. Ambrose*, 80 Ga. 134; *House v. Barber*, 29 S. C. 466.

⁹ *Urich's Appeal*, 86 Pa. St. 386, 27 Am. Rep. 707; *Howell v. Ackerman* (Ky.), 11 S. W. Rep. 819. See *Fountain Co., etc., Co. v. Buckleheimer*, 102 Ind. 76, 52 Am. Rep. 645.

¹⁰ *City of Wilkesbarre v. Wyoming, etc., Soc. (Pa.)*, 134 Pa. St. 616; 26 W. N. C. 297; *Dilworth v. Gusky*, 131 Pa. St. 343; *Schult v. Moll* (N. Y.), 10 N. Y. S. Rep. 703; *Pierce v. Simmons* (R. I.), 19 Atl. Rep. 242; *Robbins Ex'r v. Robbins* (Ky.), 9 S. W. Rep. 254; *Wood v. Robertson*, 113 Ind. 323; *Asheville Division v. Aston*, 92 N. C. 578. The word "heirs" at common law, was never required in grants to corporations. An aggregate corporation had perpetual succession, and no words of limitation were necessary and in a corporation sole, since it had no "heirs," the word successors, was generally used. 2 Bl. Com. 109; 4 Kent's Com. 7; *Wilcox v. Wheeler*, 47 N. H. 488; *Wilkesbarre v. Historical Soc.*, 134 Pa. St. 616; *Overseers v. Sears*, 22 Pick. (Mass.) 126; *Tiffany*, Real Prop. Sec. 20. *Cong. Soc. v. Stark*, 34 Vt. 243; *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 400.

¹¹ *Washburn on Real Prop.* 54. See *post*, Sec. 177. The rule is the same in a release by the tenant for life to the reverser. 2 Prest. Est. 58.

¹² 2 Prest. Est. 56-62. See *post*, Sec. 172.

¹³ *White v. Woodbury*, 9 Pick. 136; *Sears v. Russell*, 8 Gray 89;

posed upon the devisee to pay a certain sum of money, a fee will be implied, without the use of any words of limitation whatever. But this is only permissible where the estate of the devisee is not expressly limited otherwise,¹⁴ or where there is not sufficient personal estate under the control of the devisee to cover the expense of performing the charge¹⁵ and when the charge is an absolute personal liability of the devisee. If the money is directed to be paid out of the rents and profits of the estate, and the devisee assumes no personal liability, in case of the failure of the rents and profits, he will take only a life estate, if there is nothing else in the will indicating the intention that he shall have a fee.¹⁶

§ 31. Statutes abolishing words of limitation.—The foregoing is a rather full statement of the requirements of the common law in respect to the employment of words of limitation in the conveyance of a fee simple. But in England and in most of the States of this country, the rule has been changed, so that ~~in a devise of real property the intention to convey a fee simple will be presumed~~, in the absence of an express intention to the contrary.¹⁷ In these

Gould v. Lamb, 11 Metc. 84; Fisher v. Fields, 10 Johns. 505; Koenig's Appeal, 57 Pa. St. 252; Angell v. Rosenbury, 12 Mich. 266. See *post*, Sec. 370.

¹⁴ Couch v. Eastham, 29 W. Va. 784; Hinkle's Appeal, 116 Pa. St. 490; Gankler v. Moran, 68 Mich. 353.

¹⁵ Curtis v. Fowler (Mich.), 33 N. W. Rep. 804.

¹⁶ Doe v. Richards, 3 T. R. 356; Godfrey v. Humphrey, 18 Pick. 537; Wait v. Belding, 24 Pick. 138; Jackson v. Bull, 10 Johns. 148.

¹⁷ Such is the law in Alabama, Arkansas, Georgia, Iowa, Illinois, Kentucky, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New York, New Jersey, North Carolina, South Carolina, Texas, Virginia; 1 Washburn on Real Prop. 52, note 3, 86, note 3; Williams on Real Prop. 20, 1; Traphagen v. Levy, 45 N. J. Eq. 448; Doe v. Patten (Del.), 16 Atl. Rep. 558; Crain v. Wright, 114 N. Y. 307; Little v. Giles, 25 Neb. 313; Barnes v. Boardman, 149 Mass. 106; Smith v. Greer, 88 Ala. 414; Cook v. Couch, 100 Mo. 29; Moffat v. Cook, 150 Mass. 529; Teaney v. Mains (Iowa 1901), 84 N. W. Rep. 953; Kron v. Kron (1902), 195 Ill. 181, 62 N. E. Rep. 809; Chamberlain v. Runkle

States, a devise to A. would now give him a fee, while formerly he would only have taken a life estate. But if the testator shows in any part of the will an intention to give only a life estate, the general devise of the estate will be construed only to pass the life estate.¹⁸ This abrogation of the common-law rule has also in some of the States been extended to conveyances *inter vivos*.¹⁹ The rule had in the course of time become purely arbitrary, the reasons for the same having long since passed away with the advancement of civilization.

§ 32. The power of disposition.—Originally the greatest estate granted to a tenant was an estate for life, and when, afterwards, lands were granted to one and his heirs forever, the heirs were deemed to be co-equal grantees, or donees, with the first taker. In consequence, the power of alienation was not given to the owner of such an estate. Subsequently, he was allowed to convey it, with the consent of the lord and the presumptive heir.²⁰ Then, in the time of Henry I and II, the right was given to defeat the inheritance of all the heirs, except the oldest son.²¹ The statute *Quia Emptores* refers only to alienations *inter vivos* and for a long period in the history of the common law, it was impossible to make

(Ind. 1902), 63 N. E. Rep. 486; *Ball v. Woolfolk*, 175 Mo. 378, 75 S. W. Rep. 410; *Flanary v. Kane* (Va. 1904), 46 S. E. Rep. 681; *Shirley v. Clark* (Ark. 1904), 81 S. W. Rep. 1057.

¹⁸ *Tillett v. Aydlett*, 93 N. C. 15; *Leeper v. Neagle*, 94 N. C. 338; *Corby v. Corby*, 85 Mo. 371; *Williams v. McKinney*, 34 Kan. 514; *Lowrie v. Ryland*, 65 Iowa, 584; *Dew v. Kuehn*, 64 Wis. 293.

¹⁹ Such is the case in Alabama, Arkansas, Georgia, Illinois, Iowa, Kentucky, Mississippi, Missouri, Nebraska, New Hampshire, New York, Maryland, Tennessee, Virginia, Texas; 1 Washburn on Real Prop. 52, note 3; 2 Greenl. Cruise, 354; *Williams on Real Prop.* 19, note 1. See *Jarvis v. Davis* (N. C.), 5 S. E. Rep. 227; *Warner v. Willard*, 54 Conn. 470 Tr.; *Utter v. Sidman*, 170 Mo. 284, 70 S. W. Rep. 702; *Bain v. Staab*, 65 Pac. Rep. 177.

²⁰ 1 Washburn on Real Prop. 78, 79; *Maine, Anc. Law* 230.

²¹ 1 Washburn on Real Prop. 79.

a disposition of a freehold, by will. But in the thirty-second year of the reign of Henry VIII, a statute was passed, which permitted a devise of real estate. The power of devising lands by will was enjoyed in time of the Saxons, but was abolished by the Norman feudal system, except in certain favored localities, which were exempt from the burdens and restrictions of that system.²² To what extent the power of alienation may now be restricted, in fee simple estates, will be shown in the subsequent chapter on estates upon condition, but since the statute *Quia Emptores*, in alienations *inter vivos*, as well as in devises —

§ 33. An absolute power of disposition is an incident of a fee.— In the leading case of *Jackson v. Robbins*,²³ the effect of an absolute power of disposition, in the devisee, was considered and it was said: “ We may lay it down as an incontrovertible rule that when an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee, and the only exception to the rule is that when the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal, in that particular and special case, the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition of the reversion. This distinction is carefully marked and settled in the cases.” The Court, in the above case, was considering the effect of a general power of disposition in connection with the construction of a devise. Before the various statutes abolishing the necessity for words of inheritance, in the creation of a fee, in conveyances, no such formality was required in wills, and since the enactment of statutes upon this subject, in the various States, a general power of disposition is held, very generally, to be incidental to a fee-simple estate.²⁴

²² See, Chapter, *Title by Devise*.

²³ 16 Johns. 288.

²⁴ *Green v. Sutton*, 50 Mo. 186, a leading case, citing *Jackson v. Rob-*

§ 34. *Attempted limitation after void.*—A fee simple estate includes the whole interest and property in a tract of land and after the grant of a fee, since the grantor would retain no interest in the land conveyed, any subsequent limitation would be held to be inconsistent with the estate granted and would be void. For instance, after the grant of a tract of land to the grantee, "his heirs and assigns," a provision that the land should be exempt from debts created by the grantee, where he was given an absolute power of disposition, was held to be incompatible with the grant of the fee simple estate and void.²⁵ And so would be a provision, after the grant of a fee, that if the grantee should die without issue, "then said lands, or the proceeds should revert to the grantor, or his heirs."²⁶ But where the grant does not create or con-

bins, *supra*; *English v. Beehle* (32 Mo. 186); *Fanning v. Doan* (128 Mo. 323), where the power of disposal was presumed from the use of the word "assigns"; *Johnson v. Morton* (Texas), 67 S. W. Rep. 790; *Ray v. Spears* (Ky.), 64 S. W. Rep. 413. In *Cornwall v. Wulff* (148 Mo. 542), counsel contended that this doctrine rested alone upon the great name of Kent, but the court, per Gantt, C. J., observed: "If so, it has no ignoble origin, but this is not true, though his recognition of the rule has no doubt added to its stability." *Van Horne v. Campbell*, 100 N. Y. 287; 4 Kent's Com. (12 ed.) star p. 270. But see, *Walton v. Drumtra*, 152 Mo. 489; 1 Prest. Est. 477; *Bradley v. Peixoto*, 3 Ves. jr. 324; *Blackstone Bank v. Davis*, 21 Pick. 42; *McWilliams v. Nisley*, 2 Serg. & R. 507; *Stewart v. Brady*, 3 Bush, 623; *Greene v. Greene*, 125 N. Y. 506; *Potter v. Couch*, 141 U. S. 296. The power to "sell and convey" in the absence of limitation, grants a fee-simple estate. *St. Louis Land Ass'n v. Fueller*, 182 Mo. 93; 81 S. W. Rep. 414. See, also, *Carr v. Field* (Ky. 1904), 80 S. W. Rep. 448; *Ball v. Woolfolk*, 175 Mo. 378, 75 S. W. Rep. 410.

²⁵ *Ricks v. Pope*, 129 N. C. 52, 39 S. E. Rep. 638; *Ray v. Spears* (Ky. 1901), 65 S. W. Rep. 867; *Green v. Sutton* (a leading case), 50 Mo. 186; *Stewart v. Stewart*, 186 Ill. 60; 57 N. E. Rep. 885; *White v. Dedman* (Tex. 1900), 57 S. W. Rep. 870; *McMichel v. McMichel*, 51 S. C. 555; *Martin v. Jones*, 62 Ohio St. 519, 57 N. E. Rep. 238.

²⁶ *Ray v. Spears*, 64 S. W. Rep. 413, 65 *id.* 867. See, also, *Kron v. Kron*, 195 Ill. 181; 62 N. E. Rep. 809; *Brien v. Robinson*, 102 Tenn. 157, 52 S. W. Rep. 802; *Printup v. Hill* (Ga. 1901), 107 Fed. Rep. 789.

vey an absolute estate in the premises, but only a user, or right to the possession for particular purposes, since the fee simple estate would not be conveyed by such an instrument, a subsequent limitation would not be inconsistent with the grant and would be upheld.²⁷

§ 35. **Liability for debts.**— This was not originally an incident of freehold estates. They were first made liable to execution for the debts of the owner during his lifetime by the statute 13 Edw. I, ch. 18. But there was no provision in the English law, until Stat. 3 and 4, Will. IV, ch. 104, for subjecting the estates of decedents to the satisfaction of all the debts of the ancestor. In this country lands are generally liable for the debts of the owner, in all forms of actions, before and after his death, and in the hands of his heirs and devisees.²⁸

²⁷ *Tupper v. Ford*, 73 Vt. 85, 50 Atl. Rep. 547; *Blain v. Staab* (N. M. 1901), 65 Pac. Rep. 177.

²⁸ 1 Greenl. Cruise, 60, n.; *Watkins v. Holman*, 14 Pet. 63; *Wyman v. Briglen*, 4 Mass. 150; see *post*, Sec. 529; *Bellas v. McCarthy*, 10 Watts 31; 4 Kent's Com. 420; *Williams on Real Prop.* 81, Rawle's note. For enforcement of creditor's rights, in equity, against land, see, 3 Pom. Eq. Jur. Secs. 1413, 1415.

CHAPTER V.

ESTATES TAIL.

- SECTION** 36. Base or qualified fees.
37. Fee conditional at common law.
38. Estates tail.
39. Necessary words of limitation.
40. Estates tail created by implication.
41. Classes of estates tail.
42. How estates tail may be barred.
43. Merger of an estate tail.
44. Estate tail after possibility of issue extinct.
45. Estates tail in the United States.

§ 36. **Base or qualified fees.**— Whenever a fee is so qualified, as to be made to determine, or liable to be defeated, at the happening of some contingent event or act, the fee is said to be base, qualified, or determinable. There are four classes of such fees, viz fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law. Some authors apply the term *base fee* solely to the last class; but for all practical purposes, either of the above names may be applied to either or all.¹ The first three classes will be treated at length in the chapter on estates upon condition.²

§ 37. **Fee conditional at common law.**— At an early day, as far back as the time of Alfred, it was the custom to limit estates to one and particular heirs, instead of his heirs in general. Generally, it was to the heirs of his body,—i. e., his

¹ 1 Washburn on Real Prop. 88-91; 2 Bla. Com. 109; 1 Prest. Est. 466-475; Seymour's Case, 10 Rep. 97; 1 Spence Eq. Jur. 144; Co. Litt. 199; Digby Hist. Real Prop. 161. A base or qualified fee is not void, in North Carolina. Keith v. Scales, 32 S. E. Rep. 809.

² See Chapter, *Estates upon condition*.

fee conditional at common law becomes

issue, his lineal heirs. But it can be limited to any other class of heirs. If the first taker died leaving no heir of that kind, the estate was defeated and reverted to the donor. But as soon as that class of heirs came into being, as, in the case of an estate to one and the heirs of his body, upon the birth of a child, the condition was held to be so far performed as to permit the tenant to alien or charge the land in fee simple. And the subsequent death of the issue would have no effect upon the purchaser's title.³ But, if no alienation was made during the life of such heirs presumptive it would revert to the donor upon the death of the tenant, just as if they had never come into being.⁴

Estate land

§ 38. **Estates tail.**—In consequence of the readiness with which fees conditional could be converted into a fee simple, great dissatisfaction was felt and manifested by the nobles and landed gentry. It had been their custom to settle their great estates upon their oldest sons and their issue, in order to keep them within their families, and prevent their subdivision into smaller estates. When fees conditional were made by judicial legislation capable of alienation upon the birth of issue, the protection to their entails was taken away, and the barons applied to King Edward I to grant them a remedy. In compliance with this appeal, the statute “De Donis Conditionalibus” was passed in the thirteenth year of

³ 2 Bla. Com. 111; 2 Inst. 333; Co. Lit. 19 a, note 110; 1 Spence Eq. Jur. 21, 141; Buckworth v. Thirkell, 3 B. & P. 652; Williams on Real Prop. 42; Nevil's Case, 7 Coke, 34 b.

⁴ 2 Inst. 332; 1 Spence Eq. Jur. 141; Williams on Real Prop. 42, 43. A conditional fee, in South Carolina, is created by a deed to the grantee “during his life and after his death to the lawfully begotten issue of his body and should he die without such issue, then said lands to revert to my children.” Holman v. Wesner (1903), 67 S. C. 307; 45 S. E. Rep. 206. See, also, Mattison v. Mattison, 65 S. C. 345, 43 S. E. Rep. 874; Shealy v. Wamrock, 115 Ga. 913, 42 S. E. Rep. 239; Methodist Church v. Young, 130 N. C. 8, 40 S. E. Rep. 691; Davis v. Hollingsworth, 113 Ga. 210, 38 S. E. Rep. 827; Calmes v. Jones (Ky.), 63 S. W. Rep. 583.

the reign of Edward I. By this statute fees conditional, which were limited to the heirs of one's body, were made inalienable under any circumstances. It was held that the heirs do not take as purchasers, but as special heir; nevertheless, the ancestor could not by any act of alienation defeat their interest in the estate.⁵ The fee conditional was then called estate tail. Estates tail, therefore, to quote Mr. Washburn's definition, "are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them to his grandchildren, in a direct line, so long as his posterity endures in a regular order and course of descent, and upon the death of the first owner without issue, the estate determines."⁶ The tenants in tail cannot alien the estate, but it has all the other characteristics of a fee simple. The tenant can freely commit waste; nor is he under any obligation to the reversioner to pay off an incumbrance or keep down the interest on it.⁷

§ 39. **Necessary words of limitation.**—In the creation of an estate tail words of limitation must be used, which indicate clearly what heirs are to take. The usual form of limitation is to one and the heirs of his body. But any other equivalent

⁵ 2 Prest. Est. 378-380; 2 Bla. Com. 112-116; 2 Inst. 332, 333; 1 Washburn on Real Prop. 94, 95.

⁶ 1 Washburn on Real Prop. 99; 2 Prest. Est. 360; Williams on Real Prop. 43, 44.

⁷ Co. Lit. 224 a; 2 Bla. 115; Liford's Case, 11 Rep. 50; Jervis v. Benton, 2 Vern. 251; Chaplin v. Chaplin, 3 P. Wms. 229. But a receiver may be appointed to collect the rents and profits of an estate tail to keep down the interest on incumbrances. Story's Eq. Jur., Sec. 835; Bertie v. Abingdon, 3 Merw. 560. Dower and curtesy are incidents of estates tail. 1 Washburn on Real Prop. 107; Co. Lit. 224 a; *post*, Secs. 78, 86. Tenant in tail cannot charge the inheritance with his debts and obligations after his death. Liford's Case, 11 Rep. 50; Wharton v. Wharton, 2 Vern. 3; Partridge v. Dorsey, 3 Har. & J. 302; 1 Cruise Dig. 84; Williams on Real Prop. 57, 58. But his interest in the same, viz., his life estate may be sold for the satisfaction of his debts. 1 Washburn on Real Prop. 107; Williams on Real Prop. 58, 59.

expressions would be sufficient, provided the word "heirs" was not omitted.⁸ The same distinction as to construction between estates created by deed and by will, mentioned in connection with fees simple, applies here. So that in the case of a devise, an estate will be held to be one in tail, whatever may be the words of limitation used. Thus a devise to A. and his seed, or his issue, or his heirs male, etc., all showing an intention to create an estate tail, would be held a good limitation of an estate tail.⁹ And very often the gift will be construed to be an estate tail, where there is no direct limitation to the heirs of his body, as where there was a devise to A. and if he should die without issue of his body, then to B. The intention is so clear that B. is to have it only after the termination of what would be an estate tail, that A. was held to have such an estate by implication.¹⁰

⁸ 2 Prest. Est. 480-482-485; 1 Washburn on Real Prop. 104, 105; Co. Lit. 20 b; 2 Bla. Com. 115; Weart v. Cruser, 49 N. J. L. 75; Lehn Dorf v. Cope (Ill.), 13 N. E. Rep. 505 (to M. "and her heirs by her present husband, H."); Ford v. Johnson, 41 Ohio St. 366 (word heirs omitted, and grantee took only a life estate). But see Fletcher v. Fletcher, 88 Ind. 418, where the word "children" was held to mean heirs of the body. An estate tail may be created by a quit claim deed, as it is not a mere release, but a complete transfer. Chew v. Kellar, 171 Mo. 215, 71 S. W. Rep. 172. Adopted children will not take as remaindermen, under a deed to one and the "heirs of his body." Clarkson v. Hatton, 143 Mo. 47.

⁹ 2 Bla. Com. 115; Co. Lit. 27 a; Nightingale v. Burrell, 15 Pick. 104; Arnold v. Brown, 7 R. I. 196; Hill v. Hill, 74 Pa. St. 173; s. c. 15 Am. Rep. 545; Reinoehl v. Shirk, 119 Pa. St. 108.

¹⁰ Arnold v. Brown, 7 R. I. 196; 1 Washburn on Real Prop. 100; Idle v. Cooke, 2 Ld. Raym. 1152; Hayward v. Howe, 12 Gray, 49. According to the intention of the testator, it will either convert it into an estate tail, or, if the prior limitation has sufficient words of limitation, the prior limitation will be construed to be a fee simple, liable to be defeated by the failure of issue, and the limitation over will take effect as an executory devise. Such was held to be the proper construction in the case of Hill v. Hill, 74 Pa. St. 173, 15 Am. Rep. 545. See also Alender's Lessee v. Sussan, 33 Md. 11, 3 Am. Rep. 171.

§ 40. *Estates tail created by implication.*—Under the common law of England, and in the United States, where estates in tail have not been abolished, by statute, an estate tail may be created by implication.¹¹ The requisites of an express grant or devise, of an estate tail, are, that in addition to the word “heirs” there should be words of procreation, which indicate the body from which these heirs are to proceed, or the person by whom begotten. The general limitation to a man and the heirs of his body is sufficient, as it is immaterial of whom they are begotten.¹² But since the statute I Victoria (ch. 26, sec. 29, passed in 1837), and by many of the statutes in the United States, an estate tail cannot arise, by implication, from words importing the vesting of an estate upon a failure of issue, as these statutes require that such words shall be held to mean a failure of issue in the lifetime or at the death of the ancestor named. Hence, where a remainder in lands is limited to take effect on the death of any person “without heirs” or “without issue” since such words, under the statutes named, are held to mean heirs or issue *living at the death of the person named*, the ground work upon which a fee-tail was *implied*, in such a grant or devise, is swept away and no estate tail, by implication, can be created from the use of such words.¹³

§ 41. *Classes of estates tail.*—If the estate be limited generally to the heirs of one’s body, it is called an estate tail general. If it be limited to particular heirs of the body, as to the heirs of one’s body upon the body of a certain named wife begotten, only the issue of that particular wife can take, and it is called an estate tail special. The issue of any other

¹¹ *Yocum v. Siler*, 160 Mo. loc. cit. 296.

¹² *Den v. Snitcher*, 14 N. J. L. 53; *Yocum v. Siler*, *supra*; *Barber v. Pittsburg, etc. Ry. Co.*, 166 U. S. 83, 41 L. Ed. 925.

¹³ 1 *Jarman on Wills*, 521 and cases cited; *Roseboom v. Roseboom*, 81 N. Y. 356; *Clark v. Leupp*, 88 N. Y. 228; *Yocum v. Siler*, 160 Mo. p. 297; *Middlesex Banking Co. v. Field* (Miss. 1904), 37 So. Rep. 139.

wife cannot take.¹⁴ The special tail, in order to be good, must be so limited as not to be unlawful.¹⁵ But it does not matter how improbable the marriage is, or that they would have issue if married, the limitation will nevertheless be good. Such would be the case even though the man and woman are both married at the time to different parties; or they are so old that according to the ordinary laws of nature, they are incapable of procreating children. The law will consider it still possible for them to have issue, as long as they both live.¹⁶ Another form of estate tail special is that to their heirs, male or female, of one's body. In this case the inheritance is confined to the male or female heirs to the exclusion of the others. And each taker must trace his descent through an unbroken line of that class of heirs. Thus if the limitation be to the heirs male of one's body, the grandson by a daughter could not take, nor if it be to heirs female, could the granddaughter by a son inherit. Very often the limitation is to the heirs male of the body, then to the heirs female, exhausting the first class of heirs, before the remainder to the latter takes effect. In such a conveyance, neither the grandson by the daughter, nor the granddaughter by the son, could inherit the estate, and it would revert for failure of issue,¹⁷ if there were no technical heirs, male or female.

§ 42. How estates tail may be barred.—The statute *de donis* made the ordinary modes of conveyance incapable of barring entails, but in the course of time, the restraint upon alienation

¹⁴ 2 Bla. Com. 113, 114; 2 Prest. Est. 413, 414; 1 Washburn on Real Prop. 102, 103.

¹⁵ Thus, if the limitation is to the issue of the grantee begotten upon a woman, who is so near a relative as to render the marriage unlawful, the limitation in tail would be void, and the donee would take only a life estate. 1 Washburn on Real Prop. 103.

¹⁶ 2 Prest. Est. 395; 1 Washburn on Real Prop. 103.

¹⁷ 2 Bla. Com. 114; 2 Prest. Est. 402, 403; 1 Washburn on Real Prop. 103, 104; Williams on Real Prop. 35; Hulburt v. Emerson, 16 Mass. 241.

effected by this statute became so burdensome, practically excluding lands from the market as objects of barter or sale, that the courts at last by a fictitious contrivance, aided by remedial statutes, secured a means of alienation. It was in the nature of a fictitious suit, by which some persons laid claim to the land, and the tenant in tail either acknowledged the justice of his claim, or allowed judgment by default to be entered up against him. There were two modes in use, viz.: fines, and common recoveries. They do not now exist, and have at no time existed in more than two or three of the States of this country. The subject therefore deserves no further consideration.¹⁸ Since then, in England, it has not

¹⁸ The common recovery was the most common and the most effectual mode of barring the entail: "This was a fictitious suit brought in the name of the person who was to purchase the estate, against the tenant in tail who was willing to convey. The tenant, instead of resisting this claim himself, under the pretense that he had acquired his title of some third person, who had warranted it, vouched in, or by a process from the court called this third person, technically the *vouchee*, to come in and defend the title. The vouchee came in, as a part of the *dramatis personæ* of his judicial farce, and then, without saying a word, disappeared and was defaulted. It was a principle of the feudal law, adopted thence by the common law, that if a man conveyed lands with a warranty, and the grantee lost his estate by eviction by one having a better title, he should give his warrantee lands of equal value by way of recompense. And as it would be too barefaced to cut off the rights of the reversion as well as of the issue in tail by a judgment between the tenant and a stranger, it was gravely adjudged, (1) that the claimant should have the land as having the better title to it, and (2) that the tenant should have judgment against his vouchee to recover lands of equal value on the ground that he was warrantor, and thus, theoretically, nobody was harmed. If the issue in tail, reversioner or remainderman, lost that specific estate, he was to have one of equal value through this judgment in favor of the tenant in tail; whereas, in fact, the vouchee was an irresponsible man, and it was never expected that he was anything more than a *dummy* in the game." 1 Washburn on Real Prop. 97, 98. Taltarum's Case, Year Book, 12 Edw. IV 19 is the leading case on the subject; 2 Bla. Com. 116; Williams on Real Prop. 45-48; Taylor v. Horde, 1 Burr. 84; Page v. Hayward, 2 Salk. 570. See the following American cases, in which fines and common recoveries are discussed and recognized, but declared to be abolished. McGregor v. Com-

been possible to keep the estate entailed for any great length of time, at the most only during the minority of the tenants. As soon as the tenant became of age, he was able to bar it. This gave rise to what are known as marriage settlements, in which the lands were settled on the husband and wife for life, remainder to the first and other sons in tail, etc. In such a case the estate tail in remainder would be locked up until the eldest son has reached his majority.¹⁹

§ 43. *Merger of an estate tail.*— It is a general rule, which will receive constant illustration in the following pages, that where a less and a greater estate unite in one person, the former is merged and lost in the latter. But this is not always the case. A man may have an estate tail and the reversion in fee upon failure of issue, but the estate tail will remain intact, and cannot be barred except in the mode here indicated.²⁰

§ 44. *Estate-tail after possibility of issue extinct.*— When the legal possibility of issue has ceased, it leaves to the tenant in tail a life estate of a peculiar character, which is denominated an estate tail *after possibility of issue extinct*. He is not liable to an action for waste by the reversioner, although

stock, 17 N. Y. 162; *Croxhall v. Sherard*, 5 Wall. 268. In Pennsylvania they apparently exist still. *Richman v. Lippincott*, 29 N. J. L. 44; *Lyle v. Richards*, 7 S. & R. 322; *Dewitt v. Eldred*, 4 Watts & S. 421; *Taylor v. Taylor*, 63 Pa. St. 485. They never existed in Missouri. *Moreau v. Detchemendy*, 18 Mo. 527. An estate tail by statute in Massachusetts, is barred by a deed in common form. *Gilkie v. Marsh* (1904), 186 Mass. 336, 71 N. E. Rep. 703.

¹⁹ *Williams on Real Prop.* 50, 51; 1 *Washburn on Real Prop.* 99.

²⁰ *Wiscot's Case*, 2 Rep. 61; *Roe v. Baldwere*, 5 T. R. 110; *Poole v. Morris*, 29 Ga. 374; *Altham's Case*, 8 Rep. 154 b; *Corbin v. Healy*, 20 Pick. 515. In determining questions of merger, the principle by which the court is guided is the intention of the parties; in the absence of the expression, either documentary or verbal, of any intention, the court looks to the benefit of the person in whom the two estates are vested. *Ingle v. Vaughan Jenkins* (Eng. 1900), 69 Law J. Ch. 618, 83 Law T. (N. S.), 155; *Cole v. Beale*, 89 Ill. App. 426.

he may be restrained by an equitable injunction from the commission of willful and malicious waste. It is apparent that this can only happen in the case of an estate tail special. If the limitation be to the heirs of one's body generally, there is a legal possibility of issue, as long as the tenant is living.²¹

§ 45. Estates tail in the United States.—In the early colonial period, estates tail prevailed in this country very generally, and they could, in some of the States, be barred by fines and recoveries.²² But at the present time they have been abolished in most of the States. In some they are changed into fees simple, while in others they are divided into a life estate and remainder to issue, or easy modes of converting them into fees simple are provided.²³

²¹ 1 Washburn on Real Prop. 110, 111; Williams on Real Prop. 54, 55; 2 Sharwood's Bla. Com. 125; Soe v. Audley, 1 Cox, 324; List v. Rodney, 2 Norris, 483; Co. Lit. 27 b, 28 a. In Tennessee, it is held that a remainder to the children of a woman is not extinguished until her death, although she may be very old and childless, as the law does not assume that there is an impossibility of issue at any age, however great. Bigley v. Watson, 98 Tenn. 353, 39 S. W. Rep. 525, 38 L. R. A. 679. As the grantee of a tenant in tail would take nothing but the life estate of such tenant, under the Missouri statute, it would be immaterial, as to such grantee, whether the living female grantor has reached such age that the possibility of having further heirs of her body is extinct or not, or whether her heirs are contingent or vested remaindermen. Utter v. Sidman, 170 Mo. 285, 70 S. W. Rep. 702. But see, Jackson v. Everett (Tenn.), 58 S. W. Rep. 340.

²² Hawley v. Northampton, 8 Mass. 34; Perry v. Kline, 12 Cush. 120; Corbin v. Healey, 20 Pick. 515; Jewell v. Warner, 35 N. H. 170; Dennett v. Dennett, 40 N. H. 500; Jackson v. Van Zandt, 12 Johns. 149; Croxhall v. Sherard, 5 Wall. 283; Dewitt v. Eldred, 4 Watts & S. 421; 4 Kent's Com. 14; Walker Am. Law. 299; 1 Washburn on Real Prop. 111.

²³ In Alabama, California, Connecticut, Florida, Georgia, Kentucky, Maryland, Michigan, Minnesota, Mississippi, North Carolina, Tennessee, Texas, Wisconsin, Virginia, and West Virginia, estates tail are converted into fees simple. Wheatley v. Barker, 79 Ga. 790, 4 S. E. Rep. 387, note; Ewing v. Shropshire, 80 Ga. 374; East v. Garrett, 84 Va. 523; Smith v. Greer, 88 Ala. 414; Balt. & O. R. R. Co. v. Patterson, 68 Md. 606; Leather v. Gray (N. C.), 7 S. E. Rep. 657; Bingham v. Waller

(Tenn. 1904), 81 S. W. Rep. 843; *Viely v. Frankfort, etc., Co.*, 51 S. W. Rep. 173; *Hertz v. Abrahams*, 110 Ga. 707, 50 L. R. A. 361, 36 S. E. Rep. 409. In Maryland, only estates tail general are converted into fees simple. An estate tail, male or female, remains unaffected by the statute. *Pennington v. Pennington*, 70 Md. 118. In Arkansas, Illinois, Kansas, Missouri, New Jersey, and Vermont, the tenant in tail takes a life estate and the heirs of his body the remainder in fee *per formam doni*. *Lehndorf v. Cope* (Ill.), 13 N. E. Rep. 505; *Horsley v. Hilburn*, 44 Ark. 458; *Weart v. Cruser*, 49 N. J. L. 75; *Wood v. Kice* (Mo.), 15 S. W. Rep. 623; *Lewis v. Barnhardt*, 43 Fed. Rep. 854; *Black v. Webb* (Ark. 1904), 80 S. W. Rep. 367; *Utter v. Sidman*, 170 Mo. 284, 70 S. W. Rep. 702. Under the Illinois statute, where the grantee of a fee tail refuses to take, he does not become "seised in fee tail," so that the land, or any part of it would vest in fee, in his heirs. *Spencer v. Spruel*, 196 Ill. 119, 63 N. E. Rep. 621. In Indiana (*Allen v. Craft*, 109 Ind. 476) and New York, the tenant takes a fee simple, if there is no limitation in remainder, after the estate tail and a life estate, when there is such a limitation. And while in Delaware, Maine, Massachusetts, Pennsylvania and Rhode Island, estates tail are not expressly abolished, and presumably if not aliened they would descend to the special heirs, and revert to the grantor upon failure of such heirs, it is now provided by statute in those States that a conveyance in common form will pass a fee simple estate, and bar the entail. *Titzell v. Cochran* (Pa.), 10 Atl. Rep. 9; *Coombs v. Anderson*, 138 Mass. 376; *Lawrence v. Lawrence*, 105 Pa. St. 335; *Rowland v. Warren*, 10 Oreg. 129; *Pierson v. Lane*, 60 Iowa, 60; 1 Washburn on Real Prop. 112, note; *Williams on Real Prop.* 35, Rawle's note; *Gilkie v. Marsh* (1904), 186 Mass. 336, 71 N. E. Rep. 703; *Simpson v. Reed*, 205 Pa. St. 53, 54 Atl. Rep. 53; *Stauch v. Ziegler*, 196 Pa. St. 489, 46 Atl. Rep. 486; *Stone v. Bradlee* (Mass. 1903), 66 N. E. Rep. 708. In South Carolina, the statute *de donis* has never been recognized as a part of the common law, and fees conditional still exist there. 3 S. C. Stats. at Large, 341; *Archer v. Ellison*, 28 S. C. 238; *Powers v. Bullwinkle*, 33 S. C. 293. See, also, *Keith v. Scoles* (N. C.) 32 S. E. Rep. 809; *Holman v. Wesner* (1903), 67 S. C. 307, 45 S. E. Rep. 206; *Mattison v. Mattison*, 65 S. C. 345, 43 S. E. Rep. 874; *Methodist Church v. Young*, 130 N. C. 8, 40 S. E. Rep. 691.

CHAPTER VI.

ESTATES FOR LIFE.

- SECTION** 46. Definition and classes of life estates.
47. Peculiarities of an estate *per autre vie*.
48. Words of limitation in estates for life.
49. Estates tail, converted into life estates by statute
50. The merger of life estate in a greater.
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§ 46. Definition and classes of life estates.— An estate for life is strictly one whose duration is limited by the life or lives of certain persons; it may be the life of the tenant, the life of another, or the joint lives of the tenant and others. But the term has been generally extended so as to include all freeholds not of inheritance.¹ It will, therefore,

¹The life estates above referred to are frequently termed "conven-

embrace an estate for an uncertain period, which may continue during a life or lives. Such would be a grant to a woman during widowhood. If she marries, her estate would terminate; but it may endure as long as she lives.² And it is of no consequence how uncertain the duration of the estate may be, or how likely it will terminate in a given number of years; if it can, and may, continue during a life, it is considered a freehold estate for life. Such is a grant to one, until he can, out of the rents and profits, pay the debts of the grantor. But if the conveyance be a devise to executors, until the deviser's debts are paid, they would take only a chattel interest.³ An estate for one's own life is considered by the law to be the highest and best estate for life that one can have. Consequently the courts, in construing a doubtful grant for life, would hold it to be for the life of the tenant, rather than for the life of the grantor.⁴ An estate for the life of another is called in the Norman-French, an estate *per auter vie*, and the one whose life limits its duration is called the *cestui que vie*.⁵ In the present chapter we shall speak only of estates for life in general and of those incidents which pertain to the estates for life, which are created by the act of the parties, or in other words, of conventional life estates. There are other classes of life estates, which come into being by operation of law, as in the case of dower and curtesy; these will be treated in a separate chapter.⁶

tional" life estates, to distinguish them from life estates created by operation of law. 4 Kent's Com. 25, where such estates are treated as "estates for life by agreement." Tiffany, Real Prop. 30.

² Co. Lit. 42 a; Hurd v. Cushing, 7 Pick. 179; Jackson v. Myers, 3 Johns. 388; Roseboom v. Van Vechten, 5 Denio 414; Hatfield v. Sneden, 54 N. Y. 285; Clark v. Owens, 18 N. Y. 434; Hewlins v. Shippam, 5 B. & C. 221, 2 Bla. Com. 121; McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015; Holt v. Lamb, 17 Ohio St. 374; Hayward v. Kinney, 84 Mich. 591.

³ Co. Lit. 42 a; 1 Washburn on Real Prop. 116.

⁴ Co. Lit. 42 a; 2 Bla. Com. 121; 1 Washburn on Real Prop. 115.

⁵ Co. Lit. 41 b; 2 Bla. Com. 120.

⁶ See *post*, ch. VII, Secs. 69, 127.

§ 47. Peculiarities of an estate *per auter vie*.—An estate for the life of another, as, for example, an estate for the life of the grantor, is a freehold, but is not an estate of inheritance. Perhaps during the earlier existence of the feudal system, it was not considered as strictly a freehold interest; but it is now, and has long been, included in that class of estates. The estate terminates with the death of the *cestui que vie*, and does not expire with the death of the tenant. If, therefore, the tenant dies during the life of the *cestui que vie*, the estate continues and must vest in some one. If he has conveyed it away, his grantee will hold it, unaffected by his death. But if he dies in possession, a question of some difficulty arises. At common law, it could not descend to his heirs, for the law of descent applies only to estates of inheritance; and this is not such an estate. It could not descend to the executor or administrator, for they could take only chattel interests, and this was a freehold. It was also not devisable, for it was a freehold interest. At common law it was permitted for any one who first took possession to hold it, and he was called the *general occupant*.⁷ This right of general occupancy could only be exercised where there were no persons designated in the grant who could take as *special occupants*. If the grant was to A. and his heirs during the life of B., the heirs would take as special occupants, to the exclusion of the general occupant.⁸ But these special occupants had not the interest of purchasers during the life of the tenant. They only took what was left undisposed of,

⁷ Co. Lit. 41 b; 2 Bla. Com. 259.

⁸ 2 Bla. Com. 259, 260; *Atkinson v. Baker*, 4 T. R. 229. A tenant at will of the tenant *per auter vie*, in possession at the death of the latter, will, as against the general occupant, have a superior claim as one species of special occupant, though he would have to yield possession to the special occupant, who was also heir of the tenant. Co. Lit. 41b, note 232. And in like manner, the executor or administrator might have taken the estate as special occupant, if the grant had been to the tenant and his executors and administrators, instead of to him and his heirs. See authorities, *supra*.

and could not prevent its alienation by the tenant. On the other hand, the tenant could not bar them by a devise of the estate.⁹ This peculiarity of the common law has since been done away with by statute in England,¹⁰ and in almost every State in this country. In some, estates *per auter vie* are made to descend to heirs in common with other real estate; while in others it is treated as a chattel interest, and constitutes assets in the hands of the personal representatives.¹¹

§ 48. Words of limitation in estates for life.— There are no words of limitation required at common law. A grant of an estate was construed to be for the life of the grantee, where there was no express limitation.¹² But in those States where now by statute all grants and devises are made to convey a fee simple estate, unless a less estate is expressly limited, it would be necessary to limit the estate for the life of the grantee in express words.¹³ And in devises, a life estate is often raised by implication. Thus where A. devised his lands to his heirs after the death of B., it was held that B. took an estate for life by necessary implication, since no one could take the estate except the heir, and he was postponed by the will until B.'s death. But if the devise had been to a stranger after the death of B., the heirs

⁹ Doe v. Robinson, 8 B. & C. 296; Doe v. Luxton, 6 T. R. 289; Allen v. Allen, 2 Dru. & War. 307; 1 Washburn on Real Prop. 121.

¹⁰ 1 Vict. c. 26; 14 Geo. II c. 20; 4 Davy's Case, 38, 56.

¹¹ In Missouri, Arkansas, Rhode Island, North Carolina, Massachusetts and some others, it is real estate; while in New York, New Jersey, Pennsylvania, Indiana, Kentucky, Minnesota, Maryland, Michigan, Wisconsin, Texas, it is personal property. In all the States it can now be disposed of by will. In Maryland, the right of special occupancy is still recognized, so that if the estate *per auter vie* is expressly limited to the heirs, the heirs will take as special occupants. In the other States, the limitation does not give them a superior title, if the statute makes the estate personal property. See 1 Washburn on Real Prop. 121; Williams on Real Prop. 21, Rawle's note.

¹² Co. Lit. 42 a; 5 Bla. Com. 121; Truesdell v. Lehman, 47 N. J. Eq. 218; Dorney's Estate, 136 Pa. St. 142.

¹³ See *ante*, Sec. 30.

would have taken by descent during the life of B. instead of the latter.¹⁴

§ 49. *Estates tail, converted into life estates by statute.*—In many of the United States, a grant or devise of an estate to the grantee or devisee and to the "heirs of his body," or to his "issue," or to his "children," which, at common law, would be held to create an estate in tail, is by statute, converted into an estate for life in the first taker, with remainder over, on his death, to his heirs.¹⁵ A life estate is held, by operation of law, to result from any grant or devise, that at common law, would be held to create an estate tail, and in some jurisdictions, even though the premises in a deed attempt to convey an absolute estate in fee, if a limitation appears in the habendum, evincing an intention to limit the estate granted or devised to the first taker and to his "heirs" or "issue" the conveyance is held to create only a life estate in the first taker, with remainder over to his heirs.¹⁶ "If the limitation in one part of a conveyance is to A. and his heirs generally, and in the other part the estate is limited to A. and to the "heirs of his body," the two descriptions of the estate are not, necessarily contradictory, and the specific limitation will prevail over the general limitation.¹⁷ In such case, the estate granted will be an estate tail, which, by operation of law, in jurisdictions where such statutes are in force, would convey only a life estate in the grantee, with remainder to his heirs.¹⁸

¹⁴ 1 Washburn on Real Prop. 116, 117.

¹⁵ Wagner's Stat. Mo. 1872, page 1351; R. S. 1899, Secs. 4592, 4594. Statutes to this effect exist in Arkansas, Illinois, Kansas, Missouri, New Jersey and Vermont, *ante*, Sec. 45.

¹⁶ Clarkson v. Clarkson, 125 Mo. 381; Clarkson v. Hatton, 143 Mo. 47; McGinnis v. McGinnis (Ky.), 29 S. W. Rep. 333; Wilmers v. Robinson (Ark.), 55 S. W. Rep. 950; Hunt v. Searcy (Mo.), 67 S. W. Rep. 206; Utter v. Sidman, 170 Mo. 284; Davidson v. Manson, 146 Mo. 608; Walton v. Drumtra, 152 Mo. 489.

¹⁷ Hunter v. Patterson, 142 Mo. 310.

¹⁸ Hunter v. Patterson, *supra*.

§ 50. **The merger of life estate in a greater.**—If a life estate is conveyed to one having a reversion or any other greater estate, or the tenant acquires the reversion, the life estate is merged in the latter.¹⁹ So would an estate for the life of another merge in an estate for one's own life.²⁰ But if the tenant for life conveys to the reversioner an estate for the life of the latter, a possible reversionary interest being left in the tenant, there will be no merger, and the tenant would take the estate again, if the reversioner should die during his life-time.²¹ The two estates must also be of the same character. A legal life estate will not merge into an equitable estate in remainder.²²

§ 51. **Alienation by tenant for life.**—Unless there is a condition in restraint of alienation,²³ the tenant for life may convey his estate as freely as the tenant in fee. He may alien his entire interest, which would become, in his grantee, an estate *per auter vie*. Or he may grant any smaller estate, and may carve up his estate into any number of smaller estates, as long as they do not together exceed his life estate.²⁴ If the life tenant attempted to convey, by a com-

¹⁹ 2 Bla. Com. 177; Co. Lit. 41 b; Mudd v. Mullican (Ky.), 12 S. W. Rep. 263.

²⁰ 1 Washburn on Real Prop. 117; 1 Spence Eq. Jur. 144; Williams on Real Prop. 22; Boykin v. Ancrum, 28 S. C. 486, 6 S. E. Rep. 305, 13 Amer. St. Rep. 698.

²¹ 1 Washburn on Real Prop. 117, 118; Co. Lit. 42, 218 b.

²² Davis v. Townsend (S. C.), 10 S. E. Rep. 837. Where life tenants, in a legal life estate, under a will, are entitled to vested remainders in such property, the two estates coalesce and such tenants take the fee. Graham v. Whitridge (Md. 1904), 57 Atl. Rep. 609, 58 *id.* 36. See Hollenberger v. Youkee, 145 Pa. St. 179, 22 Atl. Rep. 821; Sheldon v. Hallock, 62 Conn. 143, 25 Atl. Rep. 483; Turk v. Skiles, 45 W. Va. 82, 30 S. E. Rep. 234. But see, Re Radcliff (C. A.), 1 ch. 227.

²³ Hayward v. Kinney, 84 Mich. 591; Criswell v. Grumblin, 107 Pa. St. 408.

²⁴ 1 Cruise Dig. 108; Stewart v. Clark, 13 Metc. 79; Jackson v. Van Hoesen, 4 Cow. 325; Williams on Real Prop. 26; Lehnendorf v. Cope (Ill.), 13 N. E. Rep. 505.

non-law feoffment, a greater estate than he had, it worked a forfeiture of his estate, his grantee received nothing, and the estate in remainder or in reversion vested in possession.

This rule follows as a consequence from the feudal notion that the wrongful feoffment of the life tenant was a renunciation of the feudal tenure between him and the lord, an act of disseisin, which divested the remainder-man or reversioner, of his seisin by its livery to the grantee.²⁵ And this rule applies to this day, wherever it has not been changed by statute. But if he attempts the conveyance of a greater estate by any other mode of conveyance, such as a grant, lease, and release, or bargain and sale, which operate under special statutes or under the Statutes of Uses, it will only have the effect of conveying what interest he has, and no forfeiture results therefrom.²⁶ These deeds do not operate by transmutation of possession, and therefore do not divest the tenant in remainder or reversion of his seisin. The nature and effect of these various deeds will be more particularly considered in subsequent pages.²⁷

§ 52. Power given life tenant to convey the fee.— The question is decided differently in different jurisdictions as to the right of a life tenant to convey the fee, where a general power of sale is given to such tenant by the testator. In the absence of a limitation over, the courts very generally hold that such a power, on the part of a tenant for life, will enable him to convey the fee, as this would, manifestly, carry out the intent of the testator or donor,²⁸ but where

²⁵ 2 Bla. Com. 274, 275; 1 Cruise Dig. 108; 1 Washburn on Real Prop. 118, 119; Jackson v. Mancius, 2 Wend. 365; Stump v. Findlay, 2 Rawle, 168; Matthews v. Ward's Lessee, 10 Gill & J. 449; Redfern v. Middleton, 1 Rice 459; Faber v. Police, 10 S. C. 376. See *post*, Secs. 317, 536.

²⁶ 1 Washburn on Real Prop. 119. See *post*, Sec. 317.

²⁷ See *post*, Secs. 540, 549.

²⁸ In *Cummings v. Shaw* (108 Mass. 159), the court say: "If a question had arisen as to the validity of a devise over, it might be

there is a devise over, after the life estate, the decisions are not in complete harmony as to the construction of such a power. The federal supreme court, basing its holding upon a leading early case,²⁹ uniformly holds that such a power does not have the effect of enabling the life tenant to convey the fee, as this would have the effect of enlarging the life estate into a fee, where a contrary intent is evidenced by the creation of the life estate.³⁰ But many of the courts of the different States construe such a power, upon the part of the tenant for life, as an authority upon his part to convey an estate in fee, even though there may be a limitation over, after the termination of the life estate, upon the theory that a power of alienation of the life estate was an incident to such estate, without express grant thereof, and to restrict the right of sale to the life estate would not effectuate the intention of the testator, who would not be presumed to have intended the idle ceremony of granting a power already enjoyed.³¹

§ 53. Tenure between tenant for life and reversioner.—The relation of tenure so far exists between the life tenant and his reversioner, as that the possession of the former is never deemed to be adverse to the latter. That is, during the ex-

important to determine whether the plaintiff took an estate for life, or in fee, but it cannot be so in this case."

²⁹ *Smith v. Bell*, 6 Pet. 68; 8 L. Ed. 322. The authority of this case is somewhat impaired by the fact that counsel for the grantee of the power did not appear in the supreme court. *Gifford v. Choate*, 100 Mass. 340.

³⁰ *Brant v. Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745.

³¹ *Parks v. Robinson* (N. C.), 50 S. E. Rep. 649; *Troy v. Troy*, 60 N. C. 623; *Wright v. Westbrook*, 121 N. C. 156, 28 S. E. Rep. 299; *White v. White*, 21 Vt. 250; *Underwood v. Cave* (Mo.), 75 S. W. Rep. 455, 60 Cent. Law Jour. 441. It is held, in Tennessee, that where the life tenant sells the entire estate and sets aside a portion of the proceeds for the remainderman, the latter may ratify the sale and recover the portion so set aside from the life tenant's administrator. *Russell v. State Nat. Bank*, 104 Tenn. 614, 58 S. W. Rep. 245.

istence of the life estate he cannot disseise his reversioner by any adverse claim of title. Nor will the disseisin of the life tenant by a stranger affect the rights of the reversioner during the life of the former. He may recover possession of the disseisor at any time after the death of the life tenant within the statutory period of limitation. The statute only runs from the death of the tenant.³² And where the life tenant has granted the fee, his grantee becomes a trespasser from his death, and may be ousted by the reversioner, it matters not how long he may have been in possession during the life of the tenant for life.³³ But the common-law real actions, when brought against the life tenant for recovery of the land under a claim of title adverse to both reversioner and life tenant, barred the claims of the reversioner as well as the life tenant, even though the former was not made a party to the suit. These real actions could only be brought against the tenant in possession, who was called the tenant of the *præcipe*. ~~The life tenant was, therefore, under obligation~~ to the reversioner to defend the title in such actions; but he could relieve himself of the duty by calling in the reversioner to assist in the defense. This was called "praying in aid." He could, however, defend without calling in

³² *Varney v. Stephens*, 22 Me. 334; *Austin v. Stevens*, 24 Me. 526; *Foster v. Marshall*, 22 N. H. 491; *Jackson v. Schoonmaker*, 4 Johns. 390; *McCorry v. King's heirs*, 3 Humph. 367; *Archer v. Jones*, 26 Miss. 583; *Kirksey v. Cole*, 47 Ark. 504; *Parker v. Osnum* (Mich. 1904), 97 N. W. Rep. 756; *Chicago, P. & St. L. Ry. Co. v. Vaughan*, 206 Ill. 234, 69 N. E. Rep. 113. No adverse possession by a grantee can be predicated during the life of the life tenant. *Hauser v. Craft*, 134 N. C. 319, 46 S. E. Rep. 756; *Beatty v. Clymer* (Tex. 1903), 75 S. W. Rep. 540; *Hamilton v. Wickson* (Mich. 1902), 90 N. W. Rep. 1032; *Hall v. French*, 165 Mo. 430, 65 S. W. Rep. 769; *Cook v. Collier* (Tenn. 1901), 62 S. W. Rep. 658. Where land was devised to two for life, with remainder to the heirs of one, the possession of a grantee of all but one of such remaindermen held not adverse as to him until the death of both life tenants. *Bullin v. Hancock* (N. Car.), 50 S. E. Rep. 621.

³³ *Williams v. Caston*, 1 Strobb. 130. See *Moore v. Luce*, 29 Pa. St. 263.

such assistance, and the judgment would be equally conclusive against the reversioner.⁸⁴ These actions have now been abolished in England and in this country, and since the principle did not prevail in any other forms of actions, a judgment for recovery of land only affects the parties to the suit.⁸⁵

§ 54. Apportionment, between life tenant and reversioner of incumbrances.— The life tenant is bound to pay all the accruing interest on existing incumbrances upon the estate; but he is not compelled, as against the reversioner, to pay off the principal of the debt. The payment of the principal falls upon the reversioner.⁸⁶ If the life tenant pays off the entire debt, he becomes a creditor of the reversioner for the share of the latter, and vice versa. The payment is, in such a case, apportioned between them. The tenant would have

⁸⁴ 1 Prest. Est. 207, 208; 1 Washburn on Real Prop. 73, 74, 122.

⁸⁵ 1 Spence Eq. Jur. 225; 1 Washburn on Real Prop. 122, 123.

⁸⁶ 1 Story Eq., Sec. 486; 4 Kent's Com. 76; Kensington v. Bouverie, 31 Eng. Law & Eq. 345; Mosely v. Marshall, 25 Barb. 42; Doane v. Doane, 46 Vt. 496; Warley v. Warley, 1 Bailey Eq. 397. But this is not a personal claim against the life tenant, which the incumbrancer can enforce. He is only obliged to pay the interest, if he desires to save the estate from forfeiture. Morley v. Sanders, L. R. 8 Eq. 594; Kensington v. Bouverie, *supra*; Doane v. Doane, *supra*; Plympton v. Boston Dispens., 106 Mass. 544; Downing v. Hartshorn (Neb. 1903), 95 N. W. Rep. 801; Tyndall v. Peterson, 99 N. W. Rep. 659; Parrish v. Ross (Ky.), 44 S. W. Rep. 134; Bowen v. Brogau, 119 Mich. 218, 77 N. W. Rep. 942. It is different in respect to the liability of the tenant for life for accruing taxes. These he is obliged to pay; if he does not, and purchases the tax title given for default of taxes, he cannot set it up in opposition to the reversioner. Cairns v. Chabert, 3 Edw. Ch. 312; Fleet v. Dorland, 11 How. Pr. 489; Patrick v. Sherwood, 4 Blatchf. 112; Crawford v. Meis (Iowa 1904), 123 Iowa 610, 99 N. W. Rep. 186, 66 L. R. A. 154; Pruitt v. Holly, 73 Ala. 369; Varney v. Stevens, 22 Me. 331; Defreese v. Lake, 109 Mich. 415, 67 N. W. Rep. 505, 63 Amer. St. Rep. 584, 32 L. R. A. 744; Stewart v. Matheny, 66 Miss. 21, 5 So. Rep. 387, 14 Amer. St. Rep. 538; Trimmer v. Dorden, 61 S. C. 220, 39 S. E. Rep. 373; Hall v. French, 165 Mo. 430, 65 S. W. Rep. 769; Jeffers v. Sydnam (Mich. 1902), 89 N. W. Rep. 42.

to pay such a sum as would equal the present value of the amount of interest he would probably have paid during his life, if the mortgage had continued so long in existence, estimating his probable length of life by the ordinary tables of mortality. The balance, after deducting this sum, would be the amount due from the reversioner.³⁷ Formerly it was arbitrarily apportioned between them, the tenant paying one-

³⁷ *Saville v. Saville*, 2 Atk. 403; *Eastabrook v. Hapgood*, 10 Mass. 315, note; *Foster v. Hilliard*, 1 Story, 87; *Newton v. Cook*, 4 Gray, 46; *Gibson v. Crehore*, 5 Pick. 146; *Bell v. Mayor of New York*, 10 Paige Ch. 71; *House v. House*, *Id.* 158; *Swaine v. Perine*, 5 Johns. Ch. 482; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Dorsey v. Smith*, 7 Har. & J. 367; *Snyder v. Snyder*, 6 Mich. 470; *Abercrombie v. Riddle*, 3 Md. Ch. 324; *Tyndall v. Peterson* (Neb. 1904), 99 N. W. Rep. 659. The tables usually employed are Wigglesworth's and the Carlisle tables, the latter being considered the more accurate.

The following algebraic formula will be very helpful, if not actually necessary, to an accurate computation of the tenant's share of contribution:

$$P = \frac{S}{r} \left\{ \frac{(1+r)^n - 1}{(1+r)^n} \right\}$$

p = amount of contribution.
 s = annual interest. 65
 r = rate per cent. of interest. 6
 n = number of years of duration of life. 5

The calculation with the aid of this formula can be simplified by the use of logarithms.

When it is stated in the text, that the reversioner is obliged to pay the balance remaining, after deducting the sum to be liquidated by the tenant for life, it is not meant that he is under a personal obligation to pay it. He may refuse, and allow the tenant for life to enforce the incumbrance against him. See *post*, Sec. 149. The tenure existing between them only prevents the tenant from holding the incumbrance, so acquired, adversely to the reversioner, if he should desire to obtain the benefit of the purchase by contributing his share towards the expenses. *Foster v. Hilliard*, 1 Story 77; *Davies v. Myers*, 13 B. Mon. 511. In Nebraska it is held that a life tenant who pays off an encumbrance, will be entitled to be reimbursed by the remainderman for the amount paid, less such sum as will equal the present value of the annual installments of interest he would have paid, during his life, if the encumbrance had so long continued, with lawful interest on the residue, so ascertained, from the date of payment. *Tyndall v. Peterson* (Neb. 1904), 99 N. W. Rep. 659.

third, and the reversioner two-thirds. But this rule has now generally been superseded by the rule of apportionment, just explained.³⁸

§ 55. *Same — Of rent.*— It was the common-law rule that, if a tenant for years was ousted by one holding a better title before the expiration of his lease, or between the days of payment of his rent, he was not liable for any rent, since the rent could not be apportioned to the time during which he enjoyed the possession under the lease. So, if a tenant for life grants a lease for years, the rent to be paid on a fixed day, and he dies before the rent becomes due, his personal representative would have no right of action for rent accruing between the last pay-day and the day of his death.³⁹ And if the lease was given by virtue of, and under, a power, so that it did not terminate with the death of the life tenant, the entire rent would be payable to the reversioner, and the personal representatives of the life tenant would get nothing. This rule was so strictly enforced that in one case the rent lacked one hour of falling due, when the life tenant died, and the reversioner took the rent.⁴⁰ But

³⁸ 1 Story Eq. 487. See *Jones v. Sherrard*, 2 Dev. & B. Ch. 179; *Downing v. Hortshorn* (Neb. 1903), 95 N. W. Rep. 301; *Tyndall v. Peterson*, 99 N. W. Rep. 659; *Parrish v. Ross*, 44 S. W. Rep. 134; *Bowen v. Brogau*, 119 Mich. 218, 77, N. W. Rep. 942. But it is still the rule of law in South Carolina, that the tenant is to pay one-third, and the reversioner two-thirds. *Wright v. Jennings*, 1 Bailey, 277. In *Garland v. Crow*, 2 Bailey, 24, the court say: "In contemplation of law, an estate for life is equal to seven years' purchase of the fee. To estimate the present value of an estate for life, interest must be computed on the value of the whole property for seven years; and perhaps, interest on the several sums of annual interest from the present time to the periods at which they respectively fall due, ought to be abated." Following this rule, and calculating the interest at seven per cent., it would be a little more than thirty-five per cent. of the value of the estate. See *post*, Sec. 104.

³⁹ 2 Bla. Com. 124; 1 Washburn on Real Prop. 126; *Fitchburg Cotton Co. v. Melvin*, 15 Miss. 268; *Perry v. Aldrich*, 13 N. H. 343; *Hoagland v. Crum*, 112 Ill. 365 (55 Am. Rep. 424). See *post*, Sec. 149.

⁴⁰ *Strafford v. Wentworth*, 1 P. Wms. 180; *Rickingham v. Penrice*, *Id.*

this injustice of the common law has now been remedied by statutory changes, so that now generally, the rent is apportioned between the life tenant and reversioner, giving each his *pro rata* share according to the time of enjoyment of the lease before, and after the tenant's death. And the personal representatives of the life tenant may sue the tenant for years for the rent which may be apportioned to him.⁴¹

§ 56. Claim for improvements.— The tenant for life has no claim for any improvements which he may have made upon the premises. He is bound to keep the premises in repair. but is under no legal obligation to undertake any improve-

178; 1 Washburn on Real Prop. 127; *post*, Sec. 149. In England by the Settled Estates Act, 1877, every tenant for life, unless expressly declared to the contrary in the deed to him, may demise the premises for twenty-one years, which shall not determine at the death of the tenant, provided the lease takes effect in possession within one year after its execution, and the rent reserved is made an incident of the reversion. Williams on Real Prop. (5 ed.) 26, 27. But in the United States, as a general rule, there are no such statutes, and an express power to make leases is necessary, in order to have the term continue after the expiration of the life estate.

⁴¹ Williams on Real Prop. 27; 1 Washburn on Real Prop. 127; Price v. Pickett, 21 Ala. 741; 3 Kent's Com. 469, 470. Under the Iowa code, where the life tenant leased a farm for a year and died within four months, his executor cannot recover any portion of the rent, in the absence of a showing of what proportion had then accrued, or that any rent had then accrued. Gudgel v. Southerland (1902), 90 N. W. Rep. 623. A lease of a life tenant, under the West Virginia statute, in case of the life tenant's death, is continued in effect until the end of the current year, unless revived by the attornment of the tenant and the affirmation of the remainderman. Holden v. Boring (1903), 52 W. Va. 37, 43 S. W. Rep. 86. Under the Tennessee Code, a recovery of rent due on the termination of the life estate, may be had, but the creation of a lease to extend beyond the life estate is not authorized. Collins v. Crownover (1900), 57 S. W. Rep. 357. See also, Hoagland v. Crum, 113 Ill. 365, 55 Amer. St. Rep. 424; Lowery v. Reef (Ind.), 27 N. E. Rep. 626; Carmen v. Mosier, 105 Iowa, 367, 75 N. W. Rep. 323; Guthman v. Vallery, 51 Neb. 824, 71 N. W. Rep. 734; Fields v. Bush, 94 Ga. 664, 21 S. E. Rep. 827; Lehnendorf v. Cope, 122 Ill. 317, 13 N. E. Rep. 505.

ments. If he does, it is a voluntary act of his own, which gives rise to no claim against the reversion for the payment of his share of the expenses.⁴² On the other hand, the tenant for life is obliged to pay all the taxes of every kind which may be assessed upon the land⁴³ and, if he fails to do so, a receiver may be appointed to take charge of the estate, and pay the taxes out of accruing rents and profits.⁴⁴ If the life-estate is held in trust, the trustee must charge the life-estate with the expense of the administration.⁴⁵

§ 57. *Estovers*.—This word signifies the timber that a tenant is allowed to cut upon the land for use upon the premises, and for keeping them in repair. They were divided by the common law into three kinds, viz. (*house-bote, plough-bote, and hay-bote.*) House-bote included the wood necessary for the repair of the buildings and for the purpose of fuel. Plough-bote covered such as was needed for the manufacture or repair of all instruments of husbandry; while hay-bote was what was used in the erection and maintenance of fences and hedges. The tenant, whether he is one for life, or for years, has this right as a compensation for the duty of keep-

⁴² 1 Washburn on Real Prop. 123; *Parsons v. Winslow*, 16 Mass. 361; *Sohier v. Eldridge*, 103 Mass. 351; *Corbet v. Laurens*, 5 Rich. Eq. 301; *Elam v. Parkhill*, 60 Tex. 581; *Van Bibber v. Williamson*, 37 Fed. Rep. 756; *Hancox v. Meeker*, 95 N. Y. 528; *Trimmer v. Dorden*, 61 S. C. 220, 39 S. E. Rep. 373; *Pulse v. Osborne*, 60 N. E. Rep. 374; *Brodie v. Parsons* (Ky.), 64 S. W. Rep. 426; but see apparently *contra*, *Appeal of Datesman*, 127 Pa. St. 348.

⁴³ *Reyburn v. Wallace*, 93 Mo. 326.

⁴⁴ *Varney v. Stevens*, 22 Me. 331; *Cairns v. Chabert*, 3 Edw. Ch. 312; *Prettyman v. Walston*, 34 Ill. 192; *McCook v. Harp* (Ga.), 7 S. E. Rep. 174; *Stewart v. Matheny* (Miss.), 5 So. Rep. 387; see *In re Detmole*, 4 N. Y. Supp. 903; *Pruitt v. Holly*, 73 Ala. 369; *Jeffers v. Sidman* (Mich. 1902), 89 N. W. Rep. 42; *Hall v. French*, 165 Mo. 430, 65 S. W. Rep. 769. A life tenant's agreement to buy improvements, erected by his lessee, is not binding on the remainderman. *Chilvers v. Race*, 196 Ill. 71, 63 N. E. Rep. 701.

⁴⁵ *Cammann v. Cammann*, 2 Demarest (N. Y.), 211.

ing the premises in repair and so does his assignee.⁴⁶ But the right is limited to only what is reasonably necessary for present use. If the tenant exceeds this amount, and cuts timber, for the purpose of sale, or even cuts a reasonable amount of wood, which is not suitable for estover, and exchanges it for what is, he is deemed guilty of waste, and is liable to the reversioner for damages.⁴⁷ Nor can he use them on any other place but the one from which they are taken. Thus a widow, who had two places set out to her as dower out of two separate estates, was not allowed to cut wood on one place for use on the other, even though the latter has no woodland. But if she obtained both parcels of land from the same estate, it would not be waste for her to use wood on one, which was cut on the other.⁴⁸ In England the rule in regard to the right of estovers is much stricter than it is in this country, on account of the difference in the economic necessities of the two countries. In this country woodland is very abundant, and what would be waste in England, would not necessarily be so here. The rule as applied in this country is that the life tenant may cut as much timber as he may need for use upon the premises, provided it does not materially injure the value of the reversion. Nothing but actual injury would be considered waste and there can be no general rules laid down in detail

⁴⁶ 1 Washburn on Real Prop. 128, 129; Co. Lit. 416; 2 Bla. 35; Morris v. Knight (1900), 14 Pa. Sup. Ct. 324; Flener v. Flener (Ky. 1902), 69 S. W. Rep. 954.

⁴⁷ 1 Washburn on Real Prop. 129; 2 Bla. Com. 122; Webster v. Webster, 33 N. H. 21; Smith v. Jewett, 40 N. H. 532; Hubbard v. Shaw, 12 Allen 122; White v. Cutler, 17 Pick. 248; Padelford v. Padelford, 7 Pick. 152; Sarles v. Sarles, 3 Sandf. Ch. 601; Gardiner v. Dering, 1 Paige Ch. 573; Doe v. Wilson, 11 East, 56; Chapman v. Epperson Co., 101 Ill. App. 161. A purchaser of timber wrongfully cut would be liable to the remainderman for its value, if he had notice of the facts, Berger v. Meehan Co. (Ky. 1902), 67 S. W. Rep. 1002.

⁴⁸ Cook v. Cook, 11 Gray 123; Padelford v. Padelford, 7 Pick. 152; Phillips v. Allen, 7 Allen, 117; Dalton v. Dalton, 7 Ired. Eq. 197; Owen v. Hyde, 6 Yerg. 334; Webster v. Webster, 33 N. H. 26.

which would be applicable to each case which may arise. The determination of the question depends upon the circumstances of each case.⁴⁹

§ 58. Emblements — What they are.— Emblements are the profits which the tenant of an estate is entitled to receive out of the crops which he has planted, and which have not been harvested, when his estate terminates. Under the term emblements are only included, as a rule, such products of the soil as are of annual growth and cultivation. Such would be the different cereals and vegetables, wheat, corn, beans, hay, flax, potatoes, melons, etc. Hops are also included, although they are not planted annually.⁵⁰ But they do not include the grasses, which are only planted perennially, nor the fruit of trees, because in these cases, the tenant cannot expect to reap such benefit in one year, and he is aware of the fact when he plants them.⁵¹ This does not, of course, refer to the right which nurserymen have to trees and shrubs, which they plant for the purpose of sale. As has been shown, in such cases the plants are fixtures, which he is entitled to remove, tree and plant, as well as the fruit thereof.⁵² And to entitle one to the crops, they must be planted by him. If the crop has been planted by another, the tenant will not be entitled to them, however much care he may have bestowed upon them.⁵³ As an incident to the right of emble-

⁴⁹ *Padelford v. Padelford*, 7 Pick. 152; *Pyncheon v. Stearns*, 11 Metc. 304; *Webster v. Webster*, 32 N. H. 26; *Jackson v. Brownson*, 7 Johns. 227; *Crockett*, 2 Ohio St. 180; *Board Sup. Warren Co. v. Gans*, 80 Miss. 76; 31 So. Rep. 539.

⁵⁰ Co. Lit. 55 a. b. note 364; 2 Bla. Com. 122; *Stewart v. Doughty*, 9 Johns. 108; 1 Washburn on Real Prop. 132, 133. See also *Gardiner v. Tate*, 110 Ga. 456, 35 S. E. Rep. 697.

⁵¹ 1 Washburn on Real Prop. 133; *Reiff v. Reiff*, 64 Pa. St. 134; 2 Bla. Com. 123; *Evans v. Inglehart*, 6 Gill & J. 1888, Co. Lit. 55 b., 4 Kent's Com. 73.

⁵² *Taylor's L. & T.* 81; 1 Washburn on Real Prop. 11, 133; *Penton v. Robart*, 2 East 88; *Miller v. Baker*, 1 Metc. 27; *Whitmarsh v. Walker*, *ib.* 313; *Wyndham v. Way*, 4 Taunt. 316.

⁵³ *Grantham v. Hawley*, Hob. 132; *Stewart v. Doughty*, 9 Johns. 108;

ments, the tenant or his representatives have a right of entry upon the land, after the termination of the tenancy, for the purpose of attending to the crop while growing, and for harvesting it when ripe. The right of ingress and egress, however, is limited to what is necessary for these purposes.⁵⁴ But it has been asserted and claimed by some authorities, that the tenant would be liable for rent for such occupation of the land.⁵⁵ It does not, however, seem to be the general custom to pay it or demand it.⁵⁶ In some of the States it is provided by statute that the tenant must pay rent for the time during which he holds over.⁵⁷ The common law as to what constitutes emblements, and the extent of the right, has been very accurately and definitely settled. But it will be found that local usages and customs will cause the local law to vary somewhat from the common law. Still the more important principles are found to be uniformly applied throughout the country.⁵⁸

§ 59. Same—Who may claim them.—In order that a tenant may claim emblements, he must show that his estate was one of uncertain duration. This would, of course, include the representatives of all tenants for life, whether they are conventional or legal life estates, and because they constitute the larger class of those who are entitled to them, the subject has been discussed in this connection.⁵⁹ Ten-

Gee v. Young, 1 Hayw. 17; *Thompson v. Thompson*, 7 Muf. 514; *Price v. Pickett*, 21 Ala. 741.

⁵⁴ 1 Washburn on Real Prop. 136, 137; *Forsythe v. Price*, 8 Watts 282; *Humphries v. Humphries*, 3 Ired. 362.

⁵⁵ 1 Washburn on Real Prop. 137.

⁵⁶ *McClellan v. Krall*, 43 Kan. 216.

⁵⁷ *King v. Foscue*, 91 N. C. 116.

⁵⁸ 1 Washburn on Real Prop. 137. In several of the States, the tenant for years under special circumstances is by local custom allowed emblements, although generally, as will be explained in Sec. 59, tenants for years have no right to emblements. See *Van Doren v. Everitt*, 5 N. J. L. 460; *Howell v. Schenck*, 24 N. J. L. 89; *Templeman v. Biddle*, 1 Harr. 522; *Dorsey v. Eagle*, 7 Gill & J. 331; *Foster v. Robinson*, 6 Ohio St. 95.

⁵⁹ *Taylor's L. & T.* 81; *Chesley v. Welch*, 37 Me. 106; *Kittredge v.*

ants at will also have the right,⁶⁰ but not tenants for years or at sufferance.⁶¹ And as an outcome of the law of emblements the executors of the tenants in fee are entitled to the crops if they are ripe for harvest, in preference to the heirs.⁶² But if the estate is terminated through the fault of the tenant, as when he abandons the premises, or voluntarily destroys his estate, by failure to perform a condition, or where the party is in wrongful possession, without color of title, he is not entitled to emblements.⁶³ Thus, a widow has no claim to emblements, where she terminates her tenancy during widowhood by marriage;⁶⁴ nor has a mortgagor, where the mortgage is foreclosed by the mortgagee, since he could have avoided its destruction by payment of the mortgage.⁶⁵ But if the purchaser under a foreclosure sale, permits the mortgagor, or one claiming under him, to retain possession

Woods, 3 N. H. 503; Whitmarsh v. Cutting, 10 Johns. 360; Graves v. Weld, 5 B. & Ad. 105; Debow v. Colfax, 10 N. J. L. 128; Harris v. Carson, 7 Leigh 632; Spencer v. Lewis, 1 Houst. 223; Haslett v. Glesin, 7 Har. & J. 17; King v. Whittle, 73 Ga. 482.

⁶⁰ Davis v. Thompson, 13 Me. 209; Sheeburn v. Jones, 20 Me. 70; Chandler v. Thurston, 10 Pick. 205; Stewart v. Doughty, 9 Johns. 108; Harris v. Frink, 49 N. Y. 24.

⁶¹ Doe v. Turner, 7 M. & W. 226; Wheeler v. Kirkendall, 67 Iowa 612.

⁶² Penhallow v. Dwight, 7 Mass. 34; Kingsley v. Holbrook, 45 N. H. 319; Howe v. Batchelder, 49 N. H. 208; Pattison's Appeal, 61 Pa. St. 29. But they will pass with the land under a devise. Bradner v. Faulkner, 34 N. Y. 349. In Mississippi a contrary rule is maintained, and the crops pass to the heir upon the death of the tenant in fee. McCormick v. McCormick, 40 Miss. 763. See also on the general subject, 2 Redf. on Wills, 143. As to the right of a vendee of the tenant to emblements, see Sievers v. Brown, 34 Oregon 454, 56 Pac. Rep. 171, 45 L. R. A. 642.

⁶³ 2 Bla. Com. 123; Chesley v. Welch, 37 Me. 106; Chandler v. Thurston, 10 Pick. 210; Whitmarsh v. Cutting, 10 Johns. 360; Rowell v. Klein, 44 Ind. 290; Richard v. Liford, 11 Rep. 51; McLean v. Bovee, 24 Wis. 295.

⁶⁴ Debow v. Colfax, 10 N. J. L. 128; Hawkins v. Skegg, 10 Humph. 31.

⁶⁵ Doe v. Mace, 7 Black 2; McCall v. Lenox, 9 Serg. & R. 302; Jones v. Thomas, 8 Blackf. 428. But see, World Bldg. Co. v. Martin, 151 Ind. 630, 52 N. E. Rep. 198; Varnun v. Winslow, 106 Iowa 287, 76 N. W. Rep. 708.

for any length of time, and plant crops, as a tenant at will he would have a right to the emblements.⁶⁶ The right to emblements is not only enjoyed by the parties above enumerated, but also by their assignees and sublessees, unless the tenant is restricted from alienating the land.⁶⁷ And very often sublessees and assignees would be entitled to emblements, when the original parties would not. Thus, if a widow, having an estate during widowhood, leases the premises, and then marries, her tenant would be entitled to emblements, while she would not have been if she had been in possession.⁶⁸

§ 60. Definition and history of waste.— Every tenant of a particular estate is prohibited from doing anything with the land which would constitute waste in the legal acceptance of the term. The subject applies, therefore, to all tenants, whether for life or for years, or at sufferance. In early times this disability was attached by law only to estates of dower and curtesy, it being supposed that, since they were created by the act of the law, the law should in all cases provide for the due protection of the inheritance. But in the case of conventional estates less than a fee, if the grantor did not expressly provide such a protection, it was his own fault, and he was left without a remedy. Subsequently, by the statute of Marlbridge, the disability of committing waste

⁶⁶ *Allen v. Carpenter*, 15 Mich. 38. And the same rule applies to a mortgagor's tenant, who holds subject to the mortgage. *Mayo v. Fletcher*, 14 Pick. 525; *Lynde v. Rowe*, 12 Allen 101; *Lane v. King*, 8 Wend. 584. But where the crops are already harvested, when the mortgage is foreclosed, the tenant is entitled to them; they do not pass to the purchaser under the mortgage. *Johnson v. Camp*, 51 Ill. 220.

⁶⁷ *King v. Whittle*, 73 Ga. 482; *King v. Foscue*, 91 N. C. 116.

⁶⁸ *Bla. Com.* 124; *Bulwer*, 2 B. & Ald. 470; *Davis v. Eyton*, 7 Bing. 154; *Bevans v. Briscoe*, 4 Har. & J. 139; *contra*, *Oland's Case*, 5 Rep. 116; *Debow v. Colfax*, 10 N. J. L. 128; *Bittinger v. Baker*, 29 Pa. St. 70. See also *contra*, note 1, *supra*, in reference to mortgagors' tenant. As to right of assignee for creditors, to emblements, see *Huber's Estate*, 10 Lanc. L. Rev. 45.

was made an ordinary and general incident to all kinds of estates for life and for years. And the statute of Gloucester imposed upon the guilty party the penalty of treble damages, together with the forfeiture of his estate.⁶⁹ Waste is an unlawful act or omission of duty, which results in permanent injury to the inheritance. It may consist in either diminishing its value, in increasing its burdens, or destroying and changing the evidences of title to the inheritance.⁷⁰ Waste may therefore be voluntary, as by an act of commission, and involuntarily, by an act of omission.⁷¹

§ 61. What acts constitute waste — General rule.— Whether a particular act constitutes waste is a question of fact for the jury to determine. If it does damage to the reversioner, and is not one of the ordinary uses to which the land is put, it is a waste. And the same act might be waste in one part of the country, while in another it is a legitimate use of the land. The usages and customs of each community enter very largely into the settlement of this question.⁷²

⁶⁹ 1 Washburn on Real Prop. 139, 140. At common law only tenants by act of the law could commit waste. *Palmer v. Young*, 108 Ill. App. 252. Statutes providing for double damages now exist in many of the United States. *Isom v. Oil Co.*, 140 Cal. 678, 74 Pac. Rep. 294.

⁷⁰ Bla. Com. 281; *Huntley v. Russell*, 13 Q. B. 588; *Doe v. Burlington*, 5 B. & Ad. 517; *Jones v. Chappell*, L. R. 20 Eq. 539; *McGregor v. Brown*, 10 N. Y. 117; *Preffit v. Henderson*, 29 Mo. 327. And in some cases the law raises a conclusive presumption that the act complained of is an injury to the inheritance, and therefore constitutes waste. *McGregor v. Brown*, *supra*; *Agate v. Lowenbein*, 57 N. B. 604. See *post*, Sec. 62.

⁷¹ Bla. Com. 281; 1 Washburn on Real Prop. 140. Thus, to alter a building, so as to change the manner of using it, is voluntary waste. To let it fall into decay, is permissive or involuntary waste. Converting windows into doors is waste, in New Jersey. *Peer v. Wadsworth* (1904), 58 Atl. Rep. 379. Anything is waste which changes the character of the inheritance. *Palmer v. Young*, 108 Ill. App. 252. The owner of a *contingent* remainder cannot sue for waste. *Taylor v. Adams*, 93 Mo. App. 277; *Palmer v. Young*, 108 Ill. App. 252.

⁷² See *Drown v. Smith*, 52 Me. 143; *Jackson v. Tibbits*, 3 Wend. 341; *Pyncheon v. Stearns*, 11 Metc. 304; *Lynson's Appeals*, 31 Pa. St. 46;

§ 62. **Waste** — In respect to trees. — The tenant has no right to cut down any trees, or to injure them in any way, beyond the amount he is entitled to as estovers. And at common law certain trees, which were used for timber, could not be cut for any purpose.⁷³ But in this country the question would depend upon whether the cutting of a particular tree would be consonant with good husbandry, in its relation to the inheritance and the surrounding circumstances.⁷⁴ In the case

Webster v. Webster, 33 N. H. 25; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Jackson v. Brownson*, 7 Johns. 227; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Adams v. Brereton*, 3 Har. & J. 124; *Davis v. Gilliam*, 5 Ired. Eq. 311.

⁷³ 2 Bla. Com. 281; 1 Washburn on Real Prop. 141; *Honywood v. Honeywood*, L. R. 18 Eq. 306. Mr. Washburn mentions oak, ash and elm, as being timber trees in all parts of England, while others constitute timber in some sections, and not in other sections, according to local usages and customs, p. 65 *supra*. Timber trees are those which are used for building and repairing houses. *Chandos v. Talbot*, 2 P. Wms. 606; *Alexander v. Fisher*, 7 Ala. 514. The only purpose for which the tenant may cut timber is for the repair of the buildings on the land, which he is under obligation to keep in repair. 22 Vin. Abr. 453; *Doe v. Wilson*, 11 East 56. And he cannot cut timber unsuitable for repair, to sell and with the proceeds to procure other timber which is suitable. *Chapman v. Epperson Co.* (1902), 101 Ill. App. 161; *Berger v. Meehan Co.* (Ky. 1902), 67 S. W. Rep. 1002. See *ante*, Sec. 57.

⁷⁴ *Keeler v. Eastman*, 11 Vt. 293; *Chas. v. Hazelton*, 7 N. H. 171; *Hickman v. Irvine*, 3 Dana 121; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Givens v. McCalmont*, 4 Watts, 460; *Shine v. Wilcox*, 1 Dev. & B. Eq. 631; *Smith v. Poyas*, 2 DeS. 65; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Duncome v. Felt*, 45 N. W. Rep. 1004; *Davis v. Clark*, 40 Mo. App. 515. But it is an almost universal rule, that shade and ornamental trees cannot be cut down by the tenant. *Honeywood v. Honeywood*, L. R. 18 Eq. 306; *Hawley v. Wolverton*, 5 Paige, 522; *Dunn v. Bryan*, 7 Ired. Eq. 143; *Marker v. Marker*, 9 Hare 1. So also is it waste to cut young trees. *Dunn v. Bryan*, *supra*. In conformity with the rule enunciated in the text, it has been held in Massachusetts that the cutting of oak for firewood is not waste according to the common usage and custom in that State. *Padelford v. Padelford*, 7 Pick. 162. A remainderman is held, in *Roby v. Newton* (Ga.), 68 L. R. A. 601, to be entitled to the forfeiture of the life tenant's interest because of waste only when it appears that there has been both permissive and voluntary waste by the tenant, or one for whom he was responsible, and that the voluntary waste was committed wantonly.

of wild and uncultivated lands, the tenant would have the right to clear the land of the trees, whatever they may be, if such clearing was necessary for the purpose of cultivating it.⁷⁵ And the timber cut by the tenant in clearing belongs to him, which he may sell for his own profit.⁷⁶ But in no case is the tenant allowed to cut timber for sale, unless this is the customary mode of using the land.⁷⁷

⁷⁵ *Drown v. Smith*, 52 Me. 141; *Keeler v. Eastman*, 11 Vt. 293; *Jackson v. Brownson*, 7 Johns. 227; *Harder v. Harder*, 20 Barb. 414; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Hastings v. Crunkleton*, 3 Yeates 261; *Davis v. Gilliam*, 5 Ired. Eq. 311; *Woodward v. Gates*, 38 Ga. 205; *Adams v. Brereton*, 3 Har. & J. 114; *Crockett v. Crockett*, 2 Ohio St. 180; *Proffitt v. Henderson*, 29 Mo. 327. And the same rule is now applied to a dowress, although formerly under the old rule, that the tenant of a particular estate could under no circumstances change woodland into arable land, the widow was held not to have dower in wild lands. 4 Kent's Com. 76; *Ballantine v. Poyner*, 2 Hayw. 110; *Perkins v. Coxe*, *Id.* 339; *Hastings v. Crunkleton*, 3 Yeates, 261; *Owen v. Hyde*, 6 Yerg. 334; *Findlay v. Smith*, 6 Munf. 134; *Alexander v. Fisher*, 7 Ala. 514. See *contra*, *Connor v. Shepherd*, 15 Mass. 164. But it must be with the *bona fide* intention to clear the land. If under this pretense, the tenant is really cutting for the purpose of profiting by the sale of the wood, it will be waste, notwithstanding the land is made more valuable by being cleared. See *Kidd v. Dennison*, 6 Barb. 8; *Davis v. Gilliam*, *supra*.

⁷⁶ *Davis v. Gilliam*, 5 Ired. Eq. 311; *Crockett v. Crockett*, 2 Ohio St. 180.

⁷⁷ *Chase v. Hazleton*, 7 N. H. 171; *Clemence v. Steere*, 1 R. I. 272; *Parkins v. Coxe*, 2 Hayw. 339; *Kidd v. Dennison*, 6 Barb. 9; *Davis v. Clark*, 40 Mo. App. 515. But if the land is customarily used in cultivating trees for sale, the tenant may follow the custom, and continue to cut and sell the wood. *Bagot v. Bagot*, 32 Beav. 509; *Clemence v. Steere*, *supra*; *Ballentine v. Poyner*, 2 Hayw. 110. So also if the land is let with a furnace or turpentine still, wood may be cut for use in the furnace, or the pine may be tapped for resin to be used in the still, if that had been the custom with former owners. *Den v. Kenny*, 5 N. J. L. 652; *Findlay v. Smith*, 6 Munf. 134; *Carr v. Carr*, 4 Dev. & B. 179; The unauthorized cutting of timber by tenants has been held to be waste, in the following recent cases: *Butts v. Fox* (Mo. 1904), 81 S. W. Rep. 493; *Dix v. Jaquay*, 88 N. Y. S. 228; 94 App. Div. 554; *Chapman v. Epperson Co.*, 101 Ill. App. 161; *Bergan v. Meehan Co.* (Ky. 1902), 67 S. W. Rep. 1002; *Morris v. Knight*, 14 Pa. Sup. Ct. 324;

§ 63. **Property in timber unlawfully cut.**— If timber is unlawfully cut from the premises, the reversioner in fee continues to have the property in it, and he may recover damages or the possession of the timber and for that purpose he may maintain any of the personal actions of trover, replevin or *trespass de bonis*.⁷⁸ And the same principle is applied to any article of a personal nature, which has been unlawfully severed from the freehold.⁷⁹

§ 64. **Continued — In respect to minerals and other deposits.**— The tenant is not permitted to dig and sell gravel, clay and other deposits, which may be found thereon, or to use the clay for the purpose of making bricks.⁸⁰ If, however, it had been the custom with previous owners to make such use of the land, the tenant may continue to use what pits and mines are already opened, but he cannot open new ones.⁸¹ In the case of minerals he may follow the same *White v. Fox*, 125 N. C. 544; 34 S. E. Rep. 645; *Chase v. Driver*, 92 Fed. Rep. 780, 34 C. C. A. 668.

⁷⁸ *Lewis Bowle's Case*, 11 Rep. 82; *Seagram v. Knight*, L. R. 2 Ch. App. 631; *Richardson v. York*, 14 Me. 216; *Jones v. Hoar*, 5 Pick. 285; *Lane v. Thompson*, 43 N. H. 324; *Mooers v. Wait*, 3 Wend. 104; *Berrimann v. Peacock*, 9 Bing. 386; *Channon v. Patch*, 5 B. & C. 897; *Frothingham v. McKusick*, 24 Me. 403; *Langdon v. Paul*, 22 Vt. 205.

⁷⁹ 1 Washburn Real Prop. 155. See also, *Smith v. Smith*, 105 Ga. 106, 31 S. E. Rep. 135; *Davis v. Gilliam*, 40 N. C. 308; *Davis v. Clark*, 40 Mo. App. 515; *Webster v. Peet*, 97 Mich. 327; *Modlin v. Kennedy*, 53 Ind. 267; *Brashear v. Macey*, 3 J. J. Marsh 93; *Weatherby v. Woodd*, 29 How. Pr. 404.

⁸⁰ Co. Lit. 53 b; *Huntley v. Russell*, 13 Q. B. 572; *Livingston v. Reynolds*, 2 Hill 157. So also to open new mines, or to make excavations in search for mines, would be waste, unless the right is expressly granted. 2 Bla. Com. 282; *Saunders's Case*, 5 Rep. 12; *Darcy v. Askwith*, Hob. 234; *Stoughton v. Leigh*, 1 Taunt. 410; *Viner v. Vaughan*, 2 Beav. 466; *Irwin v. Covode*, 24 Pa. St. 162; *Owings v. Emery*, 6 Gill 260. See *White, Mines & Min. Rem.*, Sec. 22.

⁸¹ *Huntley v. Russell*, 13 Q. B. 591; *Moyle v. Moyle*, Owen 66; *Knight v. Moseley*, Amb. 176; *Stoughton v. Leigh*, 1 Taunt. 410; *Kier v. Peterson*, 41 Pa. St. 361; *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cow. 460; *Lenfers v. Henke*, 73 Ill. 405; 24 Am. Rep. 263; *Hendrix v. McBeth*, 61 Ind. 473; 28 Am. Rep. 680.

vein and for the purpose may make new shafts, railroads, and other improvements.⁸²

§ 65. Continued — Management and culture of land.— At common law it was not permitted of the tenant of a particular estate to change the character of the land, as wood, pasture or arable land, and put it to a different use. Any such change in the management or culture of the land constituted waste, for which the tenant would be answerable to the reversioner.⁸³ The rule, however, in this country is, that no such change will be waste unless it results in a permanent injury to the inheritance. In each case it is a question of fact, whether a particular act is waste, and it is very largely governed by the usages and customs of the place in which the question arises.⁸⁴ The tenant, however, is obliged

⁸² *Clavering v. Clavering*, 2 P. Wms. 388; *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cow. 460; *Irwin v. Covode*, 24 Pa. St. 162; *Lynn's Appeal*, 31 Pa. St. 45; *Kier v. Peterson*, 41 Pa. St. 361; *Crouch v. Puryear*, 1 Rand. 258; *Findlay v. Smith*, 6 Munf. 134. *Sayers v. Hoskinson*, 110 Pa. St. 473. A tenant for life cannot operate oil or gas wells that were not open when he came into possession. *Marshall v. Mellon*, 170 Pa. St. 371; *Williamson v. Jones*, 39 W. Va. 256. But open oil or gas wells can be worked by life tenant the same as a tenant without impeachment for waste. *In re Chaytors Set.*, 69 L. J. Ch. 837, 2 Ch. 804; *White, Mines & Min. Rem.*, Sec. 22, p. 36. The right to work mines may either be justified by the terms of the settlement or the fact that they were opened when the life estate attached. *In re Chaytors settlement* (Eng. 1900), 69 Law. J. Ch. 837; 2 Ch. 804. But see *Maher's Admr. v. Maher*, 73 Vt. 243, 50 Atl. Rep. 1063. A devisee of a life estate, in Indiana, is entitled to the royalties from oil wells opened by the testator's lessee, though after the life estate accrued. *Andrews v. Andrews* (1903), 67 N. E. Rep. 461. See, as to right to royalty, in Texas, *Lone Acre Oil Co. v. Swayne* (Tex. 1903), 78 S. W. Rep. 380. After the death of the life tenant, his tenant would be a trespasser, if he continued to work the mines. *Crawford v. Forest Oil Co.*, 208 Pa. 5, 57 Atl. Rep. 47; *Eckin v. Hawkins*, 52 W. Va. 124.

⁸³ 2 Bla. Com. 282; Co. Lit. 53; *Darcy v. Askwith*, Hob. 234a, 1 Washburn on Real Prop. 145.

⁸⁴ *Keeler v. Eastman*, 11 Vt. 293; *Clemence v. Steere*, 1 R. I. 272; *Webster v. Webster*, 33 N. H. 25; *Jones v. Whitehead*, 1 Pars. 304;

to use the land in the manner required by the rules of good husbandry, and it will be waste if he permits the arable or meadow land to be overgrown with brushwood, or if he exhausts the lands by unwise tillage.⁸⁵

§ 66. Continued — In respect to buildings.— In like manner at common law, the strict rule was applied, that any change in the character of the building, even though it resulted in a benefit to the inheritance, would be considered waste. Thus the removal of wainscots, the opening of new doors and windows, as well as the more important change of the building from a dwelling house to a store, or a change in the location of the building, was held to be waste.⁸⁶ A more liberal rule is now applied, and actual damage must be shown, in order that the action might lie.⁸⁷ And although even now a ma-

Sarles v. Sarles, 3 Sandf. 601; *Owen v. Hyde*, 6 Yerg. 334; *Proffitt v. Henderson*, 29 Mo. 327; *Sayres v. Hoskinson*, 110 Pa. St. 473.

⁸⁵ *Ciemens v. Steere*, 1 R. I. 272; *Clark v. Holden*, 7 Gray 8; *Sarles v. Sarles*, 3 Sandf. Ch. 601. Likewise the removal of grasses, manure made upon the land, and the digging of turf, which by the rules of good husbandry should be left upon the land to enrich it, would be waste. *Sarles v. Sarles*, *supra*; *Daniels v. Pond*, 21 Pick. 371; *Moulton v. Robinson*, 27 N. H. 550; *Plumer v. Plumer*, 30 N. H. 558; *Middlebrook v. Corwin*, 15 Wend. 169; *Lewis v. Jones*, 17 Pa. St. 262; *Harris v. Mins*, 20 W. R. 999. Where, in an action for waste, committed by the assignee of the life tenant, it was shown not only that the orchards and sugar bush had been cut, but that the farm had been permitted to grow up with weeds and that, while capable of supporting 20 cows and producing 1,500 bushels of grain, before the waste, it was thereafter practically worthless, the measure of damages was held to be the difference in value of the farm, per acre, before and after the waste. *Cole v. Bickelhaupt* (N. Y. 1901), 71 N. Y. S. 636; 64 App. Div. 6.

⁸⁶ Co. Lit. 53a, note 344; *City of London v. Greyme*, Cro. Jac. 181; 1 Washburn on Real Prop. 146; *Huntley v. Russell*, 13 Q. B. 588; *Greene v. Cole*, 2 Saund. 252; *Jackson v. Cator*, 5 Ves. 688; *Douglass v. Wiggins*, 1 Johns. Ch. 435; *Agate v. Lowenbein*, 57 N. Y. 504; *Mannsell v. Hart*, 11 Ired. Eq. 478; *Thatcher v. Phinney*, 7 Allen's Tel. Cas. 156; *Austin v. Stevens*, 24 Me. 520; *Wall v. Hinds*, 4 Gray 256. But he may tear down a ruinous building, which is dangerous to his cattle or to life and limb. *Clemence v. Steere*, 1 R. I. 272.

⁸⁷ *Young v. Spencer*, 10 B. & C. 145; *Doe v. Curlington*, 5 B. & Ad.

terial and permanent change in the character of the building, and the uses to which it might be put, will not be permitted, yet any slight or immaterial change, as the cutting of a door or the opening of two rooms into one, will be permissible, whenever it is possible for the premises to be restored to their original condition at the end of his term, and in no case is it likely that the erection of new buildings will be considered waste.⁸⁸ The tenant is also under obligation to keep the buildings in repair,* and is responsible in damages, if he permits them to fall into decay. Tenants for life or for years, are required to make all the repairs necessary to keep the premises in as good condition as they were when they entered into possession; and for that purpose they may use the timber to be found on the land.⁸⁹ But the tenant is obliged to repair, even though there be no

507; *Webster v. Webster*, 33 N. H. 25; *McGregor v. Brown*, 10 N. Y. 118; *Jackson v. Tibbits*, 3 Wend. 341; *Phillips v. Smith*, 14 Mees. & W. 595; *Jackson v. Andrew*, 18 Johns. 431. Making doors out of windows, is waste. *Peers v. Wordsworth* (1904), 58 Atl. Rep. 379.

⁸⁸ *Jones v. Chappelle*, L. R. 20 Eq. 539; *Winship v. Pitts*, 3 Paige 259; *Jackson v. Tibbits*, 3 Wend. 341; *Sarles v. Sales*, 3 Sandf. Ch. 601; *Beers v. St. John*, 16 Conn. 329. But see *Dooley v. Stringham*, 4 Utah 107, where the tearing down of an old building and erection of a new one was considered an act of waste. See cases cited in notes 86 and 87, *supra*. And if the structure is an agricultural fixture, which the tenant may remove according to the law of fixtures, it is certainly no act of waste for him to put it there; and he may remove it at the expiration of the estate, if he can do so without materially injuring the inheritance. *Van Ness v. Pacard*, 2 Pet. 137; *Austin v. Stevens*, 24 Me. 520; *Clemence v. Steere*, 1 R. I. 272; *Dozier v. Gregory*, 1 Jones L. 100. But see *Madigan v. McCarthy*, 108 Mass. 376; *Benney v. Foss*, 62 Me. 251; *Conklin v. Foster*, 57 Ill. 104. For change of building, see *Smith v. Chopple*, 25 Pa. Sup. Ct. 81; held, not to be waste, to move building, in *Mels v. Babst Brew. Co.*, 104 Wis. 7, 79 N. W. Rep. 738, 46 L. R. A. 478.

⁸⁹ 1 Washburn on Real Prop. 149; *Long v. Fitzsimmons*, 1 Watts & S. 530; *Darcy v. Askwith*, Hob. 235; *Miles v. Miles*, 32 N. H. 147; *Harder v. Harder*, 26 Barb. 409; *Sticklebone v. Hatchman*, Owen 43; *Walls v. Hinds*, 4 Gray 266; *Griffith's Case*, Moore 69; Co. Lit. 53 a; *Wilson v. Edmunds*, 24 N. H. 517; *Kearney v. Kearney*, 17 N. J. Eq. 504; *Harvey v. Harvey*, 41 Vt. 373.

timber on the land.⁹⁰ He will not, however, be forced to expend any very large sums of money, where there has been any extraordinary decay or destruction of the buildings. And if the buildings were in a state of decay at the time when his term begun, he will not be called upon to repair.⁹¹ The tenant is not responsible for damage done by the act of God, the public enemies, or by the law. But he is obliged to protect the premises from waste by strangers, and for the acts of such persons he is responsible to the reversioner.⁹² If the buildings are destroyed by fire through the carelessness of the tenant or his servants, he is responsible in damages, but he is not liable if it is the result of an accident, and he is free from fault.⁹³

§ 67. Exemption from liability.—Although the liability for waste is an ordinary incident of all kinds of particular estates, the lessor or reversioner may by grant exempt the tenant from such liability. He is then said to have an estate for life or for years "without impeachment of waste." Such a tenant may do any of those things enumerated above,

⁹⁰ Co. Lit. 53 a; 1 Washburn on Real Prop. 149.

⁹¹ Co. Lit. 53, 54 b; Wilson v. Edmonds, 24 N. H. 517; Clemence v. Steere, 1 R. I. 272.

⁹² Co. Lit. 53 a, 54 a; Huntley v. Russell, 13 Q. B. 591; Attersoll v. Stevens, 1 Taunt. 198; Fay v. Brewer, 3 Pick. 203; Pollard v. Shaffer, 1 Dall. 210; Wood v. Griffin, 46 N. Y. 237; Cook v. Champlain Trans. Co., 1 Denio 91; Austin v. Hudson R. R., 25 N. Y. 341; White v. Wagner, 4 Har. & J. 373; Beers v. Beers, 21 Mich. 464.

⁹³ By statute (6 Anne, Ch. 31) the English common law of liability for loss by fire was limited to cases where the fire occurred through the negligence of the tenant or his servant; and although there has been no general express re-enactment of it, the statutory qualification seems to have been generally adopted, in conformity with the statement in the text. See Filliter v. Phippard, 11 Q. B. 347; Barnard v. Poor, 21 Pick. 378; Clark v. Foot, 8 Johns. 421; Lansing v. Stone, 37 Barb. 15; Althorf v. Wolfe, 22 N. Y. 366; Maull v. Wilson, 2 Harr. 433; 4 Kent's Com. 82; 1 Washburn on Real Prop. 150, 151; Spaulding v. Chicago and C. R. R., 30 Wis. 110.

which is usually denied to a tenant of a particular estate.⁹⁴ But he cannot commit willful and malicious waste, and will be restrained from doing so if he attempts it; or, if he has already done so, he will be made to respond in damages.⁹⁵

§ 68. Remedies for waste.—If the waste is already committed, the tenant is liable to an action at law for damages. At common law, under the statute of Marlbridge and Gloucester, the judgment was given for treble the actual damage, and the land wasted was forfeited to the reversioner.⁹⁶ The forms of the common-law actions, as well as the nature of the judgment, are now regulated in the different States by statute, and for detail the reader is referred to these statutes.⁹⁷ If the waste is only threatened, or there is danger of its repetition in the future, the equitable remedy by injunction is more salutary. The tenant is enjoined from the commission of the waste, upon pain of punishment for contempt of court.⁹⁸ An injunction will be granted in every

⁹⁴ 2 Bl. 283; 1 Cruise Dig. 128; Lewis Bowle's Case, 11 Rep. 83; Pyne v. Dor., 1 T. R. 56; Cholmeley v. Paxton, 2 Bing. 207.

⁹⁵ 1 Washburn on Real Prop. 155; Vane v. Barnard, 2 Vern. 738; Marker v. Marker, 4 Eng. Law & Eq. 95. A devise of the use and full control of real estate, where the context of the will shows that the testator intended the devisee to have absolute control, free from interference by the remainderman, gives an estate without impeachment of waste. Wiley v. Wiley (Neb. 1901), 95 N. W. Rep. 702.

⁹⁶ Bla. Com. 283; 1 Washburn on Real Prop. 152.

⁹⁷ 1 Washburn on Real Prop. 153, 157, note; 4 Kent's Com. 79. The treble damages may still be obtained in some of the States. Sackett v. Sackett, 8 Pick. 306; Harder v. Harder, 26 Barb. 409; Chipman v. Emeric, 3 Cal. 283. While single damages only can be obtained in others. Smith v. Follansbee, 13 Me. 273; Harker v. Chambliss, 12 Ga. 235; Woodward v. Gates, 38 Ga. 205. In most of the States the amount of damages is regulated by statute.

⁹⁸ Bla. Com. 283; Jones v. Hill, 1 Moore, 100; Tracy v. Tracy, 1 Vern. 23; Kane v. Vanderburgh, 1 Johns. Ch. 11; Harris v. Thomas, 1 Hen. & M. 18; Mayo v. Feaster, 2 McCord Ch. 137; Mollineaux v. Powell, 3 P. Wms. 268; Basore v. Henkle, 82 Va. 474. An injunction would not be granted, unless timely and the waste willful. Gormon v. Peterson (1901), 193 Ill. 375, 62 N. E. Rep. 210, 55 L. R. A. 701. Or when the

case of waste, where irreparable injury is feared. The injury need not perhaps be very material where the question arises between persons in privity of estate; but as between strangers it is necessary to show that the danger is immediate and the probable injury material before the court will interpose.⁹⁹ And if injury has already been done, the court will not only grant an injunction against future waste, but it is competent for the court to inquire into the amount of damage suffered, and give judgment for the same.¹ At common law the technical action for waste and treble damages could only be maintained by the tenant of an estate of inheritance immediately succeeding the particular estate. And the interposition of a freehold estate in remainder would take away his action.² But the common-law action upon the case in the nature of waste could be maintained by anyone who had a reversionary interest in the land, and had been injured thereby.³

right of the tenant is in doubt. *Butts v. Fox* (Mo. 1904), 81 S. W. Rep. 493. But it has been held that statutory remedies, when they afford ample protection, supersede the equitable remedy. *Cutting v. Carter*, 4 Hen. & M. 424; *Poindexter v. Henderson*, Walk. (Mich.) 176.

⁹⁹ *Leighton v. Leighton*, 32 Me. 399; *Attaquin v. Fish*, 5 Metc. 140; *Atkins v. Chilson*, 7 Metc. 398; *Rodgers v. Rodgers*, 11 Barb. 595; *Liv- ington v. Reynolds*, 26 Wend. 115; *Storm v. Mann*, 4 Johns. Ch. 21; *London v. Warfield*, 5 J. J. Marsh. 196; *White Water Canal v. Comegys*, 2 Ind. 469; *Field v. Jackson*, 2 Dick. 599.

¹ Story's Eq. Jur., Secs. 517, 518; 1 Washburn on Real Prop. 161; *Watson v. Hunter*, 5 Johns. Ch. 170; *Ware v. Ware*, 6 N. J. Eq. 117.

² Co. Lit. 218 b, note 122; *Williams v. Balton*, 3 P. Wms. 268; *Bacon v. Smith*, 1 Q. B. 345; *Hunt v. Holl*, 37 Me. 363; *Peterson v. Clark*, 15 Johns. 205, 206; *Palmer v. Young*, 108 Ill. App. 252. Nor can a contingent remainderman maintain the action. *Taylor v. Adams*, 93 Mo. App. 277.

³ *Chase v. Hazelton*, 7 N. H. 175; *Williams v. Bolton*, 3 P. Wms. 268. But in the Code States this distinction between trespass and trespass on the case has been abolished. *Brown v. Bridges*, 30 Iowa 145; *Hine v. Railroad Co.*, 59 Hun 625; *Macy v. R. R. Co.*, 59 Hun 365. An allegation that an injury resulted to the use and interest of plaintiff in the premises, is sufficiently broad to base damages for injury to the inheritance thereon. *Dix v. Jaquay*, 88 N. Y. S. (1904), 94 App. Div.

554. It is discretionary with the court, under the California statute, whether treble damages should be allowed or not. *Isom v. Book*, 142 Cal. 666, 76 Pac. Rep. 506; *Isom v. Crude Oil Co.*, 140 Cal. 678, 74 Pac. Rep. 294. The insolvency of the party in possession is not an essential to an injunction restraining waste. *Palmer v. Young*, 108 Ill. App. 252. As to right of administrator to enjoin the commission of waste, see *Halstead v. Coen* (Ind. 1903), 67 N. E. Rep. 957. Possession by the plaintiff is not essential to an injunction. *Peck v. Ayers, &c.*, Tie Co., 116 Fed. Rep. 273; *Peterson v. Ferrell*, 127 N. C. 169, 37 S. E. Rep. 189. In a suit for damages for removal of trees, it must be shown how many trees were cut and the number of stumps appearing is not evidence that defendant cut the trees growing thereon. *Learned v. Ogden*, 80 Miss. 769; 32 So. Rep. 278. And the tenant can show that trees were in a dying condition. *Morris v. Knight*, 14 Pa. Super. Ct. 324. Evidence that an orchard was destroyed through inattention is such permissive waste as to render the tenant liable. *Cole v. Bicklehaupt*, 71 N. Y. S. 636, 64 App. Div. 6. Statutes conferring a right of action for waste, do not, generally, effect the common law right of action on the case, for waste. *Thackery v. Edigan*, 44 Atl. Rep. 689; *Smith v. Smith*, 105 Ga. 106; *Tate v. Field*, 57 N. J. Eq. 53; *White v. Fox*, 125 N. C. 544, 34 S. E. Rep. 645.

CHAPTER VII.

ESTATES ARISING OUT OF THE MARITAL RELATION.

SECTION I. — *Estate of husband during coverture.*

II. — *Curtesy.*

III. — *Dower.*

IV. — *Homestead.*

SECTION I.

ESTATE OF HUSBAND, DURING COVERTURE.

SECTION 69. Effect of marriage upon wife's property.

70. Husband's rights in equity.

71. How husband's rights may be barred.

72. How prevented from attaching.

73. Restrictions upon alienation of wife's separate property.

74. Statutory changes in the United States.

§ 69. **Effect of marriage upon wife's property.**— The legal personality of the wife is lost by marriage in that of the husband. In the eye of the common law they are considered and treated as one person, the husband being the head and representative of the duality. According to the common law, therefore, the wife cannot, during coverture, hold and be possessed of property, either real or personal, independent of her husband. Her rights become merged for the time being in his. If the property is real estate, the husband is entitled to the rents and profits, which accrue during coverture.¹ If the rents, which are due, remain uncollected at

¹ 1 Bla. Com. 442; 1 Washburn on Real Prop. 328, 329; Williams on Real Prop. 223, 224.

What is the percentage
of the combined?
see page 89.

§ 70. **Husband's rights in equity.**—The foregoing statement of the common law rights of the husband, in the real estate of the wife, during coverture, were so far modified, after the creation of the English Court of Chancery, that whenever the husband sought recourse to a court of equity, for the enforcement of his common law rights in regard to his wife's real estate, in the application of the more humane principles which obtained in courts of chancery, the wife's rights were also taken into consideration and she was held entitled to a settlement, known as her "equity to a settlement," and the court compelled the husband to provide for the maintenance and support of the wife and her children, out of her property.* The common law powers of the husband, in regard to his wife's property, being at war with the equitable rights of a married woman, by an enlargement of her equitable right to a settlement out of her separate estate, courts of equity finally came to a recognition of her right to hold and enjoy property that was given her for her exclusive use, free from the claims of her husband.† This equitable recognition of the rights of the married woman, in regard to her separate estate,¹⁰ with the progress of our civilization, has finally resulted in her almost complete emancipation, so far as her property rights are concerned, by the various statutes of the United States, hereafter discussed.¹¹

* 2 Pom. Eq. Jur. 1114; 2 Story Eq. Jur. 1378; 2 Kent's Com. 162; *Kenny v. Udell*, 5 Johns. Ch. 464. "In equity she has a separate existence from her husband, and on account thereof, she may have the possession and ownership of property separate from her husband." *Boot v. Gooch*, 97 Mo. 88, per Black, J. See also, *Welch, Admr., v. Welch*, 63 Mo. 57.

† 1 Tiffany, Real Prop., Sec. 177, p. 413; *Richardson v. DeGiverville*, 107 Mo. 435; *Williamson v. Yeager*, 91 Ky. 282; 2 Kent's Com. 162; 2 Pom. Eq. Jur. 1114.

¹⁰ See *post*, Sec. 72.

¹¹ *Post*, Sec. 74.

§ 71. How husband's rights may be barred.—His rights during coverture are barred if the wife's inheritance is forfeited for any cause; and he is divested of them by a divorce *a vinculo*, and also by a statutory divorce, where it is decreed for his fault.¹²

§ 72. How prevented from attaching.—The husband's marital rights will attach to all kinds of real property, both legal and equitable, where there is no express prohibition or release of the same. But equity very often treats a married woman as if she were single, and will protect her property against the claims of the husband, whenever it is expressly provided by the donor that she should hold and enjoy the land to her "sole" and "separate" use and free from the control of her husband. And if there be no special trustee appointed, equity will compel the husband and his privies to hold the legal estate as trustees for the separate use of the wife.¹³ No particular forms of expression are required, but the intention to exclude the husband's rights must be clearly manifested, and for that purpose it is advisable to append to the *habendum* clause of the deed the words "to her sole and separate use," or others of a similar import.¹⁴

¹² Co. Lit. 351 a; 1 Washburn on Real Prop. 330; Burt v. Hurlburt, 16 Vt. 292; Oldham v. Henderson, 5 Dana 257; Cizek v. Cizek (Neb. 1904), 96 N. W. Rep. 657, 99 ib. 28; Van Deet v. Dewitt, 200 Ill. 153, 65 N. E. Rep. 677; Becklenberg v. Becklenberg, 102 Ill. App. 504; Whitton v. Whitton (Eng. 1901), 71 Law J. 10, 85 Law T. 646; Page v. Page, 86 Law T. 638. The husband's right to his wife's property during coverture also ends with the birth of a child of the marriage, when his estate of courtesy attaches. 2 Kent's Com., 130; Tiffany, Real Prop., Sec. 176, p. 412.

¹³ 1 Washburn on Real Prop. 330; Williams on Real Prop. 224; Major v. Lansley, 2 Russ. & Mylne, 355; Stuart v. Kissam, 3 Barb. 493; Cochrane v. O'Hern, 4 Watts & S. 95; Heath v. Knapp, 4 Barr 228; Shirley v. Shirley, 9 Paige 364; Blanchard v. Blood, 2 Barb. 352; Fears v. Brooks, 12 Ga. 195; Steele v. Steele, 1 Ired. Eq. 452; Knight v. Bell, 22 Ala. 198; Griffith v. Griffith, 5 B. Mon. 113; Long v. White, 5 J. J. Marsh, 226; Richardson v. DeGiverville, 107 Mo. 435.

¹⁴ 1 Washburn on Real Prop. 331; Tritt v. Colwell, 31 Pa. St. 228;

§ 73. *Restrictions upon alienation of wife's separate property.*—According to the English rule of equity, the wife is so far considered a *feme sole* that she has the power freely to dispose of her separate property by joining with her trustee in the deed of conveyance.¹⁵ This English rule has been followed in some of the States of this country,¹⁶ while in other States the contrary rule has been adopted that no disposition of the wife's separate property can be made by her or her husband, unless a power of disposition is expressly granted to her.¹⁷ In the latter States, therefore, the wife's separate property is amply protected against the control or influence of the husband. But in England, and in those States which have adopted the English rule, he may still gain control of her property by the exercise of his persuasive

Fears v. Brooks, 12 Ga. 195; *Goodrum v. Goodrum*, 8 Ired. Eq. 313; *Welch v. Welch*, 14 Ala. 76; *Kenny v. Udell*, 5 Johns. Ch. 464; *Books v. Gooch*, 97 Mo. 88. See *Tidd v. Lister*, 17 Eng. Law & Eq. 560; *s. c.* 23 *Id.* 578.

¹⁵ 1 Washburn on Real Prop. 331; Williams on Real Prop. 224, Rawle's note; *White v. Hulme*, 1 Bro. C. C. 16; *Brandon v. Robinson*, 18 Ves. 434; *Tullett v. Armstrong*, 1 Beas. 1; *Scarborough v. Borman*, *Id.* 34. The statement in the text that the trustee must join in the conveyance with the married woman is not true when the married woman's separate estate is a passive use. It is only true when it is an active use. For recent cases holding joinder of husband necessary in conveyances of the wife of her statutory separate estate, see note to Sec. 74. See *post*, Sec. 348.

¹⁶ In New Jersey, Connecticut, Kentucky, Ohio, North Carolina, Alabama, Georgia, Missouri, Vermont and Maryland. *Leycraft v. Hedden*, 4 N. J. Eq. 55; *Imlay v. Huntington*, 20 Conn. 175; *Wooley*, 10 B. Mon. 320; *Feary v. Booth*, 4 Am. Law Reg. (N. S.) 141, note; *Frazier v. Brownlow*, 3 Ired. Eq. 237. In New York, the English rule formerly prevailed. *Dyett v. North American Coal Co.*, 20 Wend. 570. But now the matter is regulated by local statute, and the wife's power over her separate estate has been greatly restricted. *Rogers v. Ludlow*, 3 Sandf. Ch. 104; *Leggett v. Perkins*, 2 N. Y. 297. See *post*, Sec. 348.

¹⁷ In Pennsylvania, Rhode Island, Virginia, South Carolina, Mississippi, and Tennessee. *Wright v. Brown*, 8 Wright, 204; *Metcalf v. Cooke*, 2 R. I. 355; *Williamson v. Beekham*, 8 Leigh 20; *Ewing v. Smith*, 3 DeSau. 417; *Doty v. Mitchell*, 9 Smed. & M. 447; *Marshall v. Stephens*, 8 Humph. 159. See *post*, Sec. 348.

powers over her. In order to afford her complete protection, it is permitted in those States to impose restrictions upon her power to alien the estate or to anticipate the income thereof.¹⁸

§ 74. Statutory changes in United States.—The foregoing paragraphs present the law as it obtains at common law and in this country, in the absence of remedial statutes. The common-law rights of the husband in the wife's property during coverture, have been entirely taken away in some of the States, the married woman being vested, by statutes, with all the rights and capacities, in respect to her property, of a single woman, while in other States they are more or less modified and regulated by statute.¹⁹ In the limited space, which can be given to the subject, it is impossible to give the law of each State in detail, as it has been modified by statute. But the following brief and general statement may be taken as reasonably accurate: In California, Colorado, Dakota, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Mississippi, Minnesota, New Jersey, Nevada, New York, Pennsylvania, South Carolina, Texas, and Wisconsin, the common law estate during coverture has been practically abolished, except that in Florida, Indiana, Mississippi, Minnesota, New Jersey, Nevada and Pennsylvania, in order to convey her property, the husband must join in the deed, and in Texas he is held to have the management of her lands during coverture. In Alabama, Arkansas, Connecticut, Maryland, Missouri, Rhode Island, Tennessee and Vermont, the common-law rights of the husband in his wife's property have been more or less modified, the chief provision being, that his creditors cannot levy upon it for his debts. In New Hampshire and Ohio, all lands acquired by the wife by devise, conveyance, or purchase with her own funds, shall

¹⁸ 1 Washburn on Real Prop. 331; Williams on Real Prop. 225; cases cited in notes (11, 12, 13). See also *post*, Sec. 348.

¹⁹ See 1 Washburn on Real Prop. 335-341, note.

be her separate property free from the common-law rights of the husband, but she cannot convey her lands, without joining with the husband. In California, Dakota, Nevada, and Texas, the "partnership" theory of marriage, borrowed from the civil or Roman law, and in force in Louisiana, has been adopted, and a statute declares that all lands purchased by the husband or wife with funds earned by their labor shall be the common property of both, and one-half goes to the heirs of each, or it may be conveyed away during his or her lifetime, without the co-operation of the other. It is evident from this brief synopsis, that an accurate knowledge of the law of married women, in any given State, can only be had by a careful study of the statutes and decisions of that State. A general treatise of limited scope can only give an outline of the subject.²⁰

²⁰ See 1 Washburn on Real Prop. 335-41, note. In Arkansas (*Rudd v. Peters*, 41 Ark. 177), Illinois (*Dean v. Bailey*, 50 Ill. 481), Maine (*Stratton v. Bailey*, 80 Me. 345), Missouri (*Hach v. Hill*, 106 Mo. 18), and Wisconsin (*Martin v. Remington*, 100 Wis. 540), the statutory separate estate of a married woman has been held free from the debts of her husband. 1 Tiffany, Real Prop., Sec. 178, p. 416. Husband must join, in conveyances of the wife, in Indiana, *Shipley v. Smith*, 162 Ind. 526, 70 N. E. Rep. 803; and in North Carolina, *Vann v. Edwards*, 135 N. C. 661, 47 S. E. Rep. 784; Alabama, *Young v. Sheldon*, 36 So. Rep. 27; Kentucky, *Deutsch v. Questa*, 76 S. W. Rep. 329; Louisiana, *Caldwell v. Trezevant*, 111 La. 410, 35 So. Rep. 619; Texas, *McAnulty v. Ellison*, 71 S. W. Rep. 670; Missouri, *Peter v. Byrne*, 175 Mo. 233, 75 S. W. Rep. 433. But see, *Farmers Bank v. Hagelucken*, 165 Mo. 443, 65 S. W. Rep. 728; Arkansas, *Jones v. Hill*, 70 Ark. 34, 66 S. W. Rep. 194; and Pennsylvania, *Holliday v. Hively*, 198 Pa. St. 335, 47 Atl. Rep. 988. And in Missouri, as to land held as separate trust property of the wife, in which the trustee joins. *Cadematori v. Gauger*, 160 Mo. 352; 61 S. W. Rep. 195.

SECTION II.

ESTATE BY CURTESY.

SECTION 75. Definition.

76. Marriage.
77. Estate of inheritance necessary in the wife.
78. Curtesy in fees determinable.
79. Curtesy in equitable estates.
80. Seisin in wife during coverture.
81. Curtesy in reversion.
82. Necessity of issue.
83. Liability for husband's debts.
84. How estate may be defeated.

§ 75. Definition.— An estate by the curtesy is a freehold estate, limited by operation of law to the husband for life in the lands and tenements of the wife, in which she was seized of an estate of inheritance during coverture. The estate by curtesy becomes initiate upon the birth of issue, born alive and capable of inheriting the estate, and takes effect in possession upon the death of the wife.¹ Until the death of the wife, the husband cannot by reason of his curtesy initiate make any claim to the land or to the rents and profits which she receives therefrom.² It does not exist in Louisiana, California, Indiana, Michigan, South Carolina, Georgia,

¹ Co. Lit. 30 a; 2 Bla. Com. 126; 1 Washburn on Real Prop. 163; Williams on Real Prop. 227.

² Moore v. Darby (Del.), 18 Atl. Rep. 768. The death of the wife is an essential requisite before the husband's estate of curtesy attaches. Guernsey v. Lazier, 51 W. Va. 328, 41 S. E. Rep. 405.

Kansas, Texas³ and Illinois.⁴ The requisites of the estate by curtesy are: 1. Lawful marriage; 2. Seisin of wife during coverture; 3. Birth of a living child in the life-time of the wife; 4. The death of the wife.]

§ 76. **Marriage.**—The marriage must be a lawful one. If the marriage be void because of some illegality, curtesy does not attach; but if the marriage is only voidable, the husband will have curtesy, unless it be actually declared void during the life of the wife.⁵ And in some of the States, a

³ 1 Washburn on Real Prop. 164; *Tong v. Marvin*, 15 Mich. 73; *Portis v. Parker*, 22 Texas 699. But it is either recognized by the courts, or expressly given by statute, in the other States. *Adair v. Lott*, 3 Hill 186; *Thurber v. Townshend*, 22 N. Y. 517; *Armstrong v. Wilson*, 60 Ill. 226; *Malone v. McLaurin*, 40 Miss. 162; *Morris v. Morris*, 94 N. C. 613; *Luntz v. Greve*, 102 Ind. 173. In South Carolina, it has been decided that the statute of 1791 only abolished curtesy in fees simple; and that it still exists in a fee conditional. *Withers v. Jenkins*, 14 S. C. 697; *Gaffney v. Peeler*, 21 S. C. 55; *Frost v. Frost*, 21 S. C. 501. The position of the South Carolina court that curtesy in fees simple is abolished, is based upon an erroneous construction of the act of 1791. That act gave the husband the same interest in the lands and other property of his deceased wife, as was given to the wife in her deceased husband's property, that is, he was included in the Statute of Descent as an heir of the wife. The court holds that the estate by curtesy was impliedly abolished, whereas the proper construction is that he is put to his election, and cannot take both the curtesy and the statutory provision. This construction is universally recognized and adopted in the parallel case of the widow, who is entitled to dower and is also made statutory heir. She may take her dower, but cannot take both. The husband's right to possession, as tenant by curtesy, may be enforced by ejectment. *Towns v. Towns*, 121 Ala. 422, 25 So. Rep. 715; *Gregg v. Tesson*, 1 Black. 150, 17 L. Ed. 74. But see *Coquard v. Pearce*, 68 Ark. 93. But before the death of the wife, the right of the husband is not such an estate as will pass to trustees in bankruptcy. *Haseltine v. Prince*, 95 Fed. Rep. 802; *Lynde v. McGregor*, 13 Allen 182; 90 Amer. Dec. 188. Like other life tenants, a tenant by curtesy commits waste, who cuts and sells trees on the land to which his estate attaches. *Learned v. Ogden*, 80 Miss. 769, 32 So. Rep. 278.

⁴ Abolished in 1874 and a dower trust substituted therefor. *Com. v. O'Rear*, 24 N. E. Rep. 956.

⁵ 1 Washburn on Real Prop. 165.

dissolution of the marriage by decree of court at the suit of the wife for the fault of the husband, will take away the husband's estate by curtesy.⁶

§ 77. Estate of inheritance necessary in the wife.— In order that curtesy may attach, the estate of the wife must be a freehold of inheritance, and no form of conveyance of a common-law legal estate of inheritance can be devised by which the husband may be deprived of his curtesy therein.⁷ But the legal estate, of which the wife may be possessed as trustee, is not subject to the husband's curtesy.⁸

even that no
divorce?

⁶ This is the law in Maine, Massachusetts, Vermont, Connecticut, New York, Delaware, Indiana, Kentucky, Rhode Island, Arkansas, New Hampshire, Missouri, Minnesota, Ohio, New Jersey, Illinois, Maryland. 1 Washburn on Real Prop. 309-12, note; Bishop's Mar. & Div., Sec. 666; 1 Greenl. Cruise 150. See also *Neff v. Turkle*, 4 Ohio Dec. 314. By statute, in Illinois, the Chancellor granting the divorce is given full discretion to "settle and adjust the property rights of the parties." *Heyman v. Heyman*, 210 Ill. 524, 71 N. E. Rep. 591. In Missouri, the guilty party forfeits all rights and claims by virtue of the marriage. *Schlemmer v. Schlemmer* (1904), 81 S. W. Rep. 636. In Oregon, the successful party in divorce is given one-third, in fee, in the lands of the guilty party. *Benfield v. Benfield*, 44 Ore. 94, 74 Pac. Rep. 495. In England, on divorce of the wife, the court has power to extinguish the life estate of the husband in her land. *Blood v. Blood* (1902), 71 Law J. 97, 86 Law T. 641; *Kaye v. Kaye* (1902), 86 Law T. 638; *Whitton v. Whitton* (1902), 71 Law J. 10, 85 Law T. 646. In Texas, neither party can be divested of the title to real estate. *Long v. Long* (1902), 69 S. W. Rep. 428. A divorce was held to bar the curtesy of the husband, in the following cases: *Doyle v. Rolwing*, 165 Mo. 231, 65 S. W. Rep. 315, 55 L. R. A. 332; *Moran v. Somes*, 154 Mass. 200, 28 N. E. Rep. 152; *Clark v. Slaughter*, 38 Miss. 64; *Davis v. Davis*, 68 N. C. 180. But see, *Meecham v. Bunting*, 156 Ill. 586, 41 N. E. Rep. 175, 28 L. R. A. 618, 47 Amer. St. Rep. 239.

⁷ *Mildmay's Case*, 6 Rep. 41; *Mullany v. Mullany*, 4 N. J. Eq. 16; *Williams on Real Prop.* 328; 1 Washburn on Real Prop. 169. A contract of purchase does not give the wife such an "estate of inheritance," as to entitle the husband to curtesy therein. *Hall v. Crabb*, 55 Neb. 392,

⁸ *Chew v. Commissioners*, 5 Rawle, 160. And this is true, whether

⁸ *Chew v. Commissioners*, 5 Rawle, 160. And this is true, whether the trust is expressed or implied by law from the wife's contract, en-

§ 78. *Curtsey in fees determinable.*—In respect to the right of curtesy in fees simple and fees tail, no question can arise, as explained in a preceding paragraph. And the same may be said of a fee conditional at common law, where such an estate has not been converted by the *statute de donis* into an estate tail.⁹ If, however, the estate be a fee upon condition, upon limitation, or a conditional limitation, some difficulty is experienced in determining what effect the happening of the condition or contingency would have upon the husband's curtesy. The following may be stated as the prevailing rule: If the estate of the wife be one upon condition or upon limitation, estates which take effect and are determined according to the rules of the common law, and the limitation over takes effect as common-law estates, as in the case of a remainder after an estate upon limitation, the husband's curtesy is defeated.¹⁰ But, by a refinement of distinction, which is difficult to comprehend, if the estate be a fee determinable upon the happening of some future event, and the limitation over be by way of executory devise, or shifting use, or in other words a conditional limitation, the estate by curtesy still exists, unaffected by the happening of the contingency.¹¹

§ 79. *Curtsey in equitable estates.*—It was once held that the husband was not entitled to curtesy out of the equitable estates of the wife. But it is now very generally conceded that he has curtesy in all equitable as well as legal

tered into before marriage, to sell the land. *Welsh v. Chandler*, 13 B. Mon. 431.

⁹ *Odom v. Beverly* (S. C.), 10 S. E. Rep. 835.

¹⁰ Co. Lit. 241, Butler's note, 70; 1 Washburn on Real Prop. 167, 168, 170.

¹¹ *Buckworth v. Thirkell*, 3 B. & P. 652; *Moody v. King*, 2 Bing. 447; *Hatfield v. Sneden*, 54 N. Y. 285; *Grant v. Townshend*, 2 Hill 554; *Wright v. Herron*, 6 Rich. Eq. 406; *Martin v. Renaker* (Ky.), 9 S. W. Rep. 419; *Webb v. Trustees, etc., Baptist Church* (Ky.), 13 S. W. Rep. 362; 1 Washburn on Real Prop. 171, 172; Co. Lit. 241 a, Butler's note, 170; 4 Kent's Com. 33. See post, Sec. 99, note.

estates, and the same rules are applied to the former, which obtain in the latter. For the foundation of the claim of curtesy, the receipt by the wife of the rents and profits is a sufficient seisin.¹² The husband has also curtesy in the equity of redemption, where he and his wife joined in the execution of the mortgage.¹³ And this is true also, even of those equitable estates which are granted to her sole and separate use.¹⁴ But equitable estates will not be subject to the right of curtesy, if the intention of the grantor, to exclude the husband from such equitable estate, is clearly manifested in the deed.¹⁵

¹² Kent's Com. 31; 1 Washburn on Real Prop. 165, 166; *Watts v. Ball*, 1 P. Wms. 109; *Morgan v. Morgan*, 5 Madd. 408; *Sweetapple v. Bindon*, 2 Vern. 537, note 3; *Davis v. Mason*, 1 Pet. 508; *Houghton v. Hapgood*, 13 Pick. 154; *Robinson v. Codman*, 1 Sumn. 128; *Dunscomb v. Dunscomb*, 1 Johns. 508; *Clepper v. Livergood*, 5 Watts 113; *Dubs v. Dubs*, 31 Pa. St. 154. In several of the States, notably Alabama, Kentucky, Maryland, Mississippi, and Virginia, curtesy is by statute made to attach to equitable estates. 1 Greenl. Cruise, 157.

¹³ *Robinson v. Lakenan*, 28 Mo. App. 135; *Mettler v. Miller*, 129 Ill. 630.

¹⁴ *Tillinghast v. Coggeshall*, 7 R. I. 383; *Nightengale v. Hidden*, *Id.* 115; *Sartill v. Robeson*, 2 Jones Eq. 510; *Carter v. Dale*, 3 Lea, 710; 31 Am. Rep. 660. But see *Moore v. Webster*, L. R. 23 Eq. 267. *Appleton v. Rowley*, L. R. 8 Eq. 139; *Carson v. Fuhs*, 131 Pa. St. 256, and succeeding note. Curtesy attaches to the equitable estate of the wife in Rhode Island, under a void deed from her husband. *Ball v. Ball*, 20 R. I. 520, 40 Atl. Rep. 234, distinguishing, *Sayers v. Wall*, 26 Gratt. 354; *Deming v. Williams*, 26 Conn. 226, 68 Amer. Dec. 386; *Whitten v. Whitten*, 3 Cush. 191. Property granted to a married woman, in North Carolina and Missouri, free and clear of any claim of her husband, gives her the land free from his curtesy. *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. Rep. 127. *McBreen v. McBreen*, 154 Mo. 323, 55 S. W. Rep. 463. Husband's curtesy does not attach to wife's separate estate, in Tennessee, *Bingham v. Weller* (1904), 81 S. W. Rep. 843. Or in Virginia, *Ratcliff v. Ratcliff* (1904), 102 Va. 880, 47 S. E. Rep. 1007. The husband has no curtesy in the equitable separate estate of the wife, in Virginia, in the absence of a reservation thereof at his wife's death. *Jones v. Jones*, 96 Va. 749, 32 S. E. Rep. 463.

¹⁵ *Carter v. Dale*, 3 Lea 710; 31 Am. Law Rep. 660; *Stokes v. McKibbin*, 18 Pa. St. 207; *Cochran v. O'Hern*, 4 Watts & S. 95; *Rigler v.*

§ 80. *Seisin in wife during coverture.*—Another requisite of the estate of curtesy is, that the wife must be seised of the estate during coverture; and if divorce is obtained before the wife's acquisition of the seisin, he cannot claim curtesy in such property, because she would not in that case have had the seisin during coverture.¹⁶ The actual seisin was required at common law, but at the present day, in this country, all that is required is legal seisin, which is a present right to the possession. But adverse possession will preclude the husband's right of curtesy, if the seisin is not regained during coverture. In the absence of such adverse possession, actual possession is not required.¹⁷ In England, in the case of the descent of lands upon the wife, an entry by the husband during coverture is necessary to support his right of curtesy. But it is the general rule in this country, that actual entry is not required,¹⁸ and in Pennsyl-

Cloud, 14 Pa. St. 361; *Clark v. Clark*, 14 Barb. 582; *Pool v. Blaikie*, 53 Ill. 495; *Hearle v. Greenback*, 3 Atk. 716; *Bennett v. Davis*, 2 P. Wms. 316; 1 Washburn on Real Prop. 165-169.

¹⁶ *Schult v. Moll*, 10 N. Y. S. 703.

¹⁷ *Kent's Com.* 30 n; *Davis v. Mason*, 1 Pet. 506; *Jackson v. Sellick*, 8 Johns. 262; *Den v. Demarest*, 1 N. J. L. 525; *Ellsworth v. Cook*, 8 Paige Ch. 640; *Jackson v. Johnson*, 5 Cow. 74; *Bar v. Galloway*, 1 McLean, 476; *Pierce v. Wanett*, 10 Ired. 446; *Mercer v. Selden*, 1 How. 37; *McCorry v. King's Heirs*, 3 Humph. 267; *Neeley v. Butler*, 10 B. Mon. 48; *Stinebaugh v. Wisdom*, 13 B. Mon. 467; *Mettler v. Miller* (Ill. 1890), 22 N. E. Rep. 529; *Barker v. Oakwood*, 49 Hun, 416.

¹⁸ *Co. Lit.* 29 a; 1 Washburn on Real Prop. 173, 174; *Adair v. Lott*, Hill, 182; *Jackson v. Johnson*, 5 Cow. 74; *Chew v. Commissioners*, 5 Rawle, 160; *Day v. Cochrane*, 24 Miss. 261; *Stephens v. Hume*, 25 Mo. 349; *Harvey v. Wichman*, 23 Ib. 115; *Carr v. Givens*, 9 Bush. 679; *c. s.* 15 Am. Rep. 147. Mr. Tiffany, in his recent excellent work, on Real Property, takes the position that actual seisin in the wife is not an essential of the estate by curtesy, (*Tiffany, Real Prop.*, Sec. 205, p. 488) and he cites, as an authority, the opinion of Judge Scott, in *Raume v. Chambers* (22 Mo. p. 54.) However the question may be decided elsewhere, this opinion has long ceased to be the law in Missouri, where the text is followed and seisin in the wife, either in law or fact, is held to be an essential prerequisite to an estate by curtesy. *Martin v. Trail*, 142 Mo. p. 95; *Cox v. Boyce*, 152 Mo. p. 581; *Dozier v. Toalson*, 180

vania, Ohio, and Connecticut, adverse possession does not necessitate an actual *entry*.¹⁹ If the lands are in possession of a co-tenant in a tenancy in common, the wife is deemed sufficiently seized in order to give the husband curtesy, and such would also be the case, where a tenant for years or at sufferance has possession by lease from the wife. The tenant in such a case holds the actual seisin or possession as a *quasi bailee* of the reversioner.²⁰

§ 81. *Curtesy in reversion.*— But if the estate of the wife be a reversion or a remainder, supported and preceded by a particular freehold estate, she will not have such a present right to the possession, as to give her husband curtesy, unless the prior freehold is determined during coverture, and this, too, though the husband is the tenant of the prior freehold.²¹ The husband in such cases can only have curtesy, when during coverture, the particular freehold is determined or is merged in the reversion by coming into the same hands.²²

Mo. 546. Actual seisin of the wife is necessary to an estate by curtesy, in West Virginia. *Jones v. Thorn*, 45 W. V. 186, 32 S. E. Rep. 173. And also in Pennsylvania, *Keller v. Lamb*, 10 Kulp, 246. And Tennessee, *Waller v. Martin*, 106 Tenn. 341, 61 S. W. Rep. 73.

¹⁹ *Stoolfoos v. Jenkins*, 8 Serg. & R. 175; *Bush v. Bradley*, 4 Day, 298; *Kline v. Beebe*, 6 Conn. 494. *Contra*, *Mercer's Lessee v. Selden*, 1 How. 154.

²⁰ *DeGray v. Richardson*, 3 Atk. 469; *Green v. Liter*, 8 Cranch, 245; *Wass v. Bucknam*, 35 Me. 360; *Taylor v. Gould*, 10 Barb. 388; *Jackson v. Johnson*, 5 Cow. 74; *Carter v. Williams*, 8 Ired. Eq. 177; *Powell v. Gossom*, 18 B. Mon. 179; *Vanarsdall v. Fauntleroy*, 7 B. Mon. 401; *Day v. Cochrane*, 24 Miss. 261.

²¹ *Stoddard v. Gibbs*, 1 Sumn. 263; *Ferguson v. Tweedy*, 43 N. Y. 543; *Orford v. Benton*, 86 N. H. 395; *Malone v. McLaurin*, 40 Miss. 163; *Planter's Bank v. Davis*, 31 Ala. 633; *Doe v. Rivers*, 9 T. R. 272; *Webster v. Ellsworth (Mass.)*, 18 N. E. Rep. 569.

²² 1 Washburn on Real Prop. 175–178; *Doe v. Scuddamore*, 2 B. & P. 294; *Plunket v. Holmes*, 1 Lev. 11; 1 Cruise Dig. 149. Since 1887, in Ohio, the husband has curtesy in land to which his wife had an estate in remainder, where she died before the life tenant. *Moore v. Iles*, 10 Ohio C. C. 591, 9 Ohio C. D. 418.

§ 82. **Necessity of issue.**—The estate by curtesy is by the theory of the law only a continuance of the wife's estate of inheritance, and is supposed to be intrusted to him during life for the benefit of the wife's issue. It is therefore necessary by the common law, that the wife should have issue born alive, who can take the inheritance as heir to the wife. A female child in the case of a tail male would not satisfy this requirement.²³ His right becomes initiate upon the birth of the child, and attaches and vests in possession, whether it was born before or after the acquisition of the estate; and, provided it was born alive, its death any time would not affect the husband's right of curtesy.²⁴ In Pennsylvania, by statute, the birth of a child is not necessary.²⁵ The issue must not only be born alive and capable of inheriting the estate, but it must also at common law have been born during the life-time of the mother. The birth of the child after her death, by means of the Cæsarian operation, would not give the husband curtesy.²⁶

§ 83. **Liability for husband's debts.**—As soon as the right becomes initiate by the birth of the child as well as after it is consummate, it may be subjected to the satisfaction of the husband's debts and can be sold under a levy of execu-

²³ Co. Lit. 29 b; 1 Washburn on Real Prop. 178; Williams on Real Prop. 228; Heath v. White, 5 Conn. 228; Day v. Cochrane, 24 Miss. 261.

²⁴ 2 Bla. Com. 128; 1 Washburn on Real Prop. 179; Comer v. Chamberlin, 6 Allen, 166; Jackson v. Johnson, 5 Cow. 74; Guion v. Anderson, 8 Humph. 307; Martin v. Renaker (Ky.), 9 S. W. Rep. 419. The husband's right of curtesy, upon birth of a child by him, takes precedence to any claim by descent of a son of the wife by a prior marriage. Heath v. White, 5 Conn. 236. The law is different in Michigan by statute. Hathorn v. Lyon, 2 Mich. 93.

²⁵ Williams on Real Prop. 228, Rawle's note; Dubs v. Dubs, 31 Pa. St. 154; Lancaster Co. Bank v. Stauffer, 19 Pa. St. 398.

²⁶ 1 Washburn on Real Prop. 179; Co. Lit. 29 b; 1 Greenl. Cruise. 143, note; Marsellis v. Thalheimer, 2 Paige Ch. 42. The birth of issue, as a condition precedent to the attaching of curtesy, is abolished, by statute in West Virginia. Alderson v. Alderson, 46 W. Va. 242, 33 S. E. Rep. 228.

tion.²⁷ Equity will not interfere in behalf of the wife or children.²⁸ It can be conveyed by the husband independently of the wife's conveyance of her estate in the land.²⁹

§ 84. How estate may be defeated.—The statutory divorce as has been seen, will defeat the husband's right of curtesy, where it is granted for his fault.³⁰ In Pennsylvania it is also provided by statute that if the husband unjustifiably deserts his wife for a year preceding her death, he shall forfeit his claim of curtesy.³¹ So, likewise, the acceptance of a testamentary provision which was made for him in the place of the curtesy, will bar the curtesy.³² It was also the rule at common law that a feoffment in ree by the husband would destroy his tenancy by curtesy. But although the same rule is now enforced in this country in regard to feoffments, wherever they still obtain, and it is not changed by statute, yet the ordinary conveyance is held to transfer only what the grantor has, and will not work a forfeiture of his actual estate.³³ In a preceding section it has been stated that in

²⁷ *Mattocks v. Stearns*, 9 Vt. 326; *Litchfield v. Cudworth*, 15 Pick. 23; *Van Duzer v. Van Duzer*, 6 Paige 366; *Day v. Cochrane*, 24 Miss. 261; *Bozarth v. Largent*, 128 Ill. 95. But see *Harvey v. Wickham*, 23 Mo. 112; *Welsh v. Solenberger*, 8 S. E. Rep. 91. During coverture, the husband's estate of curtesy, cannot be sold for his debts in Missouri, *Ball v. Woolfolk*, 175 Mo. 378, 75 S. W. Rep. 410. The husband's rights to rents from his wife's lands is superior to that of a judgment creditor of the wife, although the land could have been sold, during the lifetime of the wife. *Hampton v. Cook*, 64 Ark. 353, 42 S. W. Rep. 535. But see, *Shaddingle v. Fisher*, 2 O. C. D. 381. The estate by curtesy entitles the husband to royalties from a mine, opened after the wife's death. *Bubb v. Bubb*, 201 Pa. St. 212; *Alderson v. Alderson*, 46 W. Va. 242, 33 S. E. Rep. 228; *Kier v. Peterson*, 41 Pa. 357; *Priddy v. Griffith*, 150 Ill. 560. But see, *Bond v. Ring*, 99 Va. 564, 39 S. E. Rep. 216.

²⁸ *Van Duzer v. Van Duzer*, 6 Paige 366.

²⁹ *Mettler v. Miller* (Ill.), 22 N. E. Rep. 529.

³⁰ See *ante*, Sec. 76.

³¹ *Bealor v. Hahn*, 122 Pa. St. 242.

³² *Beirne's Ex'rs v. Von Ahlefeldt*, 33 W. Va. 563.

³³ *French v. Rollins*, 21 Me. 372; *Flagg v. Bean*, 25 N. H. 63; *Den-*

a number of the States, statutes have been passed, which enable a married woman to hold property as free from marital rights, as if she were single. In New York, where the change was first made, it has been held that the common-law right to curtesy still exists, but it may be defeated by the conveyance of the wife during coverture.³⁴ But it seems that under the New York statute, the tenancy by the curtesy vests only where the land remains undisposed of by deed or by will. A devise of the lands would therefore defeat the tenancy.³⁵ But this doctrine is not always followed elsewhere, the curtesy being held to attach, notwithstanding the married woman is given the power to dispose of her lands by deed or by will. The power so granted to her is presumed to be exercised subject to the husband's curtesy.³⁶

nett v. Dennett, 40 N. H. 505; *McKee v. Pfont*, 3 Dall. 486; *Munneslyn v. Munneslyn*, 2 Brev. 2; *Meramec v. Caldwell*, 8 B. Mon. 32; *Baykin v. Rain*, 28 Ala. 332; *Miller v. Miller*, Meigs 484.

³⁴ *Clark v. Clark*, 24 Barb. 581; *Thruber v. Townshend*, 22 N. Y. 517.

³⁵ See *Burke v. Valentine*, 52 Barb. 412; *Scott v. Guernsey*, 60 Barb. 163; *Rider v. Hulse*, 24 N. Y. 372, N. B. 75.

³⁶ *Cooke's Appeal*, 132 Pa. St. 533. A husband who qualifies as executor under his wife's will, is denied curtesy, when inconsistent with a devise in the will. *Tiddy v. Graves*, 126 N. C. 620, 36 S. E. Rep. 127, 37 *Id.* 513.

In the states in which married women have the rights of *femes soles* and wife sells her estate, can husband afterwards recover curtesy?

What protection has vendee?

SECTION III.

DOWER.

- SECTION 85. Dower defined and explained.
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§ 85. **Dower defined and explained.**—Dower is that interest or estate which is provided by the law for the widow out of the real property of the husband.¹ At common law, and generally in this country, it is an estate for life in one-third of his lands, tenements, and hereditaments.² During coverture, her interest, though an incumbrance, is but an inchoate right, which she can neither assign, release, nor extinguish, except by joining in the deed of her husband, as explained later on. It cannot at this stage be considered even a *chose in action*; and it is not affected by any adverse possession until the death of the husband, when her right of action accrues and the statute of limitation begins to run against her; although such possession is sufficient to bar the husband's interest in the land.³ Upon the death of

¹ 2 Bla. Com. 132; Scribner Dower 114, 147; Park Dower 10, 32; Co. Lit. 31 a; 1 Cruise's Dig. 13.

² 2 Bla. Com. 180; Co. Lit. 30 a; 1 Washburn on Real Prop. 187-189; Moore v. New York, 8 N. Y. 110; Reaume v. Chambers, 22 Mo. 36. In some of the States, the widow has one-third in fee, instead of for life, while in others it is enlarged to one-half, but except in respect to quantity, the estate has the same general qualities throughout the United States. See Burk v. Barron, 8 Iowa 134; Lucas v. Sawyer, 17 Iowa 519; Wilds v. Toms, 123 Iowa 747, 99 N. W. Rep. 700; Sturgis v. Ewing, 18 Ill. 176; Noel v. Ewing, 9 Ind. 37; Gaylord v. Dodge, 13 Ind. 47. In Louisiana and California, the widow has one-half of all the common property of her husband. Beard v. Knox, 5 Cal. 252. And, although there are statutes in a number of the States giving the widow an interest in the personal, as well as the real property of the husband, dower technically can only be had out of real estate of inheritance as above stated. Dow v. Dow, 36 Me. 211; see *post*, Sec. 86.

³ Durham v. Angier, 20 Me. 242; Moore v. Frost, 3 N. H. 127; Gurnison v. Twitchell, 38 N. H. 68; Learned v. Cutler, 18 Pick. 9; Moore v. New York, 8 N. Y. 110; McArthur v. Franklin, 16 Ohio St. 200; Miller v. Pence (Ill.), 23 N. E. Rep. 1030; Williams v. Williams (Ky.), 12 S. W. Rep. 760; Winters v. DeTurk, 25 W. N. C. 511, 19 Atl. Rep. 354. And it is so far an interest in the land, that if the renunciation of her dower right has been obtained by fraud of her husband, with knowledge of the purchaser, the wife may avoid the deed in respect to her inchoate dower right. Somar v. Canady, 58 N. Y. 298, 13 Am. Rep. 523; Buzick v. Buzick, 44 Iowa 259, 24 N. W. Rep. 740; White

the husband, the wife surviving, the right becomes consummate; it is then a chose in action which entitles her to have certain of her husband's lands set out to her. She has not yet an estate, simply a consummate right to an estate, which she can assign in equity, and release at common law to one in possession, but which was incapable of assignment at common law, like all other *choses in action*.⁴

v. Graves, 107 Mass. 325, 9 Am. Rep. 38. In Iowa, the widow is entitled to a third of her husband's lands. *Wild v. Toms*, 123 Iowa 747, 99 N. W. Rep. 700. This is also the rule in Missouri (*Phillipps v. Hardenburg*, 181 Mo. 463, 80 S. W. Rep. 891), and Georgia (*McDonald v. McDonald*, 120 Ga. 403, 47 S. E. Rep. 918); Indiana (*Helt v. Helt*, 152 Ind. 142, 52 N. E. Rep. 699); Kentucky, *Anderson v. Fitzpatrick* (49 S. W. Rep. 786) and all of the United States, where the common law obtains. Dower is barred by adverse possession, for the statutory period, in Michigan. *Butcher v. Butcher* (1904), 100 N. W. Rep. 604. Also, in Missouri, *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. Rep. 120; New York, *Wetyen v. Fick*, 178 N. Y. 223, 70 N. E. Rep. 497. But see, *Lucas v. Whitacre* (Iowa 1903), 96 N. W. Rep. 776; *Grober v. Clements*, 71 Ark. 565, 76 S. W. Rep. 555; *Brumback v. Brumback*, 198 Ill. 66, 64 N. E. Rep. 741; *Sill v. Sill*, 185 Ill. 594, 57 N. E. Rep. 812. Barred, in Kentucky, under fifteen year statute. *Winchester v. Keith*, 70 S. W. Rep. 664.

⁴ *Johnson v. Shields*, 32 Me. 424; *Hoxsie v. Ellis*, 4 R. I. 123; *Lund v. Woods*, 11 Mete. 566; *Croade v. Ingraham*, 13 Pick. 33; *Jackson v. Vanderheyden*, 17 Johns. 167; *Cox v. Jagger*, 2 Cow. 651; *Stewart v. McMartin*, 5 Barb. 438; *Harrison v. Wood*, 1 Dev. & B. Eq. 437; *Saltmarsh v. Smith*, 32 Ala. 404; *Strong v. Bragg*, 7 Blackf. 63; *Torrey v. Minor*, 1 Smed. & M. Ch. 489; *Shield v. Batts*, 5 J. J. Marsh. 12; *Stewart v. Chadwick*, 8 Iowa 463; *Brown v. Meredith*, 2 Keen, 527; *Corey v. The People*, 45 Barb. 265. And likewise the dower right before assignment cannot be sold under attachment or execution. *Rausch v. Moore*, 48 Iowa 611, 30 Am. Rep. 412; *Brown v. Meredith*, 2 Keen 527; *Gooch v. Atkins*, 14 Mass. 378; *Green v. Putnam*, 1 Barb. 500; *Saltmarsh v. Smith*, 38 Ala. 404. In Vermont and Connecticut she is held to have an estate in common with the heirs from the death of her husband. *Dummerston v. Newfane*, 37 Vt. 13; *Wooster v. Hunt's Lyman Iron Co.*, 38 Conn. 257. And her interest before assignment is sufficiently vested to enable her to secure an injunction against the infliction of injuries on the property by the heir, or by any other person, whether he is a stranger to the land or the tenant of the freehold. *Shepard v. Manhattan Ry. Co.*, 57 N. Y. Super. 5. In Alabama and

It only becomes an estate in the lands, when it has been set out to her. The act of setting out the dower is called the assignment of dower. From this time on, she has a life estate, with all the rights, incidents, and disabilities, which pertain to that class of estates.⁵ In some of the States, the wife holds her dower subject to the claims of her husband's creditors, but as a general rule her dower right takes precedence to such claims.⁶ And because of this difference in

Indiana she has such an interest in the land, as that it may be assigned before it has been set out. *Powell v. Powell*, 10 Ala. 900; *Strong v. Clem*, 12 Ind. 37. And even when the dower right before assignment cannot in law be conveyed, except by way of release to the tenant of the freehold, a conveyance or assignment to a stranger will be valid in equity, and the assignee may bring the action for assignment in the name of the widow. *Robie v. Flanders*, 33 N. H. 524; *Lamar v. Scott*, 3 Rich. Eq. 516; *Potter v. Everitt*, 7 Ired. Eq. 152; *Powell v. Powell*, 10 Ala. 900; *Bray v. Conrad* (Mo.), 13 S. W. Rep. 957; *Serry v. Curry*, 26 Neb. 353. She can also mortgage her dower right before assignment. *Mut. L. Ins. Co. v. Shipman*, 119 N. Y. 324; overruling *s. o.* 50 Hun. 578.

⁵ *Windham v. Portland*, 4 Mass. 384; *Jones v. Brewer*, 2 Pick. 314; *Powell v. Monson*, 3 Mason, 368; *Lawrence v. Brown*, 5 N. Y. 304; *Andrews v. Andrews*, 14 N. J. L. 141; *Norwood v. Marrow*, 4 Dev. & B. 442; *Sotton v. Burrows*, 2 Murph. 79; *Thompson v. Stacy*, 10 Yerg. 423. As soon as judgment has been entered up, she may release or transfer the estate. *Leavitt v. Lamprey*, 13 Pick. 382. *Serry v. Curry*, 26 Neb. 853. And when the *habere facias* has been issued, she may enter upon the land. *Co. Lit.* 37 b, n; *Parker v. Parker*, 17 Pick. 236; *Evans v. Webb*, 4 Yeats 424. But if the assignment is subsequently set aside, she may be treated as a disseizor or trespasser from the time of her entry. 4 *Kent's Com.* 61; *Hildreth v. Thompson*, 16 Mass. 191; *Jackson v. O'Donaghy*, 7 Johns. 247; *Sharply v. Jones*, 5 Harr. 373; *McCully v. Smith*, 2 Bail. 103. After it is set out to her, she holds her dower land of her husband, and not of the heir or tenant. It is not the grant of the heir, and the grant by the heir of the dower land after her death, incorporated in the deed of assignment, is a grant of the reversion and not of a technical remainder. *Baker v. Baker*, 4 Me. 67; *Conant v. Little*, 1 Pick. 189; *Adams v. Butts*, 9 Conn. 79; *Lawrence v. Brown*, 5 N. Y. 394.

⁶ A judicial sale, for the debts of the husband, does not bar dower, in Nebraska. *Martin v. Abbott*, 95 N. W. Rep. 356; or Ohio, *Jewett v. Feldheiser*, 67 N. E. Rep. 1072; or Missouri, *Duke v. Brandt*, 51 Mo. 221.

the character of the widow's estate, her estate as dowress will not merge into the estate in reversion which she may acquire by inheritance from her son if it should prove to be against her wishes and her interests.⁷

§ 86. In what estates she has dower.—The widow has dower in all freehold estates of inheritance, which her issue, if any, could have inherited as heir of the husband, and of which he was seised during coverture. It therefore includes everything that is comprehended under the terms lands, tenements, and hereditaments, corporeal and incorporeal.⁸ The

When it is stated that in some of the States the dower right is subject to the claim of creditors, it is meant that a judicial sale for debt will bar the wife's dower right, and, it being inchoate, she cannot protect it. *Kirke v. Dean*, 2 Binn. 347; *Reed v. Morrison*, 12 Serg. & R. 18; *Lozear v. Porter*, 87 Pa. St. 513, 30 Am. Rep. 380; *Taylor v. Highberger*, 65 Iowa 134. But it will not be barred by the assignment for benefit of creditors, or by sale in bankruptcy. *Keller v. Michael*, 2 Yeates 300; *Eberle v. Fisher*, 13 Pa. St. 520; *Lozear v. Porter*, 87 Pa. St. 513, 30 Am. Rep. 380; *Bryar's Appeal*, 111 Pa. St. 81. But the general rule is, that it cannot in any manner be barred by a sale for debts. *Stinson v. Sumner*, 9 Mass. 149; *Griffin v. Reece*, 1 Harr. 508; *Lewis v. Cox*, 5 Harr. 403; *Hinchman v. Stiles*, 10 N. J. Eq. 361; *Coombs v. Young*, 4 Yerg. 218; *Sisk v. Smith*, 6 Ill. 503; *Davis v. Townsend* (S. C.), 10 S. E. Rep. 837. But if the land is under attachment before marriage, a sale of it will defeat the wife's dower. *Brown v. Williams*, 31 Me. 303; *Sanford v. McLean*, 3 Paige 117; *Shiell v. Sloan*, 22 S. C. 151.

⁷ *Appeal of Fink*, 25 W. N. C. 78, 18 Atl. Rep. 621. A merger of the widow's dower does not occur, when she acquires quit claim deeds from all the heirs, as a contrary intent would be presumed from the fact that a continuance of the lesser estate would be beneficial to the widow. *Wettlaufer v. Ames* (Mich. 1903), 94 N. W. Rep. 950. But see *Kreamer v. Fleming*, 191 Pa. St. 534, 43 Atl. Rep. 388, 44 W. N. C. 201; *Copeland v. Burkett* (Tenn.), 45 S. W. Rep. 533.

⁸ 2 Bla. Com. 131; Co. Lit. 40 a; 1 Washburn on Real Prop. 194-195. Dower may be claimed out of rents and other incorporeal hereditaments, except annuities not issuing out of land. Co. Lit. 32 a; 2 Bla. Com. 132; *Aubin v. Daly*, 4 B. & Ald. 59; *Chase's Case*, 1 Bland 227; 4 Kent's Com. 401. But the incorporeal hereditament, like corporeal hereditaments, must be an estate of inheritance. 1 Washburn on Real Prop. 210; *Stoughton v. Leigh*, 1 Taunt. 410; *Weir v. Tate*, 4 Ired. Eq.

widow's claim for dower will in nowise be affected by the source of the consideration paid for the land, though it consisted of money wrongfully taken from her own property, during her insanity, and which the guardian requires to be returned. The return of the money is not inconsistent with her claim of dower.⁹ She has no dower in estates *per auter vie*, or for years, except where these estates, or certain of them, are given by statute, the incidents and characteristics of freehold estates of inheritance.¹⁰ On the other hand, while the wife has dower in lands which the husband holds as tenant in tail, as she has in any other estate of inheritance, of which he is seised during coverture, and which attaches

264; Chase's Case, 1 Bland 228. She has dower in the crops planted by her husband, and growing at his decease. 1 Washburn on Real Prop. 211; Ralston v. Ralston, 3 Green (Iowa) 533. In Massachusetts, she is not dowerable in wild lands. Conner v. Shepherd, 15 Mass. 164. But in the other States, since the tenant for life has a right to clear wild lands, in order to make them available for use, the widow is granted her own dower in such land. 4 Kent's Com. 76; Hastings v. Cruckleton, 3 Yeates 261; Findlay v. Smith, 6 Munf. 134; Ballentine v. Payner, 2 Hayw. 110; Owen v. Hyde, 6 Yer. 334; Alexander v. Fisher, 7 Ala. 514. See *ante*, Sec. 62. She is likewise dowerable in the mines, which were opened and worked by her husband. Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Hendrix v. McBeth, 61 Ind. 473, 28 Am. Rep. 680. There is no dower in a burial lot. Price v. Price, 54 Hun 349. In Missouri, a wife is not restricted to estates of inheritance, but also has dower in leasehold estates. Phillipps v. Hardenburg, 181 Mo. 463, 80 S. W. Rep. 891. In Georgia, dower extends to any lands of which the husband died seised or possessed, but not to lands under an agreement of purchase, on which nothing had been paid. McDonald v. McDonald, 120 Ga. 403, 47 S. E. Rep. 918.

⁹ Rannells v. Isgrigg, 99 Mo. 19.

¹⁰ Gillis v. Brown, 5 Cow. 388; Spangler v. Spangler, 1 Md. Ch. 36; Fisher v. Grimes, 1 Smed. & M. Ch. 107; Ware v. Washington, 6 Smed. & M. 737; Burris v. Page, 12 Mo. 358; 1 Washburn on Real Prop. 194, 195; Whitmire v. Wright, 22 S. C. 446. But see Goodwin v. Goodwin, 33 Conn. 314, which holds that the widow has no dower out of an estate for 999 years, although the statute converts this leasehold into an estate of inheritance. Concerning estates *per auter vie*, see *ante*, Sec. 47; and in respect to leaseholds made estates of inheritance, see *post*, Sec. 128. Phillipps v. Hardenburg, 181 Mo. 463, 80 S. W. Rep. 891.

although he may die without heirs capable of taking the estate, yet if the character of the estate tail is changed by statute, so that the interest of the tenant in tail is reduced to a life estate, with a remainder in the heirs of his body, his wife cannot claim dower in such an estate.¹¹ The inheritance must also be a continuous and entire one. The interposition of a freehold estate between the husband's estate in possession and his reversion or remainder in fee will prevent the wife's dower from attaching. It can only attach when the interposed freehold terminates during coverture.¹² For still stronger reasons she cannot claim dower in her husband's reversions and remainders, where the preceding estate is a freehold.¹³ And so, also, where her husband's estate is a conditional limitation.¹⁴ Nor can she for

¹¹ *Trumbull v. Trumbull*, 149 Mass. 200.

¹² *Lewis Bowle's Case*, 11 Rep. 80; *Crump v. Norwood*, 7 Taunt. 362; *Brooks v. Everett*, 13 Allen 458; *Blood v. Blood*, 23 Pick. 80; *Robinson v. Codman*, 1 Summ. 130; *Dunham v. Osborne*, 1 Paige 634; *Shoemaker v. Walker*, 2 Serg. & R. 556; *Arnold v. Arnold*, 8 B. Mon. 202; 3 Kent's Com. 39; 1 Washburn on Real Prop. 195. If the interposed estate be one for years, it will not affect the dower right, since the entire seizen is in the husband. *Bates v. Bates*, 1 Ld. Raym. 326; *Hitchens v. Hitchens*, 2 Vern. 403. According to the early common law, a contingent remainder would be defeated by the coming together of the reversion and the life estate in one person. It was then held that the widow would have dower, notwithstanding the interposed contingent remainder. *Hooker v. Hooker*, Ca. Temp. 13; *Purefoy v. Rogers*, 2 Saund. 380. But the contingent remainder cannot now be defeated by merger of the life estate in the reversion. 1 Washburn on Real Prop. 197; *Williams on Real Prop.* 281, 282. The wife has no dower in future estates, in Rhode Island. *Sammis v. Sammis*, 51 Atl. Rep. 105. See, also, *Stewart v. Crysler*, 65 N. Y. S. 483, 52 App. Div. 597; *Young v. Morehead*, 94 Ky. 608, 23 S. W. Rep. 511; *Hill v. Pike*, 174 Mass. 582, 55 N. E. Rep. 324; *Warren v. Williams*, 25 Mo. App. 22; *Houston v. Smith*, 88 N. C. 312.

¹³ See *post*, Sec. 294.

¹⁴ *Bush v. Bush*, 5 Del. ch. 144.

¹⁵ 1 Washburn on Real Prop. 198; *Co. Lit.* 37 b; *Duncomb v. Duncomb*, 3 Lev. 437; *Maybury v. Brien*, 15 Pet. 21; *Babbitt v. Day*, 41 N. J. Eq. 392. See *post*, Secs. 176, 179.

the same reason have dower in lands, which her husband holds in joint tenancy, until the tenancy has been terminated by partition or by the death of the other tenant.¹⁵ But the estate of a tenant in common is subject to dower; the dower attaches to the husband's undivided interest in the land before partition, and afterwards to the share set out to him.¹⁶

~~Estates held by a partnership for partnership purposes are also subject to dower; but the dower is subordinate to the demands that might be made by partnership creditors against the partnership property.~~¹⁷ In Michigan it is provided by statute that the wives of non-resident landowners cannot

¹⁶ 1 Washburn on Real Prop. 199; Reynard v. Spence, 4 Beav. 103; Potter v. Wheeler, 13 Mass. 504; Totten v. Stuyvesant, 3 Edw. Ch. 500; Wilkinson v. Parish, 3 Paige 653; Lloyd v. Conover, 25 N. J. L. 48; Baker v. Leibert, 125 Pa. St. 106. In Iowa, the wife's dower is barred by partition in consequence of a statute which confines her dower to estates which "had not been sold on execution or on any other judicial sale." Williams v. Wescott, 77 Iowa 332.

¹⁷ Burnside v. Merrick, 4 Metc. 537; Dyer v. Clark, 5 Metc. 562; Smith v. Jackson, 2 Edw. Ch. 28; Coster v. Clark, 3 Edw. Ch. 428; Hawley v. James, 5 Paige 451; Goodburn v. Stevens, 1 Md. Ch. 437; Pierce v. Trigg, 10 Leigh 406; Sumner v. Hampson, 8 Harr. 328; Woolridge v. Wilkins, 3 How. (Miss.) 372; Bopp v. Fox, 63 Ill. 540; Duhring v. Duhring, 20 Mo. 174. But in order that the claims of the creditors may take precedence to the widow's dower in respect to the land held by two or more, the land must be in truth the property of the partnership. The character of their joint estate is determined entirely by their intention, and it is possible for partners to hold real estate as tenants in common, without its becoming partnership property. In such a case, the widow takes her dower free from the claims of creditors. Wheatley v. Calhoun, 12 Leigh 264; Markham v. Merrett, 8 How. (Miss.) 437; Hale v. Plummer, 6 Ind. 121. There is no dower in partnership realty, until all creditors are paid and partners' equities are adjusted. Hauptmann v. Hauptmann, 86 N. Y. S. 427, 91 App. Div. 197; Riddell v. Riddell, 85 Hun. 482, 33 N. Y. 99; Woodward-Homes Co. v. Mudd, 27 L. R. A. 340; Holten v. Guinn, 95 Fed. Rep. 450; Welch v. McKenzie, 66 Ark. 251, 50 S. W. Rep. 505; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. Rep. 347; Davidson v. Richmond, 69 S. W. Rep. 794; Sparger v. Moore, 117 N. C. 449, 23 S. E. Rep. 359. The wife is not endowed, in Michigan, as to land deeded to a third party, under contract of purchase, to guarantee payment of the purchase price.

claim dower in lands which they have sold and conveyed during their non-residence.¹⁸

§ 87. *Dower in equitable estates.*—According to the early English law there was no dower in equitable estates, and the Statute of Uses expressly excepted the estates executed by it from the claims of dower.¹⁹ But at present, in England, and generally in this country, the widow is entitled to dower in all classes of equitable, as well as legal estates.²⁰ In the same manner now, she has dower in the husband's equity of redemption, which gives her the right of one, who is in-

Stephens v. Leonard, 80 N. W. Rep. 1002. See, also, *Kager v. Brenneman*, 62 N. Y. S. 339, 47 App. Div. 63; *Hendrickson v. Grable*, 157 Mo. 42, 57 S. W. Rep. 784.

¹⁸ *Bear v. Stahl*, 61 Mich. 203. An alien widow of a resident land-owner was held entitled to dower, in Missouri. *Stokes v. O'Fallasey*, 2 Mo. 32. See also, *Davis v. Darrow*, 12 Wend. (N. Y.) 65.

¹⁹ 1 Washburn on Real Prop. 202, 203; 4 Kent's Com. 43; 1 Spence Eq. Jur. 501; *Dixon v. Saville*, 1 Bro. C. C. 326; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Maybury v. Brien*, 15 Pet. 38; *Hamlin v. Hamlin*, 19 Me. 141.

²⁰ *Hawley v. James*, 5 Paige 318; *Dubs v. Dubs*, 31 Pa. St. 151; *Shoemaker v. Walker*, 2 Serg. & R. 554; *Rowton v. Rowton*, 1 Hen. & M. 92; *Thompson v. Thompson*, 1 Jones (N. C.) Eq. 430; *Dawson v. Morton*, 6 Dana 471, 3 Stew. & P. 447; *Clapp v. Galloway*, 56 Mich. 272. *Contra*, *Hamlin v. Hamlin*, 19 Me. 141; *Stelle v. Carroll*, 12 Pet. 201. In Iowa, a widow is not dowable in lands held by her husband under a preëmption right. *Bowers v. Keesecker*, 14 Iowa 301. But in several of the States it has been held that the widow has dower in lands which her husband had contracted to purchase, where he died before the deed was delivered. *Church v. Church*, 3 Sandf. Ch. 434; *Smiley v. Wright*, 2 Ohio 512; *Robinson v. Miller*, 1 B. Mon. 93; *Davenport v. Farrar*, 2 Ill. 314; *Reed v. Whitney*, 7 Gray 533; *Lobdell v. Hayes*, 4 Allen 187; *Joseph v. Fisher*, 122 Ind. 399; *Young v. Young*, 45 N. J. Eq. 27; *Bowen v. Brockenbrough*, 119 Ind. 560; see *contra*, *Morgan v. Smith*, 25 S. C. 337; *Morgan v. Wright*, 25 S. C. 601. But if the contract of sale rests upon a condition precedent, which was not performed by the husband, the wife's dower does not attach. *Walters v. Walters* (Ill.), 23 N. E. Rep. 1120; *Beebe v. Lyle*, 73 Mich. 114. In some of the States the old English rule still prevails, that dower cannot be had in equitable estates. See cases cited *supra*.

terested in the mortgaged property, subject to the mortgage.²¹

§ 88. Dower in lands of trustee.— The wife has no dower in lands which her husband holds as trustee, except so far as he may at the same time have an equitable interest therein. And this rule is applied to every kind of trust, whether express or implied, as for example, where the husband, be-

²¹ *Smith v. Eustis*, 7 Me. 41; *Young v. Tarbell*, 37 Me. 509; *Moore v. Esty*, 5 N. H. 479; *Eaton v. Simonds*, 14 Pick. 98; *Fay v. Cheney*, 14 Pick. 399; *Farwell v. Cotting*, 8 Allen 211; *Savage v. Dooley*, 28 Conn. 411; *Hitchcock v. Harrington*, 6 Johns. 290; *Jackson v. Dewitt*, 6 Cow. 316; *Collins v. Torrey*, 7 Johns. 278; *Montgomery v. Bruere*, 5 N. J. L. 265; *Stoppelbein v. Shulte*, 1 Hill (S. C.), 200; *Heth v. Cocke*, 1 Rand. 344; *McIver v. Cherry*, 8 Humph. 712; *Whitehead v. Middleton*, 2 How. (Miss.) 692; *Taylor v. Fowler*, 18 Ohio 567; *Taylor v. McCrackin*, 2 Blackf. 262; *Mayburg v. Brien*, 15 Pet. 38; *Burrall v. Hurd*, 61 Mich. 608; *Burrall v. Clark*, 61 Mich. 624; *N. Y. Life Ins. Co. v. Mayer*, 14 Daly 318; *Mandell v. McClave*, 46 Ohio St. 407; *Burnet v. Burnet* (N. J.), 18 Atl. Rep. 374. See *contra*, *In re Thompson's Estate*, 6 Mackey 536. If the mortgage is foreclosed, her right of dower is defeated. *Stow v. Tift*, 15 Johns. 458; *Frost v. Peacock*, 4 Edw. Ch. 678; *Reed v. Morrison*, 12 Serg. & R. 18; *Elder v. Robbin*, 122 Ind. 203; *Seibert v. Todd*, 31 S. C. 206. On the other hand, if the mortgage is satisfied by one who is under a primary liability to pay it off, the dower right attaches to the property free from the mortgage; but if the heir or purchaser pays the mortgage to prevent foreclosure, in order that the widow may claim a proportionate benefit from the satisfaction of the mortgage, she must contribute her share towards the expenses. *Smith v. Stephens*, 164 Mo. 415, 64 S. W. Rep. 260; *Hatch v. Palmer*, 58 Me. 292; *Simonton v. Gray*, 34 Me. 50; *Hinds v. Ballou*, 44 N. H. 619; *Ballard v. Bowers*, 10 N. H. 500; *McCade v. Swap*, 14 Allen 118; *Toomey v. McLean*, 105 Mass 122; *Wedge v. Moore*, 6 Cush. 8; *Collins v. Torrey*, 7 Johns. 278; *Coats v. Cheever*, 1 Cow. 400; *Hitchcock v. Harrington*, 6 Johns. 200; *Matthewson v. Smith*, 1 R. I. 22; *Klinck v. Keckley*, 2 Hill Ch. 250; *Carter v. Goodin*, 3 Ohio St. 75; *Bank of Commerce v. Owens*, 31 Md. 320, 1 Am. Rep. 60; *Noffts v. Ross*, 29 Ill. Bpp. 301; *Everson v. McMullen*, 113 N. Y. 293. Where the dower right is subject to the mortgage, and the mortgagee is in possession, the action for dower cannot be instituted until the mortgage has been redeemed. A suit for redemption must precede the assignment of dower. *Smith v. Eustis*, 7 Me. 41; *Richardson v. Skolfield*, 45 Me. 386; *Cass v. Martin*, 6 N. H. 25; *Van Dayne v. Thayer*, 14 Wend. 233.

fore marriage, has entered into a contract for the sale of the land.²²

§ 89. Dower in mortgage.—The ~~mortgagee's wife has no dower in the mortgaged premises until foreclosure.~~ This is true both in law and equity; under the common law, as well as under the modern lien theory of mortgages.²³ And this is true, although the deed of conveyance, which was delivered as a mortgage, appears on its face to be an absolute conveyance. The judgment of the court that this deed was a mortgage would bar the wife's dower, although she was not made a party to the action.²⁴

§ 90. Dower in proceeds of sale.—Whenever it is necessary for the settlement of varied interests in lands, of which she is dowerable, that the lands should be sold, her dower right will follow and attach to the share in the proceeds of the sale, to which her husband would have been entitled. This is generally true, for whatever cause the land might have been sold.²⁵ But it has been held that she is not entitled to dower

²² 4 Kent's Com. 43, 46; *Coster v. Clarke*, 4 Edw. Ch. 429; *Prescott v. Walker*, 16 N. H. 343; *Hopkinson v. Dumas*, 42 N. H. 303; *Brooks v. Everett*, 13 Allen 458; *Dean v. Mitchell*, 4 J. J. Marsh 475; *Cooper v. Whitney*, 3 Hill 97; *Cowman v. Hall*, 3 Gill & J. 398; *Bartlett v. Gouge*, 5 B. Mon. 152; *Robinson v. Codman*, 1 Sumn. 129; *Brown v. Cave*, 23 S. C. 251; *Walker v. Rand* (Ill.), 22 N. E. Rep. 1006; *Hunkins v. Hunkins* (N. H.), 18 Atl. Rep. 655. A wife acquires no right of dower in lands, held by her husband, as trustee only. *Miller v. Miller*, 148 Mo. 13, 49 S. W. Rep. 852. See also, *Park Dower*, 100.

²³ 4 Kent's Com. 43; 1 Washburn on Real Prop. 204; *Foster v. Dwinel*, 49 Me. 44; *Crittenden v. Johnson*, 6 Eng. (Ark.) 44.

²⁴ *Lea v. Woods*, 66 Iowa 304. A widow endowed of mortgaged land, in Missouri, is chargeable with that proportion of the mortgaged land, which her dower would bear to the whole mortgaged tract. *Smith v. Stephens*, 164 Mo. 415, 64 S. W. Rep. 260.

²⁵ *Jennison v. Hapgood*, 14 Pick. 345; *Van Vronker v. Eastman*, 7 Metc. 157; *Hawley v. Bradford*, 9 Paige 200; *Titus v. Neilson*, 5 Johns. Ch. 452; *Church v. Church*, 3 Sandf. Ch. 434; *Smith v. Jackson*, 3 Edw. Ch. 28; *Bank of Commerce v. Owens*, 31 Md. 320, s. c. 1 Am. Rep. 60; *Keith v. Trapier*, 1 Bailey Eq. 63; *Pifer v. Ward*, 8 Blackf. 252; *Harts-*

in the surplus of the proceeds of sale of the land in foreclosure of a mortgage in which she has renounced her dower. That is, she is not entitled to a share in such surplus, where the foreclosure and sale took place during the life of her husband.²⁶ The sale must in any case be had at the instance of some third party, in order that the widow may make claim to her share in the proceeds. She has not the right to take the initiative in procuring the sale of the land. The creditors or other claimants against the land must do that.²⁷ If, however, the widow's dower has precedence over the claims of those who are demanding a sale of the lands, she may refuse to take a share of the proceeds of sale in the place of her dower, and in that case her dower must be assigned to her of common right, before the land is offered for sale in satisfaction of the claims of the other.²⁸ But if the widow permits the land to be sold pending an appeal from an order, adjudging her not entitled to dower in the land, the title of the purchaser under order of the court remains unaffected by a reversal of a decree of the court below, and the widow's dower right is transferred from the land to the proceeds of sale.²⁹

§ 91. **Seisin required in the husband during coverture.**—In order that the dower can attach, the husband must be seised of an estate of inheritance during coverture. But for

horne v. Hartshorne, 2 N. J. Eq. 349; *Naxareth Inst. v. Lowe*, 1 B. Mon. 257; *Willett v. Beatty*, 12 B. Mon. 172; *Crane v. Palmer*, 8 Blackf. 120; *Chaney v. Chaney*, 38 Ala. 35; *Bonner v. Peterson*, 43 Ill. 258; *Thompson v. Cochran*, 7 Humph. 72; *Williams v. Woods*, Humph. 408; *Schmitt v. Willis*, 40 N. J. Eq. 515; *N. Y. Life Ins. Co. v. Mayer*, 14 Daly 318. But see *Newhall v. Five Cents Savings Bank*, 101 Mass. 428, 3 Am. Rep. 387.

²⁶ *Genobles v. West*, 23 S. C. 154; see *contra* *N. Y. Life Ins. Co. v. Mayer*, 14 Daly 318; see *Kauffman v. Peacock*, 115 Ill. 212.

²⁷ *Hull v. Hull*, 26 W. Va. 1.

²⁸ *Kilbreth v. Root's Adm'r*, 33 W. Va. 600; *Hart v. Burch*, 130 Ill. 426.

²⁹ *Jeffries v. Allen* (S. C.), 10 S. E. Rep. 764.

this purpose it is not necessary that the husband should have the actual corporeal seisin. [Seisin in law, with a present right to actual seisin, would be sufficient.³⁰] But disseisin, resulting from adverse possession or from any other cause beginning before, and continuing during, coverture, will prevent dower from attaching. The dower can only take effect when the seisin has been recovered by the husband during coverture.³¹ A mere right of entry, as in the case of the breach of the condition in an estate upon condition, is not sufficient.³²

§ 92. Continued — Defeasible or determinable seisin.— Possession by the husband, of the premises, is *prima facie* evidence of lawful seisin, although it may be defeasible. As long as possession is retained and except as against the true owner, the widow is entitled to dower in the same manner as if the seisin had been lawful and indefeasible. And the rule is the same with qualified or determinable fees. [The widow's dower attaches subject to all the conditions which are attached to the husband's estate, and is destroyed only by the determination of the fee in the hands of the husband or his assigns.³³ ~~Nor, in the case of an unlawful ex-~~

³⁰ 2 Bla. Com. 129, 131; Co. Lit. 31 a; Mann v. Edson, 39 Me. 25; Atwood v. Atwood, 22 Pick. 283; Dunham v. Osborne, 1 Paige 635; Thompson v. Thompson, 10 Ired. 133; McIntyre v. Costelle, 47 Hun 289; Park Dower, 24; Scribner Dower, 265. No seisin or possession is essential in the husband, to endow the wife in his lands, in Missouri, by statute. Bartlett v. Tinsley, 175 Mo. 319, 75 S. W. Rep. 143. See also, Thomas v. Thomas, 32 N. C. 123; Barnes v. Roper, 90 N. C. 189.

³¹ 1 Washburn on Real Prop. 216; Small v. Proctor, 15 Mass. 495; Thompson v. Thompson, 1 Jones (N. C.) 431.

³² Thompson v. Thompson, 1 Jones (N. C.) 431; 1 Washburn on Real Prop. 216.

³³ 1 Washburn on Real Prop. 218; Co. Lit. 241, note 4; Lewis v. Meserve, 61 Me. 374; Mann v. Edson, 39 Me. 25; Knight v. Mains, 12 Me. 41; Moore v. Esty, 5 N. H. 479; Carpenter v. Weeks, 2 Hill 341; Griggs v. Smith, 12 N. J. L. 22; Thompson v. Thompson, 1 Jones (N. C.) 431; Torrance v. Carbey, 27 Miss. 697; Firestone v. Firestone, 2 Ohio St. 415; Gordon v. Dickinson (Ill.), 23 N. E. Rep. 439; Beck-

defeasible seisin, can the wife's claim for dower be resisted by the claim of the husband's grantee that he had no lawful seisin, unless the same defense could be raised by the same parties against the husband.²⁴

§ 93. Duration of the seisin.— No length of time is required for the seisin to be in the husband, in order that the wife's right of dower may attach, provided it is in him for his own use and benefit. The vesting of the seisin in law in him for an instant of time is sufficient.²⁵

§ 94. Instantaneous seisin.— But if the seisin in the husband is instantaneous, and it was not intended that he should acquire the beneficial interest therein, and he serves only as a means of passing the seisin to another, the wife will not be entitled to dower. Not the duration, but the character and purposes of the seisin, determine the wife's right of dower therein. It, therefore, does not matter whether the transactions, which effect a conveyance of the seisin through the husband, are instantaneous, or are separate in point of time of execution, provided the subsequent conveyance out of the husband is in pursuance of an agree-

with *v. Beckwith*, 61 Mich. 316; *Burrall v. Hurd*, 61 Mich. 608; *Burrall v. Clark*, 61 Mich. 624; *Lake v. Nolan* (Mich.), 45 N. W. Rep. 376.

²⁴ *Kimball v. Kimball*, 2 Me. 226; *Bolster v. Cushman*, 34 Me. 428; *Hitchcock v. Carpenter*, 9 Johns. 344; *Bancroft v. White*, 1 Cains 185; *Ward v. Fuller*, 15 Pick. 185; *Osterhout v. Shoemaker*, 3 Hill 419; *Hale v. Munn*, 4 Gray 132; *Browne v. Potter*, 17 Wend. 164; *Thompson v. Boyd*, 2 N. J. L. 543; *Gammon v. Freeman*, 31 Me. 243; *Wedge v. Moore*, 6 Cush. 8; *Pledger v. Ellerbe*, 6 Rich. L. 266; *Gale v. Price*, 5 Rich. 525; *Griffith v. Griffith*, 5 Harr. 5; *Montgomery v. Bruere*, 5 N. J. L. 265; *Hugley v. Gregg*, 4 Dana 68; *May v. Tillman*, 1 Mich. 262; *Crittenden v. Woodruff*, 6 Eng. (Ark.) 82; *Taylor's Case*, 9 Johns. 293; *Douglas v. Dickson*, 11 Rich. L. 417; *Stimpson v. Thomaston Bk.*, 28 Me. 259; *Stark v. Hopson*, 30 S. C. 370.

²⁵ 2 Bla. Com. 182; 1 Washburn on Real Prop. 218, 219; *Broughton v. Randall*, Cro. Eliz. 503; *Gage v. Ward*, 25 Me. 101; *McCauley v. Grimes*, 2 Gill & J. 318; *Douglass v. Dickson*, 11 Rich. L. 417; *McClure v. Harris*, 12 B. Mon. 291; *McIntyre v. Costello*, 47 Hun 289.

ment forming a part of the original transaction; in both cases the wife will not have dower.³⁶ The most common instance of instantaneous seisin, without attachment of dower thereto, is a conveyance of lands to the husband with a mortgage for purchase money to the grantor, executed at the same time, or subsequently, in pursuance of a contemporaneous agreement.³⁷

§ 95. Marriage must be legal.—Like estates by the curtesy, the wife has dower only when the marriage is a legal one. If the marriage is absolutely void, she has no claim for dower; but if it is only voidable, she has dower, unless the marriage has been declared void during the lifetime of the

³⁶ 2 Bla. Com. 132; 1 Washburn on Real Prop. 219, 223; *Maybury v. Brien*, 15 Pet. 39; *Moore v. Rollins*, 45 Me. 494; *Hazelton v. Lesure*, 9 Allen 24; *King v. Stetson*, 11 Allen 408; *Hinds v. Ballou*, 44 N. H. 620; *Stow v. Tift*, 15 Johns. 462; *Kittle v. Van Dyck*, 1 Sandf. Ch. 76; *McCauley v. Grimes*, 2 Gill & J. 318; *Wooldridge v. Wilkins*, 3 How. (Mass.) 369; *Mills v. Van Voorhis*, 23 Barb. 135; *Griggs v. Smith*, 12 N. J. L. 22; *Wheatley v. Calhoun*, 12 Leigh 262; *Reed v. Morrison*, 12 Serg. & R. 18; *Dimond v. Billingslea*, 2 Har. & G. 264; *Klinck v. Keckelely*, 2 Hill Ch. 250; *Boynton v. Sawyer*, 35 Ala. 497; *Stevens v. Smith*, 4 J. J. Marsh. 64; *Gully v. Ray*, 18 B. Mon. 107; *Stephens v. Leonard*, 80 N. W. Rep. 1002; *Kager v. Brenneman*, 62 N. Y. S. 339, 47 App. Div. 63; *Hendrickson v. Grable*, 157 Mo. 42, 57 S. W. Rep. 784.

³⁷ *Bullard v. Bowers*, 10 N. H. 500; *Moore v. Rollins*, 45 Me. 493; *Young v. Tarbell*, 37 Me. 509; *Strong v. Converse*, 8 Allen 559; *Hinds v. Ballou*, 44 N. H. 620; *Stow v. Tift*, 15 Johns. 462; *Mills v. Van Voorhis*, 23 Barb. 125; *Reed v. Morrison*, 12 Serg. & R. 18; *Bogie v. Rutledge*, 1 Bay 312; *Henagon v. Harilee*, 10 Rich. Eq. 285; *Chase's Case*, 1 Bland. 206; *McClure v. Harris*, 12 B. Mon. 261; *Klinck v. Keckley*, 2 Hill Ch. 250; *Sheldon v. Hofnagle*, 51 Hun 478; *Stewart v. Smith*, 36 Minn. 82. And in the same manner, in those States where the vendor's lien for the purchase-money is recognized, the widow of the purchaser takes her dower subject to the lien. *Huginin v. Cochrane*, 51 Ill. 302, 2 Am. Rep. 303; *Warner v. Van Alstyne*, 3 Paige 513; *Ellicott v. Welch*, 2 Bland. 242; *Miller v. Stump*, 3 Gill, 304; *McClure v. Harris*, 12 B. Mon. 261; *Crane v. Palmer*, 8 Blackf. 120; *Thompson v. Cochrane*, 7 Humph. 72; *Stephens v. Leonard*, 80 N. W. Rep. 1002; *Hendrickson v. Grable*, 157 Mo. 42, 57 S. W. Rep. 784.

husband.³⁸ In determining the legality of the marriage in questions of dower, as a general rule, the question will be determined by the *lex loci contractus*, and not by the *lex loci rei sitæ*.³⁹

§ 96. How dower may be lost or barred — By act of the husband.— At common law the husband could not, by any act during coverture, defeat the wife's right of dower, or prevent its attachment to the property by having inserted in the deed to himself a clause, to the effect that the land should be held by him free from the claim of dower,⁴⁰ not even where the land is mortgaged during the pendency of an action for divorce, and where the mortgage was given to secure the alimony which had been decreed to the wife.⁴¹ Nor can the wife's dower be defeated by a secret conveyance of the property by the husband before and on the eve of the marriage.⁴² But an exception was made in equity in respect to the equitable interest the husband, as vendee under the theory of implied trusts, acquires in the land under the contract of sale, and before the delivery of the deed; whereby a release of his right to specific performance will bar her right of dower therein.⁴³ And in a number of the States it is now provided

³⁸ 2 Bla. Com. 130; Co. Lit. 33 a; Bishop's Mar. & Div., Sec. 177. See *Jenkins v. Jenkins*, 2 Dana 102; *Donnelly v. Donnelly*, 8 B. Mon. 113; *Higgins v. Breen*, 9 Mo. 497; *DeFrance v. Johnson*, 26 Fed. Rep. 891. A marriage between uncle and niece, being inhibited by statute the niece cannot take dower thereunder. *McIlvain v. Scheibley* (Ky.), 59 S. W. Rep. 498.

³⁹ *Smith v. Smith*, 52 N. J. L. 207.

⁴⁰ 1 Washburn on Real Prop. 244, 255; *Swaine v. Perine*, 5 Johns. Ch. 482; *Norwood v. Marrow*, 4 Dev. & B. 442; *Runke v. Hanna*, 6 Ind. 20. And not even will the destruction of the deed before recording defeat the wife's dower in the estate, as against those who have notice. *Johnson v. Miller*, 40 Ind. 376, 17 Am. Rep. 699.

⁴¹ *Rea v. Rea*, 63 Mich. 257.

⁴² *Jones v. Jones*, 64 Wis. 301; *Lake v. Nolan* (Mich.), 45 N. W. Rep. 376.

⁴³ *Herron v. Williamson*, Litt. Sel. Cas. 250; 1 Washburn on Real Prop. 224, 225. And this is also the case, where the husband causes the

92 husband
sells land during
coverture and spends
proceeds,
widow dower?

by statute that the widow shall be dowerable only in the lands of which her husband dies seised. Under these statutes a *bona fide* conveyance by the husband during coverture will defeat his wife's dower, as effectually, as under similar statutes the wife may by conveyance during coverture defeat the husband's right of curtesy.⁴⁴

§ 97. Continued — By wife's release during coverture.—

The wife has, however, always had the power to bar her right of dower by joining with her husband in the conveyance of the land. Formerly, in England, it was barred by means of fines and recoveries.⁴⁵ But now, in England, and in this country generally, it is regulated by statute, and by joining in the deed of the husband in the manner prescribed by statute, she may release her dower. The requisites of the deed and of her acknowledgment of its execution vary with the terms of each statute.⁴⁶ But whatever might be the statutory

deed to be made to a third party instead of himself. *Lobdell v. Hayes*, 4 Allen 187; *Steele v. Magie*, 48 Ill. 396; *Heed v. Ford*, 16 B. M. 114; *Gully v. Ray*, 18 B. Mon. 107; *Welsh v. Buckings*, 9 Ohio St. 331; *Blake-ney v. Ferguson*, 20 Ark. 547. But if the contract of sale has been performed by the husband, and nothing more is to be done than to execute and deliver the deed, and the husband then dies, as has been already stated, the widow has dower in the premises, and can enforce it against the vendor. See *ante*, Sec. 87, note.

⁴⁴ *Jenny v. Jenny*, 24 Vt. 324; *McGee v. McGee*, 4 Ired. 105; *Brewer v. Connell*, 11 Humph. 500; 1 Washburn on Real Prop. 268, note. See *Atkins v. Atkins*, 18 Neb. 474. On setting aside a fraudulent conveyance made by the husband the wife's dower interest attaches to such land. *Bradshaw v. Halpin*, 180 Mo. 666, 79 S. W. Rep. 685. The husband's contract of sale does not effect the wife's dower right, as she could only be affected, by a joinder in such contract. *Rankin v. Rankin*, 111 Ill. App. 403.

⁴⁵ 1 Washburn on Real Prop. 245; 2 Bla. Com. 137.

⁴⁶ *Williams on Real Prop.* 230, 452; 1 Washburn on Real Prop. 245, 249. The wife must be of age. *Adams v. Palmer*, 51 Me. 488; *Cunningham v. Knight*, 1 Barb. 399; *Priest v. Cummings*, 16 Wend. 617, s. c. 20 Wend. 338; *Thomas v. Gammel*, 6 Leigh 9; *Jones v. Todd*, 2 J. J. Marsh. 359; *Cason v. Hubbard*, 38 Miss. 46; *Hoyt v. Swar*, 53 Ill. 139; *Hughes v. Watson*, 10 Ohio 127. Generally she must renounce the dower in the

requirements, they must be strictly complied with, otherwise the dower still exists.⁴⁷

She must, of course, have the mental capacity to understand what she is doing. If she is insane her renunciation of dower is a nullity, it matters not how strictly the provisions of the statute may have been complied with.⁴⁸ In Kentucky a stat-

same deed in which her husband conveys the land. *Shaw v. Russ*, 14 Me. 432; *Powell v. Monson*, 2 Mason 353; *Moore v. Tisdale*, 5 B. Mon. 352; *Atkinson v. Taylor*, 34 Mo. App. 442; *Grant v. Jackson*, 5 Del. Ch. 404. Execution of the deed by the husband's attorney, with the wife, is sufficient. *Fowler v. Shearer*, 7 Mass. 14; *Glenn v. Bank of United States*, 8 Ohio 72. The deed of renunciation must also be sealed. *Manning v. Laboree*, 33 Me. 343; *Keeler v. Tatnell*, 3 N. J. 62. And where the defect in the acknowledgment of the renunciation of dower does not appear upon the deed, the deed cannot be avoided for that purpose after the land has passed to a subsequent purchaser without notice. *Shivers v. Simmons*, 64 Miss. 530, 28 Am. Rep. 372. So, also, where the renunciation has been obtained through the fraud or undue influence of the husband, it cannot be avoided, unless the purchaser had actual or constructive notice of it. *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634. And a mistake in the certificate of acknowledgment cannot be subsequently amended, unless the mistake relates to an unimportant fact. *Angler v. Shieffelin*, 72 Pa. St. 106, 13 Am. Rep. 659; *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128.

⁴⁷ *Elwood v. Klock*, 13 Barb. 50; *Kirk v. Dean*, 2 Binn. 341; *Lewis v. Coxe*, 5 Harr. 402; *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76; *Scanlan v. Turner*, 1 Bailey 421; *Rogers v. Woody*, 23 Mo. 548; *Clark v. Redman*, 1 Blackf. 379; *Stevenson v. Brasher* (Ky.), 13 S. W. Rep. 242. In Texas, it is held that a substantial compliance with the requirements of the statute is sufficient. *Belcher v. Weaver*, 46 Texas 293, s. c. 26 Am. Rep. 267. See also, *Morris v. Sargent*, 18 Iowa 99; *Johnson v. Parker*, 51 Ark. 419. Joinder of wife, in deed of husband, bars dower, in New Jersey. *Goodheart v. Goodheart*, 63 N. J. Eq. 746, 53 Atl. Rep. 135; also, in Arkansas, *Dutton v. Stuart*, 41 Ark. 101; and in Ohio, *Smith v. Handy*, 16 Ohio 191. Joinder in deed of husband, bars wife's dower, in Missouri. *Bush v. Piersol*, 183 Mo. 500, 81 S. W. Rep. 1224. But where joinder is conditional, on payment of annuity, no bar results, unless condition is fulfilled. *Brown v. Tilley*, 25 R. I. 579, 57 Atl. Rep. 380.

⁴⁸ *Rannells v. Isgrigg*, 90 Mo. 19; *Rannells v. Gerner*, 80 Mo. 474.

ute authorizes the sale of a wife's inchoate dower, when she is insane, by order of court, and by a deed, in the execution of which the guardian or committee of the insane woman joins with the husband, provision being made to set apart for her, out of the purchase money, the value of such dower, to be claimed by her whenever the dower becomes consummate.⁴⁹

Since the dower is extinguished by a release in conjunction with the husband's deed, and operates as an estoppel rather than as a grant, the dower is only extinguished as against those who claim the land under the deed. If, therefore, the deed is void for some cause, whether it be fraud, accident, or mistake, as where the husband's act is void as against his creditors, her dower right would be revived and could be enforced against all other parties.⁵⁰ And if the wife has herself received value for the renunciation of dower, she will not have to return such consideration before recovering her dower, when the deed of conveyance or renunciation is invalid for any cause.⁵¹ But the wife can only release her dower to her husband's grantee. She cannot by any independent act release her right during coverture to a stranger laying claim

⁴⁹ *Fichtner v. Fichtner's Assignee* (Ky.), 11 S. W. Rep. 85.

⁵⁰ *Harsiman v. Gray*, 49 Me. 537; *Richardson v. Wyman*, 62 Me. 280, 16 Am. Rep. 459; *Robinson v. Bates*, 3 Metc. 40; *Manhattan Co. v. Evertson*, 6 Paige 457; *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Ridgway v. Masting*, 23 Ohio St. 294, 13 Am. Rep. 251; *Woodworth v. Paige*, 5 Ohio St. 70; *Pinson v. Williams*, 23 Miss. 64; *Nickell v. Tomlinson*, 27 W. Va. 597; *Smith v. Howell* (Ark.), 13 S. W. Rep. 929; *Bohannon v. Combs*, 97 Mo. 446. But in Illinois it was held, that if the deed is avoided by not being properly recorded, she could not reclaim her dower. *Morton v. Noble*, 57 Ill. 176, 11 Am. Rep. 7. It is doubtful if this may be accepted as a universally recognized exception. From the rule laid down in the text, which is fully supported by the cases cited, and by reason, the judgment in the Illinois case should have been in favor of the widow. See *contra Stowe v. Steele*, 114 Ill. 382. No estoppel can result against the wife during the husband's life, as her right to dower is then an inchoate right only. *Beeman v. Kitzman* (Iowa 1904), 99 N. W. Rep. 171.

⁵¹ *Bottomly v. Spencer*, 36 Fed. Rep. 732.

to the land, or to her husband,⁵² nor to a purchaser at a sale in partition, until the transaction has become complete by a judicial confirmation of the sale.⁵³ She may, however, relinquish her dower to her husband's grantee by a subsequent deed in which her husband does not join, if he has previously conveyed his interest by a valid deed.⁵⁴

§ 98. Continued — By elopement and divorce.— Under the early statute of Westminster, 13 Edw. I, ch. 34, which is generally received in this country as part of the common law, if a wife elopes with another man and commits adultery with him, she is deprived of her dower.⁵⁵ The forfeiture is more in the nature of a suspension than an absolute extinguishment, unless such elopement and adultery is followed by a divorce.⁵⁶ The divorce not only bars her dower right in the

⁵² Rowe v. Hamilton, 3 Me. 63; Croade v. Ingraham, 13 Pick. 33; Carson v. Murray, 3 Paige 483; Martin v. Martin, 22 Ala. 104; Mason v. Mason, 140 Mass. 63; Wright v. Wright (Mich.), 44 N. W. Rep. 944.

⁵³ Hart v. Burch, 130 Ill. 426.

⁵⁴ Irving v. Campbell, 56 N. Y. Super. Ct. 224.

⁵⁵ 4 Kent's Com. 53; 1 Washburn on Real Prop. 242, 243, 309, note. See Elder v. Riel, 62 Pa. St. 308, 1 Am. Rep. 414; Stegall v. Stegall, 2 Brocken 256; Walters v. Jordan, 13 Ired. 361; Bell v. Nealy, 1 Bailey 312; Lecompte v. Wash, 9 Mo. 551. In Massachusetts, it has been held that the statute is not recognized. Lakin v. Lakin, 2 Allen 45.

⁵⁶ Divorce is not necessary to bar her dower at common law. 1 Washburn on Real Prop. 242. But by statute it is now provided in some of the States that elopement and adultery without divorce is no bar. Bryan v. Batchelder, 6 R. I. 543; Reynolds v. Reynolds, 24 Wend. 193; Pitts v. Pitts, 52 N. Y. 593; Rawlins v. Buttel, 1 Houst. 224. See 1 Washburn on Real Prop. 309, note. Dower was barred by divorce, a *vinculo*, at common law. Barrett v. Failing, 111 U. S. 523, 28 L. Ed. 505; Wood v. Wood, 59 Ark. 441, 27 S. W. Rep. 641, 28 L. R. A. 157; Pullen v. Pullen, 52 N. J. Eq. 9, 28 Atl. Rep. 719; Price v. Price, 124 N. Y. 589, 27 N. E. Rep. 383, 12 L. R. A. 359; Allen v. Austin, 21 R. I. 254, 43 Atl. Rep. 69; Norton v. Tufts, 19 Utah 471, 57 Pac. Rep. 409. Elopement, divorce and adultery, are all held to bar dower, in the following late cases. Philipps v. Wiseman, 131 N. C. 402, 42 S. E. Rep. 861; Beatty v. Richardson, 56 S. C. 173, 34 S. E. Rep. 73, 46 L. R. A. 517; Nichols v. Park, 79 N. Y. S. 547, 78 App. Div. 95; Wilson v. Craig, 175 Mo. 362, 75 S. W. Rep. 419; McQuinn v. McQuinn (Ky.), 61

lands of which her husband is seised at the time of the divorce, but also in those lands which he had previously conveyed away without her renunciation of dower.⁵⁷ If the parties are not subsequently divorced, her dower right is revived, if she returns to her husband and is received by him and accorded a full forgiveness. She has dower in the case of a reconciliation and condonement, not only in the lands which he possessed before her elopement, but also in those which he has acquired and sold subsequently.⁵⁸ The commission of adultery, while living apart from her husband, whatever may have been the cause of the separation, will also be a bar.⁵⁹ But a separation of some kind must have taken place, in order that her adultery might work a forfeiture of the dower; adultery in her own and husband's house will not be a bar.⁶⁰ So, on the other hand, mere desertion on the part of the wife, unless complicated by adultery, is no bar to dower.⁶¹ It is necessary to support the claim to dower, that the widow should be the wife of the husband at his decease. If, therefore, they have been absolutely divorced, from whatever cause, for his as well as her fault, her dower right would be extinguished, unless the statutes of the different States, providing for divorces, contain a saving clause, giving the innocently divorced wife the right to enjoy her dower, as if she

S. W. Rep. 358. Where a decree of divorce is silent as to a widow's right to dower, it does not bar her interest, in Illinois. *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144, 64 N. E. Rep. 267.

⁵⁷ *McKean v. Brown*, 83 Ky. 208.

⁵⁸ Co. Lit. 23 a, note 8; 1 Washburn on Real Prop. 242, 243. But he is not bound to take her back again. *Govier v. Hancock*, 6 T. R. 603.

⁵⁹ 1 Washburn on Real Prop. 243; *Hethrington v. Graham*, 6 Bing. 135; *Coggswell v. Tibbetts*, 3 N. H. 41; *Goss v. Froman* (Ky.), 12 S. W. Rep. 387. But she does not lose her dower, if she commits adultery, under the mistaken belief that her prior husband was dead. 1 Washburn on Real Prop. 243; 1 Cruise Dig. 175, 176.

⁶⁰ *Coggswell v. Tibbetts*, 3 N. H. 41; *Elder v. Reed*, 62 Pa. St. 308, 1 Am. Rep. 414.

⁶¹ *Mye's Appeal*, 126 Pa. St. 341; *Henderson v. Chaires* (Fla.), 6 So. Rep. 164.

was still a wife.⁶² If the court grant to the wife a gross sum by way of alimony, she will take this sum in lieu of dower, and her dower right will thus be barred.⁶³ But in order that in any case divorce may affect the wife's dower right, except in the case of elopement and adultery, the divorce must be an absolute one, dissolving the marriage tie altogether. A divorce *a mensa et thoro*, ordinarily has no effect on the wife's dower.⁶⁴ The effect of divorce on the wife's dower is held to be determined by the law of the place in which the divorce was granted.⁶⁵

§ 99. Continued — By loss of husband's seisin.— As a general proposition, dower can be enforced only so far as the lawful seisin of the husband extends at the time when the dower right attaches. She, therefore, acquires dower in his lands, subject to all the defects, conditions, limitations, and incumbrances, which characterize and cover the husband's title. If, therefore, the husband's seisin is defeated, whether by the assertion of a paramount title, the breach of a condition, or the expiration of the limitation, the wife's dower right is also extinguished.⁶⁶ But if the husband's estate is

⁶² 4 Kent's Com. 54; 2 Bla. Com. 130; Bishop's Mar. and Div., Secs. 661, 662, 663; 1 Washburn on Real Prop. 309, note. The statutes relating to the granting of divorce usually provide that the innocent party shall not lose his or her marital rights. *Stahl v. Stahl*, 114 Ill. 375; *Percival v. Percival*, 56 Mich. 297; *Gordon v. Dickson* (Ill.), 23 N. E. Rep. 439; *Van Cleaf v. Burns*, 118 N. Y. 549; *Rhea v. Rhea*, 63 Mich. 257. A wife who takes through jointure, instead of dower, takes as a purchaser and is not affected by a divorce. *Saunders v. Saunders*, 144 Mo. 482, 46 S. W. Rep. 428.

⁶³ *Tatro v. Tatro*, 18 Neb. 395, 53 Am. Rep. 320; *Owen v. Yale*, 73 Mich. 256.

⁶⁴ *Taylor v. Taylor*, 93 N. C. 418, 53 Am. Rep. 460.

⁶⁵ *Van Cleaf v. Burns*, 118 N. Y. 549.

⁶⁶ 1 Washburn on Real Prop. 256; *Seymour's Case*, 10 Rep. 96; *Ray v. Pange*, 5 B. & Ald. 561; *Brown v. Williams*, 31 Me. 403; *Beardslee v. Beardslee*, 5 Barb. 324; *Sanford v. McLean*, 3 Paige 117; *Northcutt v. Whipp*, 12 B. Mon. 72; *Wheeler v. Smith*, 55 Mich. 355; *Moriarta v. McRea*, 45 Hun 564.

determined and made to shift over to another upon the happening of a contingency, so that the limitation over is a conditional limitation, it has been generally held, although controverted by good authorities, that the wife's dower nevertheless survives and suspends the execution of the limitation over until her death.⁶⁷ A like exception is recognized universally in favor of the continuance of the wife's dower, where the

⁶⁷ *Buckworth v. Thirkell*, 3 B. & P. 652, note; *Moody v. King*, 2 Bing. 447; *Sammes v. Payne*, 1 Leon 167; *Hatfield v. Sneden*, 54 N. Y. 285; *Milledge v. Lamar*, 4 DeSau 637; *Northcut v. Whipp*, 12 B. Mon. 72; *Nickell v. Tomlinson*, 27 W. Va. 697; *Pollard v. Slaughter*, 92 N. C. 72, 53 Am. Rep. 402; *Fry v. Scott* (Ky.), 11 S. W. Rep. 426. Chancellor Kent says: "The ablest writers upon property law are against the right of the dowress, when the fee of the husband is determined by executory devise or shifting use." C. J. Gibson in *Evans v. Evans*, *supra*, says: "Not one of the text-writers has hinted at the true solution of the difficulty, except Mr. Preston. All agree that where the husband's fee is determined by recovery, condition, or collateral limitation, the wife's dower determines with it. I have a deferential respect for the opinion of Mr. Butler, who was perhaps the best conveyancer of his day, but I cannot comprehend the reasons of his distinction in the note to Co. Lit. 241 a, between a fee limited to continue to a particular period at its creation, which curtesy or dower may survive, and the devise of a fee simple or a fee tail absolutely or conditional, which by subsequent words is made determinable upon some particular event, at the happening of which dower or curtesy will cease." "How to reconcile to any system of reason, technical or natural, the existence of a derivative estate, after the extinction of that from which it was derived, was for him (Butler) to show, and he has not done it. The case of a tenant in tail," says Mr. Preston (3 Prest. Abst. 373), "is an exception arising from an equitable construction of the statute *De Donis*, and the cases of dower of estates determinable by executory devise and springing (shifting) use owe their existence to the circumstance that these limitations are not governed by common law principles." "It was the benign temper of the judges who moulded the limitations of the estates introduced by them, whether original or derivative, so as to relax the severer principles of the common law, and among other things, to preserve curtesy and dower from being barred by a determination of the original estate which could not be prevented." The student is not prepared to understand the refined distinctions here hinted at, until he has mastered the subsequent chapters on Estates upon Condition, Uses and Trusts, Remainders and Executory Devises. A recurrence to this section after a study of the subjects mentioned is advisable.

husband's estate as tenant in tail has been determined by the failure of issue capable of taking.⁶⁸

§ 100. Continued.—By estoppel in pais.—After the death of the husband, the widow may by acts which are sufficient to work an estoppel in ordinary cases,⁶⁹ bar her right to dower without any formal release. Her acts would have that effect, if they were calculated to mislead and work a fraud upon purchasers.⁷⁰ But in order that her acts during coverture may operate as an estoppel and bar her dower they must be equivalent in legal effect to one of the different formal modes provided by law for the extinguishment of the dower.⁷¹

⁶⁸ 4 Kent's Com. 49; 1 Washburn on Real Prop. 261; Northcut v. Whipp, 12 B. Mon. 73, Paine's Case, 8 Rep. 36.

⁶⁹ See *post*, Secs. 508, 510.

⁷⁰ It must be an unequivocal act or declaration. Mere silence is not sufficient, and presence at the sale without giving notice of her right, will not estop her from claiming dower. *Heth v. Cocke*, 1 Rand. 344; *Smith v. Paysenger*, 2 Const. (S. C.) 59; *Owen v. Slatter*, 26 Ala. 547; *Tennent v. Stoney*, 1 Rich. Eq. 222; *Davis v. Cornelius* (Ky.), 10 S. W. Rep. 471. And likewise her dower is not estopped by a conveyance by her in the capacity of her husband's administratrix, where no mention was made of her dower, unless she covenants to warrant the title, or purports to convey generally her interest as well as his. *Shurtz v. Thomas*, 8 Pa. St. 359; *Usher v. Richardson*, 29 Me. 415; *Magee v. Mellon*, 23 Miss. 585; *Shoot v. Galbreath*, 128 Ill. 214. And dower will not be barred by joining the widow in a suit for specific performance against the heirs on the contract of the husband for the sale of the lands; she need not answer and may afterwards claim her dower. *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Rep. 672. But parol denials of her claim, or a participation in the proceeds of a judicial sale in a suit, to which she is made a party, will estop her. *Dongrey v. Topping*, 4 Paige 94; *Reed v. Morrison*, 12 Serg. & R. 18; *Gardiner v. Miles*, 5 Gill 94; *Allen v. Allen*, 112 Ill. 323.

⁷¹ *Martin v. Martin*, 22 Ala. 104; *Davis v. Townsend* (S. C.), 10 S. E. Rep. 837; *Rockwell v. Rockwell* (Mich.), 46 N. W. Rep. 8. And where the wife of the mortgagor releases dower in her husband's conveyance of the equity of redemption, it bars her dower in the entire estate, although she did not join in the execution of the mortgage. *Hoogland v. Watt*, 2 Sandf. Ch. 148. See *Usher v. Richardson*, 29 Me. 415. No estoppel can result during the life of the husband. *Beeman v. Kitzman* (Iowa 1904), 99 N. W. Rep. 171.

§ 101. Continued — By statute of limitations.— Under no circumstances will the wife's inchoate right be affected by the adverse possession of the land during the life-time of the husband.⁷² And after it has become, by his death, a consummate right in the nature of a *chose in action*, although long adverse possession after the husband's death is proper evidence for the jury to establish a release of the dower right, it is no absolute bar to the action, unless the statute is made expressly to include actions of dower.⁷³

§ 102. Continued — By exercise of eminent domain.— It is well settled, that the dower right of the wife or widow is defeated by the exercise of eminent domain over the land, out of which the dower issues. But it is a matter of considerable doubt, whether the right before assignment, during the life of the husband, or after his death, partakes so much of the nature of an interest or estate in the land, as to entitle her to compensation separate from her husband or his heirs and assignees. It has been held that she cannot claim such compensation, but the question cannot be considered as definitely settled.⁷⁴

⁷² *Durham v. Angier*, 20 Me. 242; *Moore v. Frost*, 3 N. H. 127; *Williams v. Williams* (Ky.), 12 S. W. Rep. 760.

⁷³ 4 Kent's Com. 70; *Parker v. Obear*, 7 Metc. 24; *Barnard v. Edwards*, 4 N. H. 107; *Spencer v. Weston*, 1 Dev. & B. 213; *Guthrie v. Owen*, 10 Yerg. 339; 1 Washburn on Real Prop. 267. But in a number of the States there are express statutory provisions in respect to barring dower by lapse of time. See *Robie v. Flanders*, 33 N. H. 524; *Durham v. Angier*, 20 Me. 242; *Spencer v. Weston*, 1 Dev. & B. 213; *Wilson v. McLenaghams*, 1 McMull. Eq. 35; *Chase v. Alley*, 82 Me. 234, 19 Atl. Rep. 397; *Carmichael v. Carmichael*, 5 Humph. 96; *Ridgway v. McAlpine*, 31 Ala. 464; *Tattle v. Wilson*, 10 Ohio 24; *Butcher v. Butcher* (Mich. 1904), 100 N. W. Rep. 604; *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. Rep. 120. See note to Sec. 85.

⁷⁴ 1 Washburn on Real Prop. 270. See *Moore v. New York*, 4 Sandf. 450, s. o. 8 N. Y. 110; *Gwynne v. Cincinnati*, 3 Ohio 24. See, *contra*, recognizing the widow's claim to compensation, *Ebey v. Ebey*, 1 Wash. 185. Dower is not lost by condemnation for a railroad, in Massachusetts. *Nye v. Taunton Branch R. R.*, 113 Mass. 277. But see, Venable

§ 103. **Widow's quarantine.**— Upon the death of the husband, the widow's right of dower becomes consummate, and she is entitled to an immediate assignment of her dower. Until assignment has been made, and for a period of forty days, she was entitled at common law to a residence in the principal mansion house of her husband, provided she did not marry within that time. This right was called her quarantine.⁷⁵ It is generally recognized in the United States; but since it is principally regulated by statute, there is a considerable variation in respect to its duration, and its relation to the right of assignment of dower.⁷⁶ The general rule is that dower should be set out to her within the time of her quarantine, and if it is not, she may at the end of that time pursue the different remedies given for the recovery of the dower and its assignment.⁷⁷

§ 104. **Assignment — Two modes.**— There are two modes of setting out dower respectively called, “of common right,” and “against common right.” If it has been assigned of common right, and the widow has lost a part or the whole of the land set out to her by the assertion of a paramount title, she is entitled to an assignment *de novo* out of the remainder of the husband's estate, so that the loss by eviction will not fall entirely upon her. And on the other hand, if there is an eviction of the heir, after assignment of dower, he will in like manner be entitled to a new assignment. But if the assignment was “against common right,” it is final, and if the share of either widow or tenant of the freehold is subsequently lost by eviction under paramount title, they have no remedy against each other, as in the case of assignment “of common right.”⁷⁸

v. Wabash R. R., 112 Mo. 103; *Duncan v. City*, 85 Ind. 104; *Olcott v. Supervisors*, 16 Wall. 694.

⁷⁵ Co. Lit. 34 b; 2 Bla. Com. 139.

⁷⁶ See *Neustacher v. Schmidt*, 25 Ill. App. 626.

§ 105. Continued.—Of common right.—Dower of common right must, as a general rule, be set out by metes and bounds.⁷⁹ It is not necessary, where the husband died seised, that the widow should receive one-third by metes and bounds of each tract of land; nor can she of right control the discretion of the sheriff or tenant in the assignment of the dower by the expression of her own wishes.⁸⁰ The tenant or sheriff, as the case may be, is vested with considerable discretion in regard to this matter, and if, under all the circumstances surrounding the case, it is advisable or reasonable, the dower might be assigned to her out of one tract altogether, or where the property consists of arable, pasture and other kinds of land, she may be given her dower in one kind to the exclusion of the others.⁸¹ But if the lands are held separately by several grantees of the husband, dower must be set out in each parcel.⁸² So, also, must assignment be made out of each separate tract, where some of them are incumbered by mortgages in which the wife has joined, and where other tracts are free from incumbrances.⁸³ While she can claim dower out of existing incorporeal hereditaments, including easements, the sheriff cannot create in her favor, and as a part of her dower, a new easement imposed on lands, not assigned to her.⁸⁴ Where the property is such

⁷⁹ 4 Kent's Com. 63; 1 Washburn on Real Prop. 277, note 277. She can claim her right of quarantine even against her husband's grantees. *Shelton v. Carroll*, 16 Ala. 148; *Phasis v. Leachman*, 20 Ala. 662.

⁷⁸ *French v. Pratt*, 27 Me. 381; *Scott v. Hancock*, 13 Mass. 162; *Jones v. Brewer*, 1 Pick. 314; *Singleton v. Singleton*, 5 Dana 87; *Holloman v. Holloman*, 5 Smed. & M. 559.

⁷⁹ Co. Lit. 34 b, note 213; 1 Washburn on Real Prop. 273; *Pierce v. Williams*, 3 N. J. L. 521.

⁸⁰ *Moore v. Dick* (Ill.), 24 N. E. Rep. 768.

⁸¹ 1 Washburn on Real Prop. 286; *White v. Story*, 2 Hill 543; *Jones v. Jones*, Busbee (N. C.) 177. See *Hardin v. Lawrence*, 40 N. J. Eq. 154.

⁸² Co. Lit. 35 a; *Doe v. Gwinnell*; 1 Q. B. 423; *Coulter v. Holland*, 2 Harr. 330; *Cook v. Fisk*, Walk. 423; *Morgan v. Blatchley*, 33 W. Va. 155.

⁸³ *Askew v. Askew*, 103 N. C. 285.

⁸⁴ *Price v. Price*, 54 Hun 349.

that the dower cannot, without loss, be set out by metes and bounds, it is then permitted that a certain share in the income or occupation and enjoyment of the land should be set apart for her, while the property is held by her in common with the tenant of the freehold.⁸⁵ In making the assignment, the extent of her one-third interest in the land is determined by the market and productive value, instead of the mere quantity of land. She is entitled to that part of the estate which would yield her one-third of the rents and profits received from the entire estate.⁸⁶ And if the land is incumbered, the dower being subject to the incumbrance, the value of the land will be estimated by a deduction of the amount of the incumbrance from the total value of the land.⁸⁷ If the land is held by the heir or devisee, the value of the land or income is estimated at the time when the dower is assigned, thus giving her the benefit of any increase, including any improvements by the heir, as well as subjecting her to the loss by any natural depreciation in the value of the land after the death of her husband.⁸⁸ If the depreciation is the result of a willful

⁸⁵ 1 Washburn on Real Prop. 286, 287; *Stoughton v. Leigh*, 1 Taunt. 402; *Stevens v. Stevens*, 3 Dana 371. And where the property consists of mines, dower may be assigned by a parol agreement to divide the profits, and to give her one-third of them. *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cow. 478; *Lenfers v. Henke*, 37 Ill. 405, 24 Am. Rep. 263. The widow has dower in oil wells, opened after husband's death, in Ohio. *Willford v. Heimhoffer*, 25 Ohio Cir. Ct. 748. But before assignment, dowress cannot make a valid mining lease. *Hook v. Garfield Coal Co. (Iowa)*, 83 N. W. Rep. 963. Dower does not entitle the widow to sell timber, in Alabama. *Garnett Smelting Co. v. Watts (1904)*, 37 So. Rep. 201.

⁸⁶ *Leonard v. Leonard*, 6 Mass. 533; *Coates v. Cheever*, 1 Cow. 476; *McDaniel v. McDaniel*, 3 Ired. 61; *Smith v. Smith*, 5 Dana 179.

⁸⁷ *Platt's Appeal*, 56 Conn. 572.

⁸⁸ *Powell v. Monson*, 3 Mason 368; *Parker v. Parker*, 17 Pick. 236; *Davis v. Walker*, 42 N. H. 482; *Thompson v. Morrow*, 5 Serg. & R. 290; *Williams on Real Prop.* 233; 1 Washburn on Real Prop. 288; Co. Lit. 32 a. In New York, the value is ascertained at the time of descent to the heir. *Sidway v. Sidway*, 53 Hun 222.

waste by the heir, she has her right of action for damages against him; but it does not affect or alter the manner of assignment.⁸⁹ If the land is held by alienees of the husband, the English rule, which is followed by the courts of some of the States, is, that the value must be estimated according to the condition of the estate at the death of the husband.⁹⁰ The general rule in this country is that the dower must be adjudged according to the value of the land at the time of assignment, less any increase of value arising from improvements made by the alliance, thus giving the widow the benefit of the increase produced by the general and natural rise in the value of the property.⁹¹ A further

⁸⁹ 1 Washburn on Real Prop. 288. See *Powell v. Monson*, 3 Mason 368; *Campbell v. Murphy*, 2 Jones Eq. 362.

⁹⁰ *Doe v. Gwinnell*, 1 Q. B. 682; *Campbell v. Murphy*, 2 Jones Eq. 357. In New York and Virginia, the value of the land at the time of alienation is the true basis of estimating the value of the dower right. *Walker v. Schuyler*, 10 Wend. 480; *Tod v. Baylor*, 4 Leigh 498; *Van Gelder v. Post*, 2 Edw. 577. In the earlier decisions, the courts of New York followed the English rule. *Humphrey v. Pinney*, 2 Johns. 484; *Shaw v. White*, 13 Johns. 484. In *Hade v. James*, 6 Johns. Ch. 258, and *Barney v. Frowner*, 9 Ala. 901, the question is left an open one. But see *Marble v. Lewis*, 36 How. Pr. 343. When there is a change in the law after the husband's alienation, the widow's dower in respect to the aliened lands is governed by the law as it existed at the time of alienation. *McCafferty v. McCafferty*, 8 Blackf. 218; *Cowan v. Strader*, 1 Ind. 134; *Moore v. Kent*, 37 Iowa 20, s. c. 18 Am. Rep. 1; *Kennerly v. Missouri Ins. Co.*, 11 Mo. 204.

⁹¹ *Powell v. Monson*, 3 Mason 365; *Boyd v. Carlton*, 69 Me. 20, 31 Am. Rep. 268; *Carter v. Parker*, 28 Me. 509; *Thompson v. Morrow*, 5 Serg. & R. 289; *Shirley v. Shirley*, 5 Watts 328; *Bowie v. Berry*, 3 Md. Ch. 359; *Rawlins v. Buttel*, 1 Houst. 224; *Green v. Tennant*, 2 Harr. 336; *Dunseth v. Bank of United States*, 6 Ohio 76; *Smith v. Addleman*, 5 Blackf. 406; *Woodbridge v. Wilkins*, 3 How. (Miss.) 360; *Taylor v. Broderick*, 1 Dana 348; *Jonas v. Hunt*, 40 N. J. Eq. 660; *Grissom v. Moore*, 106 Ind. 296, 55 Am. Rep. 742 (case of executory contract of sale during the life-time of the husband). And if the alienee has, during the life-time of the husband, diminished the value of the land by his mismanagement, the widow is without remedy. *Powell v. Monson*, 3 Mason 368; *Thompson v. Morrow*, 5 Serg. & R. 290; *McClanahan v. Porter*, 10 Mo. 746.

requisite in the assignment "of common right" is, that the estate set out to her must be absolute for life, and free from conditions and exceptions.⁹²

§ 106. Dower — Against common right.— In the assignment of dower, however, it is not necessary that it should be set out in the manner above described. Any other mode of assignment may be adopted by agreement of the parties, and that agreement will effectually bar all claims to dower "of common right," if properly and legally executed; but the practice is for the widow to give a release under seal of her dower right;⁹³ and when the settlement has been properly executed, it cannot be re-opened and the dower re-asserted, or re-assigned, unless it is charged that the agreement had been procured by fraud.⁹⁴ It is sometimes provided by statute that a settlement in bar of dower cannot have the effect intended unless such intention to bar dower is expressed on the face of the agreement.⁹⁵

§ 107. By whom may dower be assigned.— The tenant of the freehold is the only person who is entitled to make the assignment. A disseisor may do it, and if the assignment is made strictly "of common right," it is binding upon the rightful owner.⁹⁶ If the tenant be a minor, his assignment is subject to revision on his arrival at his majority, unless he is under guardianship, and his guardian makes the assignment, when it will be binding upon him.⁹⁷ Where the

⁹² Co. Lit. 34 b, note 217; 1 Washburn on Real Prop. 274.

⁹³ 1 Washburn on Real Prop. 273, 274; Co. Lit. 34 b; Vernon's Case, 4 Rep. 1; Conant v. Little, 1 Pick. 189; Jones v. Brewer, *Id.* 314.

⁹⁴ Scott v. Ashlin (Va.), 10 S. E. Rep. 751.

⁹⁵ Dudley v. Davenport, 85 Mo. 462.

⁹⁶ Co. Lit. 36 a; Stoughton v. Leigh, 1 Taunt. 402; 1 Washburn on Real Prop. 274.

⁹⁷ 2 Bla. Com. 136; Young v. Tarbell, 17 Me. 509; Curtis v. Hobart, 41 Me. 230; Jones v. Brewer, 1 Pick. 314; McCormick v. Taylor, 2 Ind. 336; Boyers v. Newbanks, *Id.* 388. In Illinois the assignment may be revised by the infant tenant of the freehold, although it was set out by

land is held by two or more jointly, either may set out the dower.⁹⁹

§ 108. Remedies for recovery of dower.—If the dower is not assigned within the time appointed by the law for the continuance of the widow's quarantine, she can compel the assignment by a resort to the courts. As a general rule, controlled in each State by statutory enactments, there are three remedies for the recovery of dower: 1. The common law action for dower. 2. A similar action in equity. 3. A summary proceeding in courts of probate, usually confined to claims of dower against the heirs and devisees of the husband.⁹⁹ The most effective remedy is the action in equity, in that it includes within its jurisdiction actions upon equitable as well as legal dower, while the common-law remedy is confined to legal dower. For further particulars, reference must be made to the statutes of the States.

the guardian. See *Bonner v. Peterson*, 44 Ill. 260. In Nebraska, dower is assignable by the county court. *Tyson v. Tyson* (1904), 98 N. W. Rep. 1076. In Iowa, either by a proceeding at law, or in equity. *Beeman v. Kitzman*, 99 N. W. Rep. 171.

⁹⁸ Co. Lit. 35 a; 1 Washburn on Real Prop. 275.

⁹⁹ Where it has not been changed by statute, courts of law and equity have concurrent jurisdiction in respect to dower, and the rules governing assignments are alike in both courts. *Herbert v. Wren*, 7 Cranch 376; *Mayberry v. Brien*, 15 Pet. 21; *Badgley v. Bruce*, 4 Paige 98; *Wells v. Beall*, 2 Gill & J. 468; *Campbell v. Murphy*, 2 Jones Eq. 357; *Osborne v. Horine*, 17 Ill. 92. The remedy in the Probate Court is generally confined to cases of dower, which arise between the widow and the heir or devisee. As a rule this remedy cannot be resorted to in a case of dower against the husband's alienee. *French v. Crosby*, 23 Me. 276; *Sheaffe v. O'Neil*, 9 Mass. 9; *Raynham v. Wilmarth*, 13 Metc. 414; *Matter of Watkins*, 9 Johns. 246; *Bisland v. Hewett*, 11 Smed. & M. 164; *Thrasher v. Pinckard*, 23 Ala. 616. In Vermont the court of probate has exclusive jurisdiction. *Danforth v. Smith*, 23 Vt. 247. In Michigan ejectment seems to lie for the enforcement of the dower. *Rea v. Rea*, 63 Mich. 257. But it cannot be instituted by any vendee of the widow; she alone can bring the action of ejectment for the assignment of dower. *Galbraith v. Fleming*, 60 Mich. 408. See *Tyson v. Tyson* (1904), 98 N. W. Rep. 1076; *Beeman v. Kitzman*, 99 N. W. Rep.

§ 109. Demand necessary.—In some States it is required by statute that a demand should be made of the heir or tenant before commencing the action; and, generally, when damages are asked for, a demand is made, whether required by statute or not, in order to fix a time from which the damages begin to run.¹ It is not necessary that the demand should be made in writing, and if it is done by attorney the power may be given by parol.² But if the demand or power of attorney is in writing, the extent of the demand should be made sufficiently clear in the writing, in order that no resort to parol evidence will be necessary.³ The demand must be made of the tenant of the freehold, and, if more than one, it must be made of all of them; and such a demand is good against subsequent purchasers of the tenant.⁴

§ 110. Against whom and where the action is brought.—The action must be brought in the county where the land lies; and the right of dower is construed and governed by the law of the place in which it is situated.⁵ The action is 171; *Hybart v. Jones*, 130 N. C. 227, 41 S. E. Rep. 293; *Rice v. Waddell*, 168 Mo. 99, 67 S. W. Rep. 605.

¹ *Young v. Tarbell*, 37 Me. 509; *Stevens v. Reed*, 37 N. H. 49; *Pond v. Johnson*, 9 Gray 193; *Jackson v. Churchhill*, 7 Cow. 287; *Hopper v. Hopper*, 2 N. J. 715.

² *Watson v. Watson*, 10 C. B. 3; *Lathrop v. Foster*, 51 Me. 367; *Baker v. Baker*, 4 Me. 67; *Stevens v. Reed*, 37 N. H. 49; *Page v. Page*, 6 Cush. 196.

³ *Haynes v. Powers*, 22 N. H. 590; *Davis v. Walker*, 42 N. H. 482; *Sloan v. Whitman*, 5 Cush. 532; *Atwood v. Atwood*, 22 Pick. 283; *Bear v. Snyder*, 11 Wend. 592.

⁴ *Luce v. Stubbs*, 35 Me. 92; *Barker v. Blake*, 36 Me. 433; *Watson v. Watson*, 10 C. B. 3.

⁵ 1 Washburn on Real Prop. 280; 2 Kent's Com. 183, note; *Lamar v. Scott*, 3 Strobh. 502; *Duncan v. Dick*, Walk. 281. And except where the land has been sold during the life-time of the husband, the dower right is determined by the law in force at the death of the husband. *Melizet's Appeal*, 17 Pa. St. 455; *Randall v. Kreiger*, 2 Dill. 447; *Lucas v. Sawyer*, 17 Iowa 517. As to lands conveyed by the husband, see *ante*, Sec. 105, note.

brought only against those who are tenants of the freehold at the beginning of the action, and such is the rule, even though there has been a conveyance after the demand has been made; and, likewise, if the tenant is a disseisor, he is the proper party.⁶ And although the widow, in the action for her dower, is bound to overcome any evidence of the defect of title in her husband, which is introduced by the defendant in his resistance of her claim of dower, until such defect of title is claimed, she is not obliged, in support of her dower right, to make strict proof of her husband's title.⁷

§ 111. Continued — **Abatement by death of widow.**—The action for dower is personal, and dies with the widow, and the suit is abated for every purpose, notwithstanding judgment has been rendered, if the assignment and the assessment of damages have not been made.⁸

§ 112. Judgment — **What it contains.**—If the widow is successful in her action, she is given judgment for the recovery and assignment of dower, and, in some places, damages for its detention.⁹ The judgment is of a twofold character; the right to recovery of her dower, being a common-law right, while the claim for damages rests upon statute. Judgment may be rendered for the assignment of dower, whether the claim for damages has been lost, or it still exists; but if the right to dower has been lost, whether it be by the

⁶ *Barker v. Blake*, 36 Me. 433; *Manning v. Laboree*, 33 Me. 343; *Hurd v. Grant*, 3 Wend. 340; *Miller v. Beverley*, 1 Hen. & M. 367; *Norwood v. Morrow*, 4 Dev. & B. 442. And where the dower is to be assigned out of several parcels of land, belonging to different persons, unless changed by statute, a separate action must be brought against each of the owners. They cannot be sued jointly. *Fosdick v. Gooding*, 1 Me. 30; *Barney v. Frowner*, 9 Ala. 901.

⁷ *Stark v. Hopson*, 22 S. C. 42.

⁸ *Rowe v. Johnson*, 19 Me. 146; *Atkins v. Yeomans*, 6 Metc. 438; *Sandback v. Quigley*, 8 Watts 460; *Turney v. Smith*, 14 Ill. 242.

⁹ 2 Bla. Com. 136; Co. Lit. 32 b; 1 Washburn on Real Prop. 279, 281.

running of the Statute of Limitations, or through abatement by the death of the widow, no damages can be recovered by her or her personal representatives.¹⁰

§ 113. Continued — **Damages when recoverable.**— Damages could not, at common law, be recovered for the detention of the dower lands. They were first granted by the Statute of Merton, which has generally, in this country, either been recognized as the common law or substantially re-enacted with important additions.¹¹ In England, under the Statute of Merton, the damages could only be recovered of the heir or abator, and their assigns, not against the alienee of the husband. But in this country, damages are recoverable against the heir from the death of the husband, or the expiration of her quarantine: if it is against a purchaser, they are allowed either from the demand made upon him, or the commencement of the suit, according to the statutory provisions or local laws of each State.¹² In New York there

¹⁰ Co. Lit. 32 b, note 4; *Rowe v. Johnson*, 19 Me. 146; *Tuck v. Fitts*, 18 N. H. 171; *Atkins v. Yeomans*, 6 Metc. 438; *Sharp v. Pettit*, 4 Dall. 212; *Shirtz v. Shirtz*, 5 Watts 255; *Turney v. Smith*, 14 Ill. 242; *Waters v. Gooch*, 6 J. J. Marsh. 586.

¹¹ Co. Lit. 32 b; *Thompson v. Collier*, Yelv. 112; *Embree v. Ellis*, 2 Johns. 119; *Hitchcock v. Harrington*, 6 Johns. 290.

¹² In some of the States the English rule still prevails that she cannot recover from the husband's grantee. *Sharp v. Pettit*, 2 Dall. 212; *Fisher v. Morgan*, 1 N. J. L. 125; *Waters v. Gooch*, 6 J. J. Marsh. 586. In others no damages are recoverable in any case. *Hayward v. Cuthbert*, 1 McCord 386; *Bank of United States v. Dunseth*, 10 Ohio 18. Where the suit is against the heir, damages are allowed from the expiration of her quarantine; but if the heir has conveyed the estate away, damages can be recovered of the vendee from the time of his purchase. *Newbold v. Ridgway*, 1 Harr. 55; *Green v. Tennant*, 2 Ib. 336; *Russell v. Austin*, 1 Paige 192. But see *Seaton v. Jamison*, 7 Watts 583. The damages are recovered of the heir for the time elapsing between the death of the husband and the conveyance by the heir. *Hazen v. Thurber*, 4 Johns. Ch. 604. Generally, where damages are allowed against the husband's alienee, they run from the demand for assignment. See 1 Washburn on Real Prop. 282, 283; *Sellman v. Bowen*, 8 Gill & J. 50; *Beavers v. Smith*, 11 Ala. 20; *Thrasher v. Tyack*, 15 Wis. 259; Mc-

is a further restriction, that damages shall not be allowed for more than six years.¹³ The mode of computing the damages is the same everywhere, being one-third of the annual rents and profits for the time for which damages are allowed.¹⁴ The damages are assessed by the jury which renders the verdict, if it is an action at law; and if an action in equity by the court, if assented to, or by a sheriff jury summoned for the purpose.¹⁵

§ 114. Continued — Assignment after judgment.— The dower, after judgment has been rendered, may be set out to her by the tenant of the freehold. And a parol assignment, if according to common right, would be binding upon all parties. But if the parties cannot agree, the widow is entitled to an order, or writing, directed to the sheriff and commanding him to set out the dower. He either does this himself, or in some States causes it to be assigned by commissioners, who are appointed for that purpose.¹⁶ [When- ever dower is awarded by legal process, the assignment must always be made according to "common right," so far as it is possible to do so under the circumstances of the case.] Any other mode of assignment would be invalid, unless assented to by the parties.¹⁷ The sheriff is then required to make a *Clanahan v. Porter*, 10 Mo. 746; *Lee v. Campbell* (Ky.), 1 S. W. Rep. 873. In Virginia, from the beginning of the action. *Tod v. Baylor*, 4 Leigh 498. In Virginia interest on the value of the widow's claim, against an alienee, runs only from the date of the suit. *Dickenson v. Gray* (1902), 42 S. E. Rep. 298.

¹³ *Bell v. New York*, 10 Paige 70; *Marble v. Lewis*, 36 How. Pr. 337; *Price v. Price*, 54 Hun 349.

¹⁴ 4 Kent's Com. 65; 1 Washburn on Real Prop. 282; *Winder v. Little*, 4 Yeates 152; *Layton v. Butler*, 4 Harr. 507; *Wilthaus v. Schack*, 38 Hun 560; *Lee v. Campbell* (Ky.), 1 S. W. Rep. 873.

¹⁵ 1 Washburn on Real Prop. 283.

¹⁶ 1 Washburn on Real Prop. 284, 285; Co. Lit. 208 a, note 105; *Mann- drell v. Mann- drell*, 7 Ves. 567; *Stoughton v. Leigh*, 1 Taunt. 402; *Mans- field v. Pembroke*, 5 Pick. 449; *Parker v. Parker*, 17 Pick. 236; *Weir v. Tate*, 4 Ired. Eq. 264.

¹⁷ 1 Washburn on Real Prop. 273, 285, 286. *Pierce v. Williams*, 3 N. J. L. 521; *Brittain v. Mull*, 91 N. C. 498.

return to the court, and if no objections are raised against the assignment, it is confirmed by order of the court, and becomes binding upon all parties.¹⁸

§ 115. Assignment.—When two or more widows claim dower.—If the land descends from one person to another, both dying before assignment of dower to the widow of the first, the widows of both the successive tenants would have dower in the same land. But since by the assignment of dower, the heir loses the seisin to that part of the land, the widow of the heir would only have dower out of the remaining two-thirds, in conformity with the maxim, *dos de dote peti non debet*. But if the heir survived the ancestor's widow, he would regain the actual seisin to the reversion of the widow's one-third, and his wife's dower right could at once attach.¹⁹ But where dower is claimed by two widows, whose husbands sustained the relation of vendor and vendee in respect to the land, the assignment of dower to the widow of the former would only suspend the dower right of the other widow to that one-third during the life-time of the first dowress; and it would revive upon her death, provided the assignment to the elder dowress did not take place before the marriage of the vendee.²⁰ But if before assignment

¹⁸ 1 Washburn on Real Prop. 284, 288; Serry v. Curry (Neb.), 42 N. W. Rep. 97, s. c. 26 Neb. 203. [And if there is any objection to be made against the assignment, it must be presented at the time, when the return of the sheriff or commissioner comes up for confirmation.] Tilson v. Thompson, 10 Pick. 359; Jackson v. Hixon, 17 Johns. 123; Chapman v. Schroeder, 10 Ga. 321. See Fellows v. Bunn (Ark.), 11 S. W. Rep. 480.

¹⁹ Hitchens v. Hitchens, 2 Vern. 405; Manning v. Laboree, 33 Me. 343; Cook v. Hammond, 4 Mason, 485; Elwood v. Klock, 13 Barb. 50; Reynolds v. Reynolds, 5 Paige 161; Safford v. Safford, 7 Paige 259; McLeery v. McLeery, 65 Me. 172, 20 Am. Law Rep. 683; Robinson v. Miller, 2 B. Mon. 288.

²⁰ Bastard's Case, 4 Rep. 122; Geer v. Hamblin, 1 Me. 54; Manning v. Laboree, 33 Me. 343; Dunham v. Osborne, 1 Paige 624; Reynolds v. Reynolds, 5 Paige 161; Stahl v. Stahl, 114 Ill. 375; Stevenson v. Brasher (Ky.), 13 S. W. Rep. 242. See Bear v. Snyder, 11 Wend.

the elder dowress released her right to the tenant of the freehold, it is simply an extinguishment of her right, and conveys nothing to the tenant. The second widow would then be entitled to dower out of the entire estate, as if there had been no superior claim of dower.²¹

§ 116. Decree of sum of money in lieu of dower.— In some of the States, it is held competent for the court, where money is assigned instead of dower in the lands, to grant her a gross sum of money instead of an annual share in the income. But the power of the court to do so is limited in other States to cases where parties have agreed upon that mode of settlement.²² As a rule the amount of money to be paid is calculated upon the chances of life. The tenant in reversion would have to pay to the widow such a sum of money as would equal the present value of the amount of interest which would probably have been paid to the widow during her life, if there had been an assignment of common right, estimating her probable length of life by the ordinary tables of mortality.²³ And if the money value of the wife's

592. In Illinois, recently, the first wife was held entitled to dower, subject to second wife's homestead and the second wife was then entitled to dower in the realty remaining and dower in the first assignment of dower, in case of her survival of the first wife. *Potter v. Clapp*, 203 Ill. 592, 68 N. E. Rep. 81.

²¹ *Elwood v. Klock*, 13 Barb. 50; *Atwood v. Atwood*, 22 Pick. 283. But see *Leavitt v. Lamprey*, 13 Pick. 382, where the court holds that a release or assignment by the elder dowress to the tenant, after judgment for recovery of her dower has been rendered, will not entitle the second dowress to dower out of the whole property.

²² *Hebert v. Wren*, 7 Cranch 370; *Johnson v. Elliott*, 15 Ala. 112; *Lewis v. James*, 8 Humph. 537; *Hart v. Burch*, 130 Ill. 426.

²³ *Simonton v. Gray*, 33 Me. 50; *Jennison v. Hapgood*, 14 Pick. 345; *Brewer v. Vanarsdale*, 5 Dana 204. In Sec. 54 an algebraic formula is given which may be used in the estimation of the present value of the dower right, the annual rents taking the place in the formula of the annual interest on the incumbrance. In South Carolina the gross sum is arbitrarily computed at one-sixth of the fee. *Wright v. Jennings*, 1 Bailey 27; *Garland v. Crow*, 2 Bailey 24. See *ante*, Sec. 54.

dower right is to be ascertained during coverture, the money value of an annuity paid during the joint lives of husband and wife, must be deducted from the present value of the income to be paid to her during her life.²⁴

§ 117. **Dower barred by jointure.**—Dower is also barred by jointure, which is a provision made for the wife by the husband out of his property and expressed to be in lieu of dower.²⁵ At common law there were two kinds, *legal* and *equitable*. Legal jointure was a provision, made by way of use,—an equitable estate for life or in fee; an estate for years was not sufficient. It could not be provided for out of the husband's personalty, only out of real property; and if it took the form of an annuity, it had to be made a charge upon land.²⁶ If it is expressly stated to be in lieu of dower, a provision of that kind would bar dower, even though made by a stranger.²⁷ Nor is it necessary that the estate should be equal in value to the dower right, if it is a substantial provision.²⁸ At common law legal jointure did not require the assent of the wife or her guardian in order to make it binding upon her, provided it was not fraudulent. Her assent only operated to conclude her from setting up

²⁴ *Strayer v. Long* (Va.), 10 S. E. Rep. 574. In Georgia, where a gross sum is allowed, in lieu of dower, the value of her interest should be estimated upon the basis of her age at her husband's death and the value of the lands, when the assignment is made, plus one-third the rents and profits since the husband's death, less a reasonable charge for use and occupation where she has been in possession. *Johnson v. Gordon*, 102 Ga. 350, 30 S. E. Rep. 507. But see, *Owens v. Barrell*, 88 Md. 204, 40 Atl. Rep. 880; *Geiger v. Geiger*, 57 S. C. 521, 35 S. E. Rep. 1031.

²⁵ It will not bar the dower, unless the provision is expressly stated to be in lieu of it. *Buckinghamshire v. Drury*, 2 Eden 72; *Bubier v. Roberts*, 49 Me. 363; *Reed v. Dickermann*, 12 Pick. 149; *Swaine v. Perine*, 5 Johns. Ch. 489; *Couch v. Stratton*, 4 Ves. 391.

²⁶ 2 Bla. Com. 137, 138; *Vernon's Case*, 4 Rep. 1; *Caruthers v. Caruthers*, 4 Bro. C. C. 500; *McCartee v. Teller*, 2 Paige 562.

²⁷ 1 Washburn on Real Prop. 316; 1 Cruise Dig. 195.

²⁸ 1 Washburn on Real Prop. 116; *Drury v. Drury*, 2 Eden 57; *Buckinghamshire v. Drury*, *ib.* 75.

the charge of fraud.²⁹ But the rule in this respect, has been changed in many of the States, and the intended wife is now required to be made a party to the deed.³⁰ Equitable jointure, which is now more largely resorted to in this country, instead of being a formal actual provision, is an executory contract for such a provision, of which a court of equity will decree specific performance. The intended wife, or her guardian, if a minor, must assent to the jointure, and with such assent it may issue out of either real or personal property or both, and may assume any form.³¹ Both legal and equitable jointure, in order to be a complete bar to dower, must be made before marriage. If it is settled upon the wife after marriage, the widow has the right to elect which she shall take, but she is not entitled to both.³² Jointures

²⁹ Co. Lit. 36 b; 1 Washburn on Real Prop. 316, 317; Buckinghamshire v. Drury, 2 Eden 64; McCartee v. Teller, 3 Paige 556.

³⁰ Vance v. Vance, 21 Me. 370; Bubier v. Roberts, 49 Me. 463; 1 Greenl. Cruise 195, 200. See, also, Kennedy v. Nedrow, 1 Dall. 417; Ambler v. Norton, 4 Hen. & M. 23. A contract by which the wife agreed, before marriage, to release all claims to dower in her husband's lands, but which did not provide for her support after his death, was not enforced, in Missouri, as a contract for equitable jointure. King v. King, 82 S. W. Rep. 101. But see, for enforcement of similar contract, Cummings v. Cummings, 25 R. I. 528, 57 Atl. Rep. 302; *In re Fennell's Est.*, 207 Pa. St. 309, 56 Atl. Rep. 875.

³¹ Drury v. Drury, 2 Eden 39-75; Caruthers v. Caruthers, 4 Bro. C. C. 500; Cobert v. Cobert, 1 Sim. & Stu. 612; Smith v. Smith, 5 Ves. 189; McCartee v. Teller, 2 Paige 550; Shaw v. Boyd, 5 Serg. & R. 309; 1 Washburn on Real Prop. 318, 319; Williams on Real Prop. 236, Rawle's note. In most of the United States, an ante-nuptial settlement, or agreement, is ineffectual to bar a wife's dower, unless it is based upon a sufficient consideration and the wife's support is provided for. King v. King (Mo. 1904), 82 S. W. Rep. 101; Tiffany, Real Prop. Sec. 193, p. 462. But where there is a sufficient consideration and her maintenance is assured, under the agreement, the settlement in lieu of dower is enforced. Cummings v. Cummings, 25 R. I. 528, 57 Atl. Rep. 302. And, likewise, such a post-nuptial agreement, is enforced. *In re Fennell's Estate*, 207 Pa. St. 309, 56 Atl. Rep. 875. And, as to an ante-nuptial settlement, the marriage is a sufficient consideration, in Kentucky. Forwood v. Forwood, 86 Ky. 114.

³² McCartee v. Teller, 2 Paige 559; Drury v. Drury, 2 Eden 64;

have of late years given way to what are known as marriage settlements, so that they are very rarely met with in actual practice. Whatever form the provision for election may take, if it is avoided for any cause, the dower right revives, at least as against the persons in whose favor it is avoided; as for example, where the marriage settlement is void against existing creditors. Her dower right in that case attaches to the property which is thus subjected to the claim of creditors.³³

§ 118. Continued — By testamentary provision.— If the testator makes provision for his widow in lieu of dower, the widow must elect between that and her dower right. The right of election is a personal one and is not transferable. The provision, if accepted, will be a good bar to dower, though it consists entirely of personality, thus excluding her from her share in the realty.³⁴ If accepted, it not only bars her dower to lands, of which the husband died seised, but also to those which he had aliened during life.³⁵ On the other hand, if the testamentary provision is rejected by

Swaine v. Perine, 5 Johns. Ch. 482; 1 Washb. on Real Prop. 317; *Shane v. McNeill*, 76 Iowa, 459; *Bottomly v. Spencer*, 36 Fed. Rep. 732. In Illinois a wife may release her dower for a consideration, provided the acknowledgment is made according to the provisions of a statute. *Bottomly v. Spencer*, 36 Fed. Rep. 732.

³³ *Strayer v. Long* (Va.), 10 S. E. Rep. 574.

³⁴ *Bubier v. Roberts*, 49 Me. 403; *Hubbard v. Hubbard*, 6 Metc. 50; *Pollard v. Pollard*, 1 Allen 490; *Welch v. Anderson*, 28 Mo. 293; *Asch v. Asch*, 47 Hun 285; *Smith's Appeal*, 60 Mich. 436. It has been held that the right of election in such cases cannot be exercised by any one for her. Thus the guardian or committee of an insane widow cannot make the election. *Kennedy v. Johnstone*, 65 Pa. St. 451, 3 Am. Rep. 650. But this proposition is not supported by all the authorities, not only in consequence of statutory provisions, but independently of them. See *Young v. Boardman*, 97 Mo. 181.

³⁵ *Allen v. Pray*, 12 Me. 138; *Chapin v. Hill*, 1 R. I. 446; *Kennedy v. Mill*, 13 Wend. 553; *Evans v. Pierson*, 9 Rich. 9; *Hornsey v. Casey*, 21 Mo. 545; *Fairchild v. Marshall*, 42 Minn. 14. *Contra*, *Borland v. Nichols*, 12 Pa. St. 38; *Higginbotham v. Cornwell*, 8 Gratt. 83.

her, it lapses into the general estate, of which the testator dies intestate, and becomes subject to the widow's rights under the law.³⁶ But the intention that the testamentary provision must be taken in lieu of dower, must be made to appear in the terms of the will, either expressly or impliedly, as where the behests of the testator cannot be fully carried out, if dower is claimed together with the provision. If this intention is not established, she might at common law claim both.³⁷ But in a number of the States by statutory enactment a testamentary provision in favor of the wife is presumed to be in lieu of dower, unless the contrary intention is shown.³⁸ It has been gravely held that a second

³⁶ *Devecmon v. Shaw*, 70 Md. 219.

³⁷ *Herbert v. Wren*, 7 Cranch 370; *Van Order v. Van Order*, 10 Johns. 30; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Kennedy v. Nedrow*, 1 Dall. 418; *Duncan v. Duncan*, 2 Yeates 302; *White v. White*, 16 N. J. L. 202; *Higginbotham v. Cornwell*, 8 Gratt. 83; *Whilden v. Whilden*, Riley 205; *Pickett v. Peay*, 3 Brev. 545; *Hall v. Hall*, 8 Rich. Eq. 407; *Green v. Green*, 7 Port. (Ala.) 19; *Pemberton v. Pemberton*, 29 Mo. 408; *Ostrander v. Spickard*, 8 Blackf. 227; *Yancey v. Smith*, 2 Metc. (Ky.) 408; *Kanovalinka v. Schlegel*, 39 Hun 451; *Snyder v. Miller*, 67 Iowa 261; *In re Hatch's Est.* (Vt.), 18 Atl. Rep. 814; *Chase v. Alley*, 82 Me. 234; *Callahan v. Robinson*, 30 S. C. 249; *Starr v. Starr*, 54 Hun 300; *Howard v. Watson*, 76 Iowa 229. The widow can elect to take a provision in lieu of dower, or to take dower, in Illinois. *Hieser v. Sutter*, 195 Ill. 378, 63 N. E. Rep. 269. And in Missouri, *Rice v. Waddill*, 168 Mo. 99, 67 S. W. Rep. 605. Kentucky, *Redmond v. Redmond*, 66 S. W. Rep. 745; and Indiana, *Mannan v. Mannan*, 55 N. E. Rep. 855.

³⁸ See *Herbert v. Wrenomitch*, 7 Cranch 378; *Bubier v. Roberts*, 49 Me. 464; *Reed v. Dickerman*, 12 Pick. 140; *Cook v. Couch*, 100 Mo. 29; *Morgan v. Morgan*, 41 N. J. Eq. 235; *Hair v. Goldsmith*, 22 S. C. 566; *Stunz v. Stunz* (Ill.), 3 Me. 407; *Griggs v. Veghty* (N. J.), 19 Atl. Rep. 867; *Hastings v. Clifford*, 32 Me. 132; *Pratt v. Felton*, 4 Cush. 174; *Kennedy v. Mills*, 13 Wend. 556; *Thompson v. Egbert*, 17 N. J. L. 459; *Boone v. Boone*, 3 Har. & McH. 93; *Pettijohn v. Beasley*, 1 Dev. & B. 254; *Lewis v. Lewis*, 7 Ired. Eq. 72; *Malone v. Majors*, 8 Humph. 577; *Ex parte Moore*, 1 How. (Miss.) 665; *Akin v. Kellogg*, 39 Hun 252, s. c. 119 N. Y. 44; *Chadwick v. Tatem* (Mont.), 23 Pac. 729; *Bradhurst v. Field*, 10 N. Y. S. 452; *Pumphrey v. Pumphrey*, 52 Ark. 198. But see *Merrill v. Emery*, 10 Pick. 507, where it is held that if the widow dies during the time prescribed for making the election, she will be pre-

wife, who survives her husband, cannot claim the testamentary provision, which had been made for the first wife *in lieu* of dower.³⁹ In most of the States, there is also a statutory rule, and if the election is not made within a certain period, usually six months, after the death of the testator, it will be presumed that she has elected to take the testamentary provision. And equity will not relieve against such presumption.⁴⁰ Once an election has been made, it becomes irrevocable, and binds the widow, and all other parties concerned in the estate.⁴¹

§ 119. Continued — By statutory provisions of inheritance. — In many of the States, the statutes of Descent and Distribution provide for the division of the decedent's estate between his children and his wife, making the wife an heir of her husband, and providing that she shall inherit either a child's part, or some fixed proportion of the estate, absolutely. The authorities agree that this statutory provision for inheritance does not abolish dower, but is intended to be, and must be taken as, *in lieu* of her dower, and she must elect which of the two interests she must take.⁴² Inasmuch as the statutory provision is ordinarily more valuable than the dower right, the natural presumption would be, where there had been a division of the property between the widow and children, that she had elected to take as heir of her husband, instead of the dower right of the widow. But inasmuch as the estate she takes as heir is subject to the claims

sumed to have elected that provision which was most favorable to her. See, also, *In re Foster's Will*, 76 Iowa 364, where it was held that if she did not elect to take the testamentary provision within six months after notice to her of such provision, she would lose her right of election and be entitled only to her dower right or statutory inheritance. See to same effect, *Fosher v. Guilliams*, 120 Ind. 172; *Howard v. Watson*, 76 Iowa 229.

³⁹ *Burrall v. Hurd*, 61 Mich. 608; *Burrall v. Clark*, 61 Mich. 624.

⁴⁰ *Aken v. Kellogg*, 115 N. Y. 449.

⁴¹ *Hurley v. McIver*, 119 N. Y. 13.

⁴² *Shoot v. Galbreath*, 128 Ill. 214.

of creditors, and the dower interest is superior to such claims,⁴³ it has been held that under those circumstances only her dower right had been allotted to her.⁴⁴ The dower right is, however, not inconsistent with her claim of a share under the Statute of Distribution, in her husband's personal estate, as to which he may die intestate. She may claim such distributive share as well as her dower.⁴⁵ It has been held in Missouri, under the statute, that if the widow rejects a testamentary provision, she still has the right to elect between her dower, and the distributive share in the estate, although there may be no general intestacy.⁴⁶

⁴³ *Hunkins v. Hunkins* (N. H.), 18 Atl. Rep. 655.

⁴⁴ *Cloyd v. Cloyd*, 15 Lea 204.

⁴⁵ *Vower's Will, In re*, 113 N. Y. 569.

⁴⁶ *Young v. Boardman*, 97 Mo. 181. See *Rice v. Waddill*, 168 Mo. 99, 67 S. W. Rep. 605; *Redmond v. Redmond*, 66 S. W. Rep. 745; *Mannan v. Mannan*, 55 N. E. Rep. 855; *Hieser v. Sutter*, 195 Ill. 378, 63 N. E. Rep. 269.

If man possessed of estate,
marries & then sells estate without
his wife joining in deed, can
she recover life interest in
property for dower?

What relief may vendee
obtain

Curtesy & Dower do not
exist in Colorado.

SECTION IV.

HOMESTEAD ESTATES.

SECTION 120. History and origin.

- 121. Nature of the estate.
- 122. Who may claim homestead.
- 123. What may be claimed.
- 124. Proceedings for allotment.
- 125. Exemption from debt.
- 126. How homestead may be lost — By alienation.
- 127. Continued — By abandonment.

§ 120. **History and origin.**— These estates are not of common-law origin. They are purely statutory and have been in existence only within the last thirty years. The object of their creation is to provide for the family a homestead, which shall be exempt from a levy under execution for the debts of the owner, and save the community from the necessity of supporting such persons. ~~The exemption rests only on public policy~~, and is not given through any sympathy for the debtor. As these estates are created by statute, and each statute varies in its details, it is impossible to do more than present in a general outline the ordinary and usual characteristics of such estates. At present they prevail in almost all of the States of this country.⁴⁷

§ 121. **Nature of the estate.**— As a general proposition, though varying somewhat in the different States, the estate

⁴⁷ See Thompson, *Homesteads & Exempt*, Chap. I. The homestead estate is not necessarily an estate arising out of the marital relation, as unmarried persons, if the head of a family, are given the right of the homestead, exempt from liability for debts, but it is more frequently enjoyed by the husband or wife, than otherwise, and hence is usually treated as an estate growing out of the marital relation. *Tiffany, Real Prop. Sec. 213, p. 503; Arnold v. Waltz, 53 Iowa 706.*

is one for the life or lives of those who may claim it, and in most cases the ordinary incidents of life estates would attach to it.⁴⁸ The most general provision is that it shall be for the life of the husband, to the surviving widow for life or during widowhood, and to the children during minority.⁴⁹ Unmarried daughters, and dependent daughters in general are sometimes included in the beneficence of the homestead law.⁵⁰ The children and widow are jointly entitled to only one homestead. Each cannot claim a separate homestead.⁵¹ And when the widow claims it, it is generally granted to her in addition to her dower right. One is not affected by the other.⁵² Where there is no widow the estate becomes liable

⁴⁸ See *Kerley v. Kerley*, 13 Allen 287; *Abbott v. Abbott*, 97 Mass. 136; *Black v. Curran*, 14 Wall. 403; *McDonald v. Crandall*, 43 Ill. 232; *Smith v. Estell*, 34 Miss. 527; *Locke v. Rowell*, 47 N. H. 49; *Tieman v. Tieman*, 34 Texas 525; *Howe v. Adams*, 28 Vt. 544; *Jewett v. Brock*, 32 Vt. 65; *Thompson on Homest.*, Sec. 540. Mr. Tiffany objects to the term "estate," being applied to the interest of the homesteader (*Tiffany*, Real Prop. Sec. 114, p. 506; Sec. 499, p. 1121), but this distinction is more technical than practical, for in many States, the interest is judicially held to be "an estate in land." This is true in Illinois. *Roberson v. Tippie*, 209 Ill. 38, 70 N. E. Rep. 584; *Alabama*, *Bailey v. Mercantile Co.*, 138 Ala. 415, 35 So. Rep. 451; *Washington*, *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. Rep. 1046; and *New Hampshire*, *Libbey v. Davis*, 68 N. H. 355. An "estate" in real property is generally defined as "the nature or extent of one's interest in land" and certainly a homestead right, which is exclusive of all other interests for life, is an "estate" in the homesteader, within the legal meaning of the term. *Helm v. Kaddatz*, 107 Ill. App. 413.

⁴⁹ *Levins v. Rovegno*, 71 Cal. 273; *In re Gilmore's Est.*, 81 Cal. 240.

⁵⁰ *Childers v. Henderson*, 76 Tex. 664.

⁵¹ *Carolina Nat. Bk. v. Senn*, 25 S. C. 572; *Meyer's Guardian v. Meyer's Adm'r* (Ky.), 12 S. W. Rep. 933.

⁵² *Chaplin v. Sawyer*, 35 Vt. 290; *Mercier v. Chase*, 11 Allen 194; *Bates v. Bates*, 97 Mass. 392; *Chisholm v. Chisholm*, 41 Ala. 327; *Merriman v. Laceyfield*, 4 Heisk. 222; *Walsh v. Reis*, 50 Ill. 477; *Breese v. Stiles*, 22 Wis. 120; *Lee v. Campbell* (Ky.), 1 S. W. Rep. 875; *Hayden v. Robinson*, 83 Ky. 615. *Contra*, *McAfee v. Bettis*, 72 N. C. 29; *Singleton v. Huff*, 49 Ga. 584; *Butterfield v. Wicks*, 44 Iowa 310; *Davidson v. Davis*, 85 Mo. 440; *Bryan v. Rhoades*, 96 Mo. 485. See *Thompson on Homest.*, Secs. 555-566. The fact that the homestead had been set

for debts when the children reach their majority.⁵³ The homestead claim only exempts the property from direct liability for debts during the life or minority of the parties for whose benefits the homestead is instituted. The reversionary estate is still liable for the debts of the head of the family, and a judgment creditor, by virtue of his lien, has so far a vested interest in the land, subject to the homestead exemption, as to be able to enjoin the party in possession under the homestead claim from committing waste. The homestead claimant has against his judgment creditors only the rights of a tenant for life or for years.⁵⁴ The right of the widow and minor children to claim the homestead, after the death of the husband and father, and the nature of their right, are determined by the law in force at the time when the property devolves upon them, i. e., at the death of such husband and father.⁵⁵

§ 122. Who may claim homestead.—It is generally provided that any one who can be in any sense denominated the "head of the family," may claim the homestead for their benefit. Thus, the right may be claimed by the husband, and, after his death, by the wife, who generally has the right to claim it for herself, though she may have no children.⁵⁶ It has been held that the wife, during the husband's out during the life of the first wife, does not prevent the second wife from claiming such homestead upon the death of the husband. *National Bank v. Shelton*, 3 Pickle 393; *Nelson v. Commercial Bank*, 80 Ga. 328; *Potter v. Clapp*, 203 Ill. 592, 68 N. E. Rep. 81.

⁵³ *Quinn v. Kinyon*, 100 Mo. 551; *Childers v. Henderson*, 76 Tex. 664; *Zwernean v. Von Rosenberg*, 76 Tex. 522; *McAndrew v. Hollingsworth* (Ark. 1904), 81 S. W. Rep. 610; *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. Rep. 525; *Simpson v. Scraggins*, 182 Mo. 560, 81 So. Rep. 1129.

⁵⁴ *Jones v. Britton*, 102 N. C. 166. The sale of a homestead, for debt, will generally vest in the purchaser, the title, after the termination of the homestead. *Butler v. Brown*, 205 Ill. 606, 69 N. E. Rep. 44.

⁵⁵ *Tyrell v. Baldwin*, 78 Cal. 470.

⁵⁶ *Nicholas v. Parezell*, 21 Iowa 265; *Stilloway v. Brown*, 12 Allen 34; *McKenzie v. Murphy*, 24 Ark. 155; *Morrison v. McDaniel*, 30 Miss. 217; *Griffin v. Sutherland*, 14 Barb. 458; *Barney v. Leeds*, 51 N. H.

life, has the right to claim exemption from her own debts.⁵⁷ An unmarried person may also claim it, if he has living with him unmarried sisters and others who are dependent upon him.⁵⁸ The tests which are generally applied to doubtful cases, are:

1. Whether there is a legal or moral duty to support the persons who are claimed to constitute the family; and,
2. Whether such persons are actually dependent upon him.⁵⁹

The cases just cited were, where an unmarried man had indigent sisters living with him, who were dependent upon him for support. In the same manner an unmarried woman, supporting the children of a deceased sister or an invalid sister, is under the homestead laws the head of a family.⁶⁰ So also the

266; *Homestead Cases*, 31 Texas 680; *Miller v. Finegan* (Fla.), 7 So. Rep. 140; *Armstrong's Estate, In re*, 80 Cal. 71; *Fountain v. Hendley*, 82 Ga. 616.

⁵⁷ *Morton v. Bradhern*, 21 S. C. 375. See, also, to same effect, *Belden v. Younger*, 76 Iowa, 567; *Hill v. Meyers* (Ohio), 19 N. E. Rep. 593; *Kruger v. LeBlanc*, 75 Mich. 424.

⁵⁸ *Marsh v. Lozenby*, 41 Ga. 154; *Graham v. Crockett*, 18 Ind. 119; *Whaley v. Cadman*, 11 Iowa 226; *Homestead Cases*, 31 Texas, 678. A surviving wife, who resided alone in the residence of her deceased husband, is held entitled to hold such residence as her homestead, in Kansas. *Aultman, Miller & Co. v. Price*, 75 Pac. Rep. 1019. The sole surviving head of a family is held entitled to a homestead in Arkansas, if he continues to reside thereon. *Baldwin v. Thomas* (1903), 72 S. W. Rep. 53. Also, in Kentucky, *Holburn v. Pfanmillers, Admr.*, 71 S. W. Rep. 940. But not in Florida. *Herrin v. Brown*, 33 So. Rep. 522. A dependent grandchild is a sufficient family to entitle a householder to a homestead. *Ragsdale & Co. v. Watkins* (Ky. 1903), 76 S. W. Rep. 45; *Cross v. Benson* (Kan. 1904), 75 Pac. Rep. 558. See also *Baldwin v. Thompson* (Ark. 1903), 72 S. W. Rep. 53; *Amer. Nat. Bank v. Cruger* (Tex. 1902), 71 S. W. Rep. 784. A minor nephew, in Illinois, whom a householder has agreed to support and is supporting, is such a person, dependent for support, upon the householder, as to entitle him to a homestead. *Stodgell v. Jackson*, 111 Ill. App. 256.

⁵⁹ *Whaley v. Cadman*, 11 Iowa, 226; *Blackwell v. Broughton*, 50 Ga. 390; *Connaughton v. Sands*, 32 Wis. 387; *Wade v. Jones*, 20 Mo. 75.

⁶⁰ *Arnold v. Waltz*, 53 Iowa, 706; 36 Am. Rep. 248; *Chamberlain v. Brown* (S. C.), 11 S. E. Rep. 952; *Moyer v. Drummond* (S. C.), 10 S. E. Rep. 952.

guardian of a minor.⁶¹ But an unmarried man, having his brother and brother's wife living with him, is not the "head of a family."⁶² And likewise an unmarried man, having no dependent relatives, keeping house alone with his servants and farm hands, or with children who are not dependent upon him, does not constitute the "head of the family."⁶³ But the father living with an adult son after the death of the wife, can claim homestead.⁶⁴ And so, also, a husband living alone, after divorce from his wife, although the custody of the children had not been awarded him.⁶⁵ But not a widower without dependents.⁶⁶ In making the declaration of homestead, it is not necessary for the declarant to show on what grounds he claims to be the head of a family. It suffices, until it is disputed, for him to allege that he is the head of a family.⁶⁷ In some of the States, homestead is denied to one who carries on an illegal business, such as gambling.⁶⁸

§ 123. What may be claimed.— A homestead, as defined by the courts, is the place where one dwells. It is his residence. And the same rules and principles apply to the homestead, which govern the determination of what is one's domicile.⁶⁹

⁶¹ Roundtree v. Dennard, 59 Ga. 629; 27 Am. Rep. 235.

⁶² Whalen v. Cadman, 11 Iowa, 226.

⁶³ Calhoun v. Williams, 32 Gratt. 18; 34 Am. Rep. 759; Garaty v. Dubose, 5 S. C. 498; Calhoun v. McLendon, 42 Ga. 406; Bosquett v. Hall (Ky.), 13 S. W. Rep. 244.

⁶⁴ Rollings v. Evans, 23 S. C. 316.

⁶⁵ Zapp v. Strohmeier, 75 Tex. 638.

⁶⁶ Ellis v. Davis (Ky.), 14 S. W. Rep. 74.

⁶⁷ Jones v. Waddy, 66 Cal. 457. In Washington, California and Idaho, a declaration of homestead must be filed and recorded, during the life of the householder and if not done, the property vests in his heirs. Lloyd v. Lloyd (Wash. 1904), 74 Pac. Rep. 1061; Harris v. Duarte (Cal. 1904), 75 Pac. Rep. 58; Mellen v. McMannis (Idaho 1904), 75 Pac. Rep. 98.

⁶⁸ Tillman v. Brown, 64 Tex. 181. But see *contra*, Prince v. Hake, 75 Wis. 638.

⁶⁹ Davis v. Andrews, 30 Vt. 678; Austin v. Stanley, 46 N. H. 51; Barney v. Leeds, 51 N. H. 265; Rogers v. Ragland, 42 Texas, 443.

It is manifest, therefore, that, while one may have two or more residences, he can have but one homestead, and that one must be wherever his legal domicile is.⁷⁰ In order that the homestead right may be claimed in a lot or parcel of land, it must be shown to be the *bona fide* residence of him and his family. An intention to make it such will give no right.⁷¹ The party claiming homestead must also be in possession of the land in his own right. Thus a remainderman, living with the tenant for life, cannot by virtue of such a possession claim the right of homestead.⁷² But the use of a part of the premises for business or renting purposes will not prevent the homestead right from attaching.⁷³ So, also, it

⁷⁰ *Cornish v. Frees*, 75 Wis. 490; *Little v. Baker* (Tex.), 11 S. W. Rep. 549.

⁷¹ *Elston v. Robinson*, 23 Iowa, 208; *Lee v. Miller*, 11 Allen, 38; *Norris v. Moulton*, 34 N. H. 394; *Smith v. Wells*, 46 Miss. 71; *Cook v. McChristian*, 4 Cal. 24; *Prescott v. Prescott*, 45 Cal. 58; *Tousville v. Pierson*, 39 Ill. 453; *Kitchell v. Burgwin*, 21 Ill. 40; *Christy v. Dyer*, 14 Iowa, 440; *Currier v. Woodward*, 62 N. H. 63; *Lake v. Nolan* (Mich.), 45 N. W. Rep. 376; *Steenburger v. Greenwood* (Ark.), 13 S. W. Rep. 702; *In re Crowley*, 71 Cal. 300; *Gerrish v. Hill* (N. H.), 19 Atl. Rep. 1001; *First Nat. Bank v. Hillinsworth*, 78 Iowa, 575. An intent to reside on the property, as a homestead, is never sufficient. It requires actual occupancy. *White v. Danforth* (Iowa, 1904), 98 N. W. Rep. 136; *Higgins v. Higgins* (Ky. 1904), 78 S. W. Rep. 1124; *Zollinger v. Dunaway* (Mo. 1904), 78 S. W. Rep. 666. But where homestead is actually occupied by a widow, it is immaterial that she had, in her own right, property better fitted for her homestead. *Wilmoth v. Gossett*, 71 Ark. 594; 76 S. W. Rep. 1073; *Sansberry v. Sims*, 79 Ky. 527; *Ex parte Brown*, 37 S. C. 181; 15 S. E. Rep. 926.

⁷² *Cornish v. Frees*, 74 Wis. 490. See to same effect, *Meigs v. Dibble*, 73 Mich. 101.

⁷³ *Hogan v. Manners*, 23 Kan. 551; 33 Am. Law Rep. 199; *Smith v. Quiggans*, 65 Iowa, 637; *Lubbock v. McMann*, 82 Cal. 226; *Parr v. Newby*, 73 Tex. 468; *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227; see *Allen, In re*, 78 Cal. 293. But see *Rhodes v. McCormick*, 4 Iowa, 368; *Kurz v. Brusch*, 13 Iowa, 371. The fact that part of the homestead is rented, where the house is in two apartments, does not deprive the homesteader of his rights, in Missouri. *Adams v. Adams*, 183 Mo. 396; 82 S. W. Rep. 66. See, also, *Pratt v. Pratt*, 161 Mass. 276; 37 N. E. Rep. 435; *Layson v. Grange*, 48 Kansas 440, 29 Pac. Rep. 585.

has been held that homestead cannot be claimed jointly with another.⁷⁴ For the same reason, a partner cannot claim homestead in partnership property.⁷⁵ But if a joint estate is subsequently partitioned, so as to enable an actual and exclusive occupation of one's divide interest, the homestead will attach from the declaration of an intention to claim homestead.⁷⁶

Lands and houses rented out cannot as a general rule be claimed as homestead.⁷⁷ But it has been held that the claim of homestead may be made, notwithstanding the claimant lives on another tract of land, which he rents because there is no house on the land which he owns. The land he owns will be treated under these circumstances to be a part of the rented land on which he resides. The absence of a house on the land which he owns makes it impossible for him to reside there.⁷⁸ But where the party owns both tracts of land he cannot claim homestead in the tract on which he does not reside.⁷⁹ Nor can the claim be made to property worth more than the sum laid down by the statute of the State. When the debtor wishes to claim the homestead, it

⁷⁴ *Cornish v. Frees*, 74 Wis. 490. But see *contra*, *O'Brien v. Krenz*, 36 Minn. 136; *Ward v. Huhn*, 16 Minn. 159; *Oswald v. McCuley* (Dak.), 42 N. W. Rep. 769.

⁷⁵ *Drake v. Moore*, 66 Iowa, 58.

⁷⁶ *Miller v. Bennett* (Ky.), 12 S. W. Rep. 194.

⁷⁷ *Folsom v. Carli*, 5 Minn. 337; *Kelly v. Baker*, 10 Minn. 154; *Ash-ton v. Ingle*, 20 Kan. 670; 27 Am. Law Rep. 197.

⁷⁸ *Rogers v. Ashland Sav. Bank*, 63 N. H. 428; *Mills v. Hobbs*, 76 Mich. 122.

⁷⁹ *Semmes v. Wheatley* (Miss.), 7 So. Rep. 430; *Rhyne v. Guevara*, 6 So. 736; *Pfeiffer v. McNatt*, 74 Tex. 640; *Vanmeter v. Vanmeter's Assignee* (Ky.), 13 S. W. Rep. 924; *Beard v. Johnson*, 87 Ala. 729; *Armstrong's Estate, In re*, 80 Cal. 71. The vendee in an executory contract for the sale of land, is held entitled to his homestead in the property, in Minnesota. *Hook v. N. W. Thresher Co.* (Minn. 1904), 98 N. W. Rep. 463. A homestead may be claimed in leased lands. *White v. Danforth* (Iowa, 1904), 98 N. W. Rep. 136; *Bailey v. Dunlap Co.*, 138 Ala. 415; 35 So. Rep. 451. But see, as to "cropper," in Texas, *Webb v. Garrett*, 70 S. W. Rep. 992.

is necessary that it should in some way be ascertained and set out. But the homestead is exempt from levy, although it is not actually set out.⁸⁰ The occupation, or declaration to claim as homestead, must be made before the property has been attached.⁸¹ Minute details in regard to this matter are in some States prescribed by the statutes.⁸² But the general rule is that the debtor must select the land which he desires for a homestead, keeping within the limit as to value. The value of the homestead is determined by the consideration of the estate which is owned by the claimant, whether it be a life estate or a fee: that is, its whole market value is the guide, and not the market value of the life estate.⁸³ If the value of the property exceeds the limit, it may be partitioned and set out by appraisers at the instance of creditors; and if it is not divisible, the property may be sold, and the sum allowed by statute will be set apart, and in most cases invested by the court in a homestead; while the remainder of the purchase-money will be devoted to the liquidation of the debts.⁸⁴ If the homestead should increase in value, after being set out, the creditors cannot make any claim for a new assignment of the homestead within the statutory limit as to value.⁸⁵

⁸⁰ *King v. McCarley* (S. C.), 10 S. E. Rep. 1075; *Swandale v. Swandale*, 25 S. C. 389; *Bridwell v. Bridwell*, 76 Ga. 627; *Little v. Baker* (Tex.), 11 S. W. Rep. 549; *Riggs v. Sterling*, 60 Mich. 643. See *McLoy v. Arnett*, 47 Ark. 445.

⁸¹ *Reynolds v. Tenant*, 51 Ark. 84.

⁸² See Thompson on Homest. Secs. 230, 236. In many of the States, the homestead right only attaches after the filing and recording of the deed thereto and as to debts previously existing, the property is liable to attachment or execution levy and sale. *Loring v. Groomer*, 142 Mo. 1, 43 S. W. Rep. 647.

⁸³ *Yates v. McKibben*, 66 Iowa 357; *Squire v. Mudgeth*, 63 N. H. 428; *Brown v. Starr*, 79 Cal. 608.

⁸⁴ 1 Washburn on Real Prop. 366, 380; Thompson on Homest., Secs. 230, 236.

⁸⁵ *In re Walkerley's Estate*, 81 Cal. 579; *Turner's Guardian v. Turner's Heirs & Creditors* (Ky.), 13 S. W. Rep. 6; *McLane v. Paschal*,

§ 124. **Proceedings for allotment.**—The manner of allotting the homestead estate, to one entitled thereto, differs in the different States. In some a claim or declaration being made in the court where the homestead is recorded,⁸⁶ while in others, the probate or county courts, according to the jurisdiction of the particular court, under the statutory proceedings governing the subject, have power to set off the homestead, on the death of the householder.⁸⁷ Generally, any court, having common law jurisdiction, would have power to recognize the claim of exemption, by a homesteader and to entertain a suit to set off the homestead⁸⁸ and where creditors attempted to force a sale of property rightfully claimed as a homestead, by the head of a family, a court of equity would entertain a bill for an injunction, to restrain a sale thereof.⁸⁹ The burden of proof is generally held to be on the party claiming the homestead to show that the land claimed as such was susceptible of being made the basis of the claim, that it was actually used as a homestead and that the tract claimed did not exceed in value the amount subject to the claim.⁹⁰ And where the evidence upon the different

74 Tex. 20; *Mills v. Hobbs*, 76 Mich. 122; *Fowler's Estate* (Cal.), 20 Pac. Rep. 81.

⁸⁶ *Otto v. Long*, 144 Cal. 144; 77 Pac. Rep. 885. The order setting apart the homestead cannot be collaterally assailed. *Otto v. Long*, *supra*. But see, where court is without jurisdiction. *Williams v. Whitaker*, 110 N. C. 393; 14 S. E. Rep. 924; *Watts v. Miller*, 76 Tex. 13.

⁸⁷ County Court has jurisdiction, in Nebraska. *Tyson v. Tyson*, 98 N. W. Rep. 1076. Where heirs of the deceased husband are in adverse possession, the probate court has no authority to entertain a suit by the widow to set off the homestead, in Arkansas. *James v. James*, 80 S. W. Rep. 148. By statute, in Texas, the homestead cannot be partitioned, during the life of the homesteader. *Flynn v. Hancock*, 80 S. W. Rep. 245.

⁸⁸ *Atlee v. Bullard*, 123 Iowa, 274, 98 N. W. Rep. 889; *Simpson v. Scroggins*, 182 Mo. 560, 81 S. W. Rep. 1129.

⁸⁹ *Cooper Grocery Co. v. Peter* (Tex. 1904), 80 S. W. Rep. 108; *Harris v. Mathews*, 81 S. W. Rep. 1198.

⁹⁰ *Harris v. Mathews*, 81 S. W. Rep. 1198. By statute, in Alabama,

issues are disputed it is held to be a question of fact for the jury to determine, whether the land was the proper subject of the homestead claim and if it was actually used as a homestead by the claimant or if it had been abandoned prior to the claim thereto.⁹¹

§ 125. **Exemption from debt.**—The exemption of the homestead from liability for the debts of the owner is various in its extent, sometimes absolute, referring to all classes of debts, and sometimes more or less limited to particular obligations, depending altogether upon the special provisions of each statute. But, perhaps the most general rule is, exemption from liability for all debts, except taxes, and such debts which create a lien upon the premises, such as for the purchase money, or judgment debts, where such judgment has been obtained prior to the attachment of the homestead.⁹² In this connection it may be stated that the homestead can, under no circumstances, be claimed against debts contracted prior to the passage of the homestead and exemption laws.⁹³ But a judgment obtained before the purchase of the property, or before actual occupation, will not attach to the property when bought or occupied, to the ex-

the burden is on the creditor. *Bailey v. Dunlop Co.*, 138 Ala. 415, 35 So. Rep. 451.

⁹¹ *Mathewson v. Kilburn*, 183 Mo. 110, 81 S. W. Rep. 1096; *Macavenny v. Ralph*, 107 Ill. App. 542.

⁹² See *Thompson on Homest.*, Secs. 290-388; *Withers v. Jenkins*, 21 S. C. 365; *Lowdermilk v. Corpening*, 92 N. C. 333; *Finnegan v. Prinderville*, 83 Mo. 517; *King v. Goetz*, 70 Cal. 236; *Halcomb v. Hood* (Ky.), 1 S. W. Rep. 401; *Hendrix v. Seaborn*, 25 S. C. 481; *Burnside v. Watkins* (S. C.), 10 S. E. Rep. 960; *McWatty v. Jefferson Co.*, 76 Ga. 352; *Meador v. Meador* (Ky.), 10 S. W. Rep. 651; *Greer v. Oldham* (Ky.), 11 S. W. Rep. 73; *Cornish v. Frees*, 74 Wis. 490; *Bell v. Wise* (Ky.), 11 S. W. Rep. 717; *Smith v. Richards* (Idaho), 21 Pac. Rep. 419.

⁹³ *Homestead Cases*, 22 Gratt. 266, 12 Am. Rep. 507; *Garrett v. Cheshire*, 69 N. C. 396; 12 Am. Rep. 647; *Gunn v. Barry*, 15 Wall. 610; *Lowdermilk v. Corpening*, 92 N. C. 333; *Wright v. Straub*, 64 Tex. 64; *Cohn v. Hoffman*, 45 Ark. 376; *Long v. Walker*, 105 N. C. 90; *Shaffer v. Hahn*, 105 N. C. 121.

clusion of the homestead right, where the purchase was made for the expressed purpose of securing a homestead.⁹⁴ And the homestead claim is held to have precedence over a debt contracted for the purpose of borrowing money which was expended in the purchase of the homestead.⁹⁵ So, also, if the debts were contracted before marriage, but they did not constitute liens upon the land, the homestead right would attach and take precedence to the claims of such creditors.⁹⁶ In some of the States it is expressly provided by statute that debts contracted in making improvements on the homestead shall have precedence over the homestead claim.⁹⁷

§ 126. How homestead may be lost — By alienation.— The attachment of the homestead right does not take away al-

⁹⁴ *Gardner v. Douglass*, 64 Tex. 76; *Cogwell v. Warrington*, 66 Iowa, 666; *Van Ratcliff v. Call*, 72 Tex. 491; *Neumaier v. Vincent*, 41 Minn. 481.

⁹⁵ *Hale v. Richards* (Iowa), 45 N. W. Rep. 734. See, also, *contra*, *Roy v. Clark*, 75 Tex. 28; *McWilliams v. Bones*, 84 Ga. 203. A homestead is generally liable for debts existing before its acquisition. *Ferguson v. Waller & Co.* (Tex. 1903), 76 S. W. Rep. 609; *Emrich v. Gilbert Co.*, 138 Ala. 316; 35 So. Rep. 322; *Edinger v. Bain* (Iowa, 1904), 98 N. W. Rep. 568; *Roark v. Bach* (Ky. 1903), 76 S. W. Rep. 340; *Walker v. Walker*, 117 Iowa, 609; 91 N. W. Rep. 908. On death of the widow and majority of the debtor's children, the homestead generally is held an asset of his estate. *McAndrew v. Hollingsworth* (Ark. 1904), 81 S. W. Rep. 610; *Winters v. Davis*, 51 Ark. 335, 11 S. W. Rep. 420; *Simpson v. Scroggins*, 182 Mo. 560; 81 S. W. Rep. 1129; *Phillipps v. Preasen*, 172 Mo. 24; 72 S. W. Rep. 501. In most of the States, obligations for the repair or betterment of the homestead, are valid charges against it. *Butler v. Brown*, 205 Ill. 606, 69 N. E. Rep. 44. The proceeds of the sale of a homestead are generally exempt, the same as the homestead. *Lee & Hester v. Hughes* (Ky. 1903), 77 S. W. Rep. 386; *Canney v. Canney* (Mich. 1902), 91 N. W. Rep. 620. And so, generally, is property purchased with proceeds. *Slattery v. Keefe*, 201 Ill. 483; 66 N. E. Rep. 365; *Richards v. Orr* (Iowa 1902), 92 N. W. Rep. 655.

⁹⁶ *Dye v. Cook*, 88 Tenn. 275; *King v. Goetz*, 70 Cal. 236.

⁹⁷ *All v. Goodson* (S. C.), 21 S. E. Rep. 703; *McWilliams v. Bones*, 84 Ga. 203; *Richards v. Shears*, 70 Cal. 187. An ungathered crop on the homestead of the debtor is exempt from sale for his debts. *Parker v. Hale* (Tex. 1903), 78 S. W. Rep. 555.

together the power of alienation. It is the subject of sale, mortgage, and release, as if no homestead right had existed. But for the complete conveyance of the title and effectual barring of the homestead right, it is generally necessary that the wife should join in the deed of conveyance.⁹⁸ And if a conveyance or mortgage is invalid, because there has not been a proper release of the homestead right, a subsequent abandonment of the homestead will not cure the defect.⁹⁹ In some States the mortgage of the homestead is prohibited altogether.¹ However, if the homestead is also limited to the minor children during their minority, a conveyance by the widow would not bar the children's claim of homestead, and they can, on the death of the mother, during their minority,

⁹⁸ *Poole v. Gerrard*, 6 Cal. 71; *Dearing v. Thomas*, 25 Cal. 224; *Burnside v. Terry*, 45 Ga. 629; *Greenough v. Turney*, 11 Gray, 334; *Morris v. Moulton*, 34 N. H. 394; *Re Cross*, 2 Dill. 320; *Sears v. Hanks*, 14 Ohio St. 298; *Crim v. Nelms*, 78 Ala. 604; *Rhea v. Rhea*, 15 Lea, 527; *Riecke v. Westenhoff*, 85 Mo. 642; *Schermerhorn v. Mahaffie*, 35 Kan. 108; *Aultman & Taylor Co. v. Jenkins*, 19 Neb. 209; *Chopin v. Runte*, 75 Wis. 361; *Louisville Bkg. Co. v. Leonard* (Ky.), 13 S. W. Rep. 521; *Grimes v. Portman*, 99 Mo. 229; *Peck v. Ormsby*, 55 Hun, 265; *Hall v. Loomis*, 63 Mich. 709; *Bunting v. Saltz*, 84 Cal. 168; *Duncan v. Moore* (Miss.), 7 So. Rep. 221; *Franklin Land Co. v. Wea Gas, etc., Co.*, 43 Kan. 518; *Betts v. Sims*, 25 Neb. 166; *Hemphill v. Haas* (Ky.), 11 S. W. Rep. 510; *Riggs v. Sterling*, 60 Mich. 643.

⁹⁹ *Bruner v. Bateman*, 66 Iowa, 488; *Belden v. Younger*, 76 Iowa, 567.

¹ *Smith v. Hutton*, 75 Tex. 625; *Planters', etc., Bank v. Dickenson*, 83 Ga. 711; *Texas Land, etc., Co. v. Blalock*, 76 Tex. 85. Most of the cases hold, that since there can be no fraudulent conveyance of a homestead, a claim to a homestead may be made, even after a fraudulent conveyance thereof. *Smith v. Kerr*, 2 Dill. (U. S.) 50; *McFarland v. Goodman*, 6 Biss. (U. S.) 111; *Kennedy v. Nat. Bank*, 107 Ala. 170; *Turner v. Vaughan*, 33 Ark. 454; *Jaffers v. Aneals*, 91 Ill. 487; *Thomason v. Neely*, 50 Miss. 310; *State v. Diveling*, 66 Mo. 375; *Dortch v. Benton*, 98 N. C. 190; *Hatcher v. Crews*, 83 Va. 371. But see, *contra*, *Minor v. Wilson*, 58 Fed. Rep. 616; *Gideon v. Struve*, 78 Ky. 134. Since a homestead is exempt, in law, from the debts of the household, creditors cannot claim that a conveyance of a homestead, from husband to wife, is a fraudulent conveyance. *Wetherly v. Strauss*, 93 Cal. 283; *Boyd v. Barnett*, 24 Ill. App. 199; *Golsbitch v. Ranibon*, 84 Iowa, 567; *Whayne v. Morgan* (Ky.), 12 S. W. Rep. 128; *Kelly v.*

assert their claim of homestead against their mother's purchaser.²

The conveyance must conform in every respect to the ordinary rules of conveyance.³ And when the homestead law requires a peculiar form of acknowledgment, in order to release the homestead right, the conveyance will be ineffectual for that purpose, if the provisions of the law are not strictly complied with.⁴ But even when the proper form of acknowledgment is employed, if the deed contains an express declaration that its execution by the wife is "solely for the purpose of relinquishing her dower interest in the land," the homestead right is not, as to her, affected by such conveyance.⁵

Fraud, in the procurement of the wife's renunciation of the homestead, will, of course, vitiate the transaction; and it has been held that she could claim her homestead even against a grantee, who was not a party to the fraud.⁶ But the renunciation of the homestead right by the wife, is only necessary to the validity of a conveyance by the husband, when the homestead right had been established, and the homestead set out, under the provisions of the homestead law. A conveyance prior to such establishment of the home-

Connell (Ala.), 18 So. Rep. 9; Burdge v. Bolin, 106 Ind. 175; Robb v. Brewer, 60 Iowa, 539; Roberts v. Robinson, 49 Neb. 717, 68 N. W. Rep. 1035; Plummer v. Rohman (Neb.), 84 N. W. Rep. 600; Steiner v. Berney (Ala. 1901), 30 So. Rep. 570, 8 Amer. & Eng. Dec. Eq. 261.

² Rogers v. Mayes, 84 Mo. 520; Rhoder v. Brockhage, 86 Mo. 544.

³ Jones v. Robbins, 74 Tex. 615; Winkleman v. Winkleman (Iowa), 44 N. W. Rep. 556; Borehan v. Byrne, 83 Cal. 23; Yocum v. Lovell, 111 Ill. 212; Shelton v. Aultman & Taylor Co., 82 Ala. 315; Jones v. Roper, 86 Ala. 210.

⁴ See Wheeler v. Gage, 28 Ill. App. 427; s. c. 129 Ill. 197; Razor v. Dowan (Ky.), 13 S. W. Rep. 914; Kimmell v. Caruthers (Ky.), 1 S. W. Rep. 2; Boreham v. Byrne, 83 Cal. 23; Gage v. Wheeler, 128 Ill. 197.

⁵ Thompson v. Sheppard, 85 Ala. 611.

⁶ Barker v. Barker (Neb.), 42 N. W. Rep. 889.

stead needs no renunciation of the right, in order to make perfect the title of the purchaser.⁷

That a conveyance by husband and wife for a valuable consideration will pass their title to the grantee free from the claims of creditors, is established beyond a doubt.⁸ But it has been held that the voluntary conveyance to a third person without consideration, is an act of abandonment, a fraud upon creditors, and the creditors may attach the property in the hands of the grantee.⁹ An alienation of the homestead for a substantial consideration conveys the whole title and the proceeds of sale are to be re-invested in a home-

⁷ *Hughes v. Hodges*, 102 N. C. 236, 262. A conveyance by the husband alone, of a homestead, is held void, in the following cases: *Penn v. Case* (Tex. 1904), 81 S. W. Rep. 349; *Alvis v. Alvis*, 123 Iowa, 546; 99 N. W. Rep. 166; *Collins v. Bounds* (Miss. 1904), 36 So. Rep. 689; *Helgebye v. Dammen* (N. D. 1904), 100 N. W. Rep. 245; *Solt v. Anderson* (Neb. 1904), 99 N. W. Rep. 678; *Way v. Scott* (Iowa, 1902), 91 N. W. Rep. 1034; *Keisewetter v. Kress* (Ky. 1902), 70 S. W. Rep. 1065; *Hubbard v. Sage Land Co.* (Miss. 1903), 33 So. Rep. 413. Where a statute requires the wife to join in conveyances of the homestead, a conveyance from husband to wife, in which she does not join, is held void, in Illinois. *Robertson v. Tippie*, 209 Ill. 38, 70 N. E. Rep. 584; *Hogue v. Steel*, 207 Ill. 340; 69 N. E. Rep. 931. But such a conveyance, under a similar statute, is upheld, in Arkansas. *Kindley v. Spraker* (1904), 79 S. W. Rep. 766. See, also, *Turner v. Burnheimer*, 95 Ala. 241; 10 So. Rep. 750; *Burkett v. Burkett*, 78 Cal. 310; 20 Pac. Rep. 715; 3 L. R. A. 781; *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. Rep. 441; *Lynch v. Doran*, 95 Mich. 395; 54 N. W. Rep. 882; *Furrow v. Athey*, 21 Neb. 671, 33 N. W. Rep. 208; *Beedy v. Finney* (Iowa, 1902), 91 N. W. Rep. 1069.

⁸ *Bowman v. Norton*, 16 Cal. 214; *Deffeliz v. Pico*, 46 Cal. 289; *Bonnell v. Smith*, 53 Cal. 377; *Parker v. Parker*, 88 Ala. 362; *Ray v. Yarnell*, 118 Ind. 112; *Maynard v. May* (Ky.), 11 S. W. Rep. 806; *Thompson v. Sheppard*, 85 Ala. 611.

⁹ *Currier v. Sutherland*, 54 N. H. 475, 20 Am. Rep. 143; *Jones v. Currier*, 65 Iowa, 533; *Campbell v. Jones*, 52 Ark. 493. But see *Dientzer v. Bell*, 11 Wis. 114; *Wienbrenner v. Weisinger*, 3 B. Mon. 33; *Planters' Bank v. Henderson*, 4 Humph. 75; *Garrison v. Monaghan*, 33 Pa. St. 232; *Rankin v. Shaw*, 94 N. C. 405; *Beard v. Blum*, 64 Tex. 59; *Willis v. Mike*, 76 Tex. 82; *Fordyce v. Hicks* (Iowa), 45 N. W. Rep. 750; *Maynard v. May* (Ky.), 11 S. W. Rep. 806.

stead, otherwise they become subject to the claims of creditors.¹⁰ If, however, the alienation consists of a mortgage of the land, the homestead right will have been lost only as to the mortgagee and persons claiming under him.¹¹ There may of course be a direct exchange of homesteads, and the same homestead rights will attach to the new property thus acquired.¹² And if partition is made of the premises in which the homestead has been claimed, the homestead would attach to the claimant's share in the proceeds of sale.¹³

§ 127. Continued — By abandonment.— The homestead may also be lost by acts which constitute an abandonment of the homestead; such would be a permanent removal from the homestead where actual residence is required to support the right, or the acquisition of a new homestead.¹⁴ The intention of abandonment, and actual abandonment, must co-exist.

¹⁰ *Smith v. Gore*, 23 Kan. 88, 33 Am. Rep. 158; *City Bank v. Smisson*, 73 Ga. 422; *Skinner v. Chadwell* (Ky.), 1 S. W. Rep. 437; *Kirby v. Giddings*, 74 Tex. 679; *Mann v. Kelsey*, 71 Tex. 609; *Lane v. Richardson*, 104 N. C. 642. It has, however, been held that homestead exemption can be claimed in proceeds of the sale of the old homestead, although the proceeds have not been re-invested in an actual homestead. See *Turner's Guardian v. Turner's Heirs and Creditors* (Ky.), 13 S. W. Rep. 6.

¹¹ *King v. Goetz*, 70 Cal. 236; *First Nat. Bank v. Briggs*, 22 Ill. App. 228; *White v. Fulghum*, 3 Pickle, 281.

¹² *Creath v. Dale*, 84 Mo. 349; *City Bank v. Smisson*, 73 Ga. 422. *Plummer v. Rohman* (Neb. 1900), 84 N. W. Rep. 600, 7 Amer. & Eng. Dec. in Eq. 379; *Jamison v. Weaver*, 87 Iowa, 72; *Breshanan v. Nugent*, 92 Mich. 76; *Bell v. Boosley*, 18 Tex. Civ. App. 639. But see *Pool v. Reid*, 15 Ala. 826; *Bennett v. Hudson*, 33 Ark. 762.

¹³ *Swandale v. Swandale*, 25 S. C. 389.

¹⁴ *Stewart v. Mackey*, 16 Texas, 38; *Gonhenant v. Cockrell*, 20 Texas, 96; *Titman v. Moore*, 45 Ill. 169; *Woodbury v. Luddy*, 14 Allen, 1; *Howe v. Adams*, 28 Vt. 544; *Ross v. Hellyer*, 26 Fed. Rep. 413; *Foster v. Leland*, 141 Mass. 187; *Reifenstahl v. Osborne*, 66 Iowa, 567; *Wilson v. Daniels* (Iowa), 44 N. W. Rep. 1246; *Feldes v. Duncan*, 30 Ill. App. 469; *Hutch v. Holly*, 77 Tex. 220; *Milburn Wagon Co. v. Kennedy*, 75 Tex. 212; *Smith v. Mattingly* (Ky.), 13 S. W. Rep. 719; *McAlpine v. Powell* (Kan.), 24 Pac. Rep. 1353; *Langston v. Maxey*, 74 Tex. 576; *Welborne v. Downing*, 73 Tex. 527.

The intention of permanent removal does not affect the continuance of the homestead right, as long as there is no actual abandonment.¹⁵ But the abandonment is an accomplished fact, where the only continued occupation consists of the temporary storage of some goods on the place.¹⁶ A temporary absence, *animo revertendi*, will not cause an abandonment.¹⁷ Nor does a forced absence from the homestead, it matters not for how long a time, constitute an abandonment.¹⁸

It is always a question of fact for the jury whether there has been an abandonment.¹⁹ The statutes sometimes provide that the abandonment must be manifested by certain acts, or a written acknowledgment under which circumstances, abandonment cannot be proven in any other way.²⁰ The fact that the husband abandons the homestead has been

¹⁵ *Kauffman v. Fore*, 73 Tex. 308.

¹⁷ *Tomlinson v. Swinney*, 22 Ark. 400; *Wood v. Lord*, 51 N. H. 454; *Barker v. Dayton*, 28 Wis. 367; *Burch v. Mouton*, 37 La. An. 725; *Scheuber v. Ballow*, 64 Tex. 166; *Leake v. King*, 85 Mo. 413; *Jones v. Robbins*, 74 Tex. 615; *Duffy v. Willis*, 99 Mo. 432; *Reinstein v. Daniels*, 75 Tex. 640; *Nichols v. Nichols*, 62 N. H. 621; *Rollins v. O'Farrell*, 77 Tex. 90; *Davis Sew. M. Co. v. Whitney*, 61 Mich. 518; *Persiful v. Hind* (Ky.), 11 S. W. Rep. 15; *Black v. Black's Adm'r* (Ky. 1889), 12 S. W. 147; *Graves v. Campbell*, 74 Tex. 576; *C. B. Carter Lumber Co. v. Clay* (Tex.), 10 S. W. Rep. 293; see *Durland v. Seiler* (Neb.), 42 N. W. Rep. 741. A sale and conveyance of the homestead to a third party, who re-conveys to the wife, is not an abandonment, in Michigan. *Burkhart v. Walker & Son*, 92 N. W. Rep. 778. By statute, in Washington, an abandonment of a homestead is only operative, when filed in the office where the homestead is recorded and actual occupancy is not an essential of the estate. *Lewis v. Mauerman*, 35 Wash. 156; 76 Pac. Rep. 737.

¹⁸ *Leake v. King*, 85 Mo. 413; *Keyes v. Scanlan*, 63 Wis. 345; *Persiful v. Hind* (Ky.), 11 S. W. Rep. 15; *Woolcut v. Lerdell*, 78 Iowa, 668.

¹⁹ *Feldes v. Duncan*, 30 Ill. App. 409; *Kutch v. Holly*, 77 Tex. 220; *Smith v. Mattingly* (Ky.), 13 S. W. Rep. 719; *Bowman v. Watson*, 66 Tex. 295; *Jones v. Blumenstein*, 77 Iowa, 361; *Marshall v. Appelgate* (Ky.), 10 S. W. Rep. 805.

²⁰ *Tipton v. Martin*, 71 Cal. 325. *Lewis v. Mauerman* (Wash. 1903), 76 Pac. Rep. 737.

held not to affect the wife's right to the homestead exemption, although she accompanies him, on the ground that her departure from the homestead, under those circumstances, is presumptive involuntary.²¹

²¹ *Collins v. Baytt*, 3 Pickle, 334; overruling *Levison v. Abrahams*, 14 Lea., 336. But see *Graves v. Campbell* (Tex.), 12 S. W. Rep. 238; 74 Tex. 576. A second marriage is usually held to be a bar or abandonment of the homestead, as the wife would have a homestead in the second husband's land and could not legally enjoy two homesteads. *Kloss v. Wylezalek*, 207 Ill. 328, 69 N. E. Rep. 863. The acquisition of a second homestead is generally held to be sufficient evidence of abandonment to prevent a claim of homestead as to a previous residence. *Wilmoth v. Gosssett*, 71 Ark. 594, 76 S. W. Rep. 1073.

CHAPTER VIII.

ESTATES LESS THAN FREEHOLD.

SECTION I. — *Estates for years.*

II. — *Estates at will, and tenancies from year to year.*

III. — *Estates at sufferance.*

SECTION I.

- SECTION 128. History of estates for years.
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- 156. How surrender may be effected.
- 157. Right of lessee to deny lessor's title.
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- 159. Options of purchase and for renewal.
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- 161. Actions between landlords and tenants.

§ 128. *History of estates for years.*—Under the feudal system, the smallest interest which could be granted out of lands, having the characteristics of an estate, was a freehold. Such are the estates, which have been treated in the preceding pages. But there obtained at that time a custom of granting by contract to tenants the possession of the lands for a stipulated period, in consideration of some rent paid or service performed by the tenant. The tenant acquired no estate or vested interest in the land, which would give to him the possessory actions necessary for the protection of such interests. If he was evicted by the landlord or by any other person, he had only his action for damages against the landlord for the breach of his contract. He could not recover possession as in the case of a freehold.¹ But subsequently the writ of ejectment was invented for his protection, by which he could recover possession of the land, with damages for its detinue, and this form of action substantially remains to this day.² But these estates, as well as the other tenancies considered in the following sections, are generally considered and treated as chattel interests in lands, having more the characteristics of a bailment, than of a freehold estate in real property. The tenant is never said to be seized of the land. The actual seisin, if acquired by virtue of his possession, is held by him as a *quasi-bailee* of the remainderman.³ This gen-

¹ Washburn on Real Prop. 433, 435; Maine's Anc. Law, 275; Digby, Hist. Real Prop. 175.

² 1 Washburn on Real Prop. 435, 436; Goodlittle v. Tombs, 3 Wils. 120; Campbell v. Loader, 3 H. & C. 527. For history of the writ *ejectionis firmæ*, on which the action of ejectment was subsequently based, see 2 Pollock & Maitlands Hist. Eng. Law, 291.

³ 1 Washburn on Real Prop. 435; 1 Cruise Dig. 224.

eral proposition is, however, often limited by statutory enactments, which give to estates for years of a certain duration, fixed by statute, all the characteristics of a freehold estate.⁴ Such leaseholds, by force of these statutes, assume the character of a freehold estate, so far as the certainty of its duration will permit.

§ 129. Definition.—An estates for years is one granted for a certain definite period of time, by the owner of the freehold, who in this connection is called the lessor, to one called the lessee, to hold and enjoy during the time stipulated and under the conditions agreed upon. The word *years* is used simply as a unit of time, and an estate for years, technically, may be for any period of time, a month, a week, etc.⁵

§ 130. Term defined.—Since the estate is to last for a definite period of time, having a precise beginning and end, it has acquired the technical designation of a *term*, from the Latin *terminus*.⁶ But the period need not be definitely fixed by the contract of the parties, which creates the estate. Under the maxim, *id certum est quod certum reddi potest*, the contract or lease would be valid, if it contained sufficient means of ascertaining its duration. A lease, therefore, for so many years as J. S. shall name, or to A. during his minority, would be a good term, while a lease for so many years as A. shall live, would not be good as a term, since there is no way in which the duration of the term can be ascertained until its expiration.⁷ It has, however, been held

⁴ 1 Washburn on Real Prop. 463; Walker Am. Law, 279.

⁵ 1 Washburn on Real Prop. 436; Brown v. Bragg, 22 Ind. 122; Gould v. School Dist., 8 Minn. 431; Dixon v. Ahern (Nev.), 24 Pac. Rep. 337; Shaw v. Hill (Mich), 44 N. W. Rep. 422; Buel v. Buel (Wis.), 45 N. W. Rep. 324; State v. Staiger (N. J.), 19 Atl. Rep. 357. Taylor, Land & Ten., Sec. 17; Huff v. McCaully (Pa.), 91 Amer. Dec. 203.

⁶ 1 Washburn on Real Prop. 438; Williams on Real Prop. 388.

⁷ Co. Lit. 45 b; 1 Washburn on Real Prop. 441; Dunn v. Cartright, 4 East, 29; Doe v. Dickson, 9 East, 15; West. Transp. Co. v. Lansing, 49 N. Y. 508; Horner v. Leeds, 25 N. J. L. 106; Delashman v. Barry, 20

to be a good lease where the lessee was given the possession as long as a certain building was not completed.⁸ And if a lease is given for a time certain, the validity is not affected by an additional stipulation that the tenant's possession thereafter is to continue at the will of the lessor.⁹

§ 131. *Interesse termini*.—The lessee does not acquire an estate in the land until he has entered into possession. His interest is simply a right of entry, and is called an *interesse termini*. Until possession is acquired, he cannot maintain any action against strangers in respect to the land. Before the entry, the right of possession and the right to bring such actions are in the lessor.¹⁰ It has also been held at common law that the lessee cannot, before entry, maintain an action of ejectment. But under the present theory in regard to this action, it is equivalent to common-law entry, Mich. 292; Russell v. McCartney, 21 Mo. App. 544; Spies v. Voss, 9 N. Y. S. 532. On the principle that the number of years can be ascertained by computation, it has been held that a devise or grant of lands, to pay debts out of the rents and profits, is treated as an estate for years. 1 Cruise Dig. 223; Batchelder v. Dean, 16 N. H. 268. See, also, *ante*, Sec. 46.

⁸ D'Arcy v. Martyn, 63 Mich. 602. See, also, Sutton v. Hiram Lodge, 83 Ga. 770 (for the space of twenty years, or during our (lessee's) natural lives). A term may be created as well in incorporeal things real, as in other species of real property. Taylor Land. & Ten., 17; Commonwealth v. Weatherhead, 110 Mass. 175. That the lessor only has a life estate, does not effect the rights of the parties to a lease for a fixed term, with privilege of a renewal. Olden v. Sassman (N. J. Ch. 1904), 57 Atl. Rep. 1075.

⁹ Myers v. Kingston Coal Co., 126 Pa. St. 582.

¹⁰ Co. Lit. 46 b; 4 Kent's Com. 97; Doe v. Walker, 5 B. & C. 111; Wheeler v. Montefiore, 2 Q. B. 142; Sennett v. Bucher, 3 Pa. St. 392; 1 Washburn on Real Prop. 442, 443. And although the words "bargain and sell" in a lease, founded upon actual and valuable consideration, will create a use, which will be executed into a legal estate by the Statute of Uses, the same rule in respect to the necessity of entry into possession applies. 2 Sand. Uses, 56; 1 Washburn on Real Prop. 443. See Harrison v. Blackburn, 17 C. B. (N. S.) 678; Austin v. Coal Co., 72 Mo. 535; 1 Greenl. Cruise 243; 4 Kent's Com. (11 ed.) 106; 1 Platt Leas. 22; Taylor Land. & Ten. (6 ed.) 11.

and can be maintained by any one who has a good title and an immediate right of entry.¹¹ The *interesse termini*, however, is so far a vested interest as to be capable of descent to the personal representatives, or of bequest like other chattel interests. It can also be assigned or released.¹² But a delay on the part of the lessee to convert his *interesse termini* into an actual estate, does not suspend his liability on the covenants of his lease, unless such delay is occasioned by the fault of the lessor.¹³ But it is the duty of the lessor to deliver the possession to the tenant; and if the leased property is in the possession of a third person, who refuses to give it up, it is the lessor's duty to oust him; and until he does this he breaks his covenant for quiet enjoyment and is liable in damages to the lessee.¹⁴

§ 132. *Terms commencing in futuro.*—Since a term of years is a contract for the delivery and detention of the possession and does not affect the seisin of the reversioner, it may be made to commence at any time in the future, as well as in the present, provided it does not offend the doctrine of perpetuities, by vesting in possession at a time beyond a life or lives in being, and twenty-one years thereafter.¹⁵ Sometimes a lease contains a covenant for renewal. Where it is a covenant for an indefinite renewal, it has been held

¹¹ 1 Washburn on Real Prop. 443, 444; *Gardner v. Keteltas*, 3 Hill 332; *Whitney v. Allaire*, 1 N. Y. 305.

¹² Co. Lit. 46 b, 338 a; 4 Kent's Com. 97; *Doe v. Walker*, 5 B. & C. 111; 1 Washburn on Real Prop. 444.

¹³ 1 Washburn on Real Prop. 445; *Salmon v. Smith*, 1 Saund. 203, note 1, *Whitney v. Allaire*, 1 N. Y. 305; *Lafarge v. Mansfield*, 31 Barb. 345; *Mechan. Ins. Co. v. Scott*, 2 Hilt. 550; *Maverick v. Lewis*, 3 McCord, 216; *Rice v. Brown*, 81 Me. 56. But see *Reed v. Beck*, 66 Iowa 21, where it was held that, where a mine was rented under a contract to pay a certain sum per ton, and a guaranty that the royalty should not fall short of a given amount, no rent was due until mining had begun.

¹⁴ *Cohn v. Norton*, 57 Conn. 480.

¹⁵ *Williams on Real Prop.* 38; *Cadell v. Palmer*, 10 Bing. 140; *Wild v. Traip*, 14 Gray 333.

to be a void agreement within the doctrine of perpetuity.¹⁶ Whether this rule would be adopted generally, is a matter of some doubt. Where the covenant for renewal is on the part of the lessor and the lessee does not expressly bind himself to accept such a renewal, the performance or non-performance of the covenant is at the option of the lessee, and he cannot be compelled to accept a renewal.¹⁷ Unless the term does take effect in possession, the lessee has only an *interesse termini*.¹⁸

It is sometimes stated without any qualification or explanation, which is at all satisfactory to a rational mind, that leaseholds can, and freeholds cannot, be created to commence in the future, and the difference in the operation of this rule on the two kinds of estates is ordinarily ascribed to some feudal distinction. But the rational explanation of the matter is the following: A lease is not a conveyance of an estate, but only an executory contract for the transfer of an estate for years, and differs in no material respect from the operation of an executory contract for the sale of a freehold estate. The difference arises at common law in the modes of executing these two executory contracts of sale. The lease is executed by the lessee taking possession of the land, without any formal transfer of it to him by the

¹⁶ *Reed v. Campbell*, 43 N. J. Eq. 406; *Morrison v. Rossignol*, 5 Cal. 64.

¹⁷ *Bruce v. Fulton National Bank*, 79 N. Y. 154, 35 Am. Rep. 505.

¹⁸ 1 Washburn on Real Prop. 439; 4 Kent's Com. 97; *Doe v. Walker* 5 B. & C. 311. *Berridge v. Glassey*, 112 Pa. St. 442, 56 Am. Rep. 322; *Illinois Starch Co. v. Ottawa Hydraulic Co.*, 23 Ill. App. 272, s. o. 125 Ill. 237. If the premises, in a lease commencing *in futuro*, are destroyed before the time arrives for it to vest in possession, the tenant is under no liability for rent. The very subject-matter of the contract being destroyed, the contract becomes an impossible one, and the parties are relieved of their liability. *Taylor v. Caldwell*, 3 B. & S. 826; *Wood v. Hubbell*, 10 N. Y. 487. A mere contract to execute a lease never conveys any estate in the premises agreed to be demised. *Henderson v. Schuylkill Valley Co.*, 24 Pa. Super. Ct. 422; *Ver Steeg v. Becker-Moore Co.* (Mo. 1904), 80 S. W. Rep. 346; *Austin v. Coal Co.*, 72 Mo. 535.

lessor. But at common law an executory contract for the sale of a freehold could only be executed by a livery of seisin, which from its very nature could not take place until the time arrived when the grantee's estate was to begin. To be strictly accurate in speech, neither the leasehold nor the freehold can be created to commence in the future, but it is practically accurate to say that a leasehold can be so created, inasmuch as the executory lease is self-executing. The necessity at common law for the livery of seisin in the execution of an executory sale of a freehold is the only obstacle in the way of applying the same statement to the sale of freeholds *in futuro*. As soon as a conveyance of the legal title to freeholds was devised, whereby the executory bargain and sale of a freehold became self-executing, we then find that freeholds, as well as leaseholds, can be created to commence in the future.¹⁹

§ 133. The rights of lessee for years.—As a general proposition, the lessee is entitled to all the rights of freeholders, which arise out of actual possession, including those of estovers, fixtures, and the modes of enjoyment of the land.²⁰ But the estate for years can be regulated by agreement of parties to an almost unlimited extent, and the rights of the parties under a lease are as variant as the contracts. There are few, if any, rights which might be considered as invariable incidents of leaseholds.

§ 134. How created.—A contract is the basis of every tenancy for years. A permissive occupation of the land is not such a tenancy as would support a claim for rent.²¹ At common law an estate for years could have been created by

¹⁹ See *post*, Sec. 543.

²⁰ *Kutter v. Smith*, 2 Wall. 497; *Davis v. Buffum*, 51 Me. 162; *Dingley v. Buffum*, 57 Me. 382; *Riddle v. Littlefield*, 33 N. H. 510; *Freer v. Stotenbur*, 33 Barb. 642; *Dubois v. Kelly*, 10 Barb. 490. See *ante*, Secs. 56-63.

²¹ *Collyer v. Collyer*, 113 N. Y. 442.

a parol contract. But under the English Statute of Frauds, all leases for more than three years must be put in writing and signed by the parties; otherwise, they shall have only the force and effect of estates at will.²² Although the statutes declare such parol leases to have only the force and effect of estates at will, yet in those States in which the doctrine of tenancies from year to year is recognized, they would be construed to be tenancies from year to year, if the tenant enters into possession and pays rent, and in all the States, such tenants would have a right to the statutory notice to quit before an action of ejectment can be maintained against them.²³ But mere possession, without an actual payment of rent, will not impose upon the tenant the obligations of a tenant from year to year; and he is at liberty to escape liability for rent by abandoning the possession.²⁴ It is not necessary that such leases should be under seal in order to be valid.²⁵ The statutes of the dif-

²² 1 Washburn on Real Prop. 446, 447.

²³ *Schneider v. Lord*, 62 Mich. 141; *Tanton v. Van Alstine*, 24 Ill. App. 405; *Quinlan v. Bonte*, 25 Ill. App. 240; *Talamo v. Spitzmiller*, 120 N. Y. 37; *People v. Rickhert*, 8 Cow. 226; *McDowell v. Simpson*, 3 Watts 129; *Dunn v. Rothermel*, 112 Pa. St. 272; *Utah Loan & T. Co. v. Garbut* (Utah), 23 Pac. Rep. 758; *Condert v. Cohn*, 118 N. Y. 309, N. B. 48; *Rosenblatt v. Perkins* (Or.), 22 Pac. Rep. 598. But see *Unglish v. Marvin*, 45 Hun 45. And as long as possession continues under a parol lease, which is void under the Statute of Frauds, the rights of the parties will be governed by the terms of the original letting. *Doe v. Bell*, 5 T. R. 471; *Barlow v. Wainwright*, 22 Vt. 88; *Currier v. Barker*, 2 Gray 224; *Quinlan v. Bonte*, 25 Ill. App. 240. Any language by which possession of premises is transferred for a fixed term, for a stipulated rent, is a lease, in Pennsylvania. *Pickering v. O'Brien*, 23 Pa. Super. Ct. 125. No seal is necessary, in Illinois, *Borggard v. Gale*, 107 Ill. App. 128, 205 Ill. 511, 68 N. E. Rep. 1063. But the lease must be for a lawful purpose. A lease of property for a bawdy house is wholly void. *Berni v. Boyer*, 90 Minn. 469, 97 N. W. Rep. 121; *Sprague v. Rooney*, 84 Mo. 349; *McDermott v. Sedgwick*, 140 Mo. 172.

²⁴ *Capper v. Sibley*, 55 Iowa 754.

²⁵ *Allen v. Jaquish*, 21 Wend. 635; *Olmstead v. Niles*, 7 N. H. 526; *Den v. Johnson*, 15 N. J. L. 116; 1 Washburn on Real Prop. 447.

ferent States are similar in their general provisions, but there is a diversity in respect to the length or duration of those leases, which will be valid without writing;²⁶ while in some, again, the writing is required to be under seal, or in other words, to be a deed.²⁷ But if only one of the parties signs the lease, and the tenant enters into actual possession of the premises, the party signing cannot relieve himself of liability on the lease by showing that the lease had not been duly executed by the other party. This is true whether the party failing to sign be the lessor or lessee.²⁸ In Maine it is held that the signature of the lessor and the seal of the lessee bind both parties to the lease.²⁹ If the lease is executed by an agent, according to the English law, and that of some of the States, the authority must be given in writing, while in other States, the writing not being under seal, a

²⁶ The English statute has been re-enacted in Pennsylvania, New Jersey, Maryland, North Carolina, South Carolina, Georgia, and Indiana. In Florida, leases for two years and under may be by parol. In Alabama, Arkansas, California, Delaware, Iowa, Kentucky, Michigan, Mississippi, New York, Nevada, Rhode Island, Tennessee, Texas, Virginia and Wisconsin, the term is one year; while in Maine, Massachusetts, Missouri, New Hampshire, Ohio and Vermont, all parol leases create tenancies at will. 1 Washburn on Real Prop. 484, note.

²⁷ The provisions of the State statutes requiring a sealed instrument in the grant of a leasehold, are not uniform. Generally it is provided that only leases of a certain duration should be sealed. See Taylor's L. and T., Sec. 34; Gratt v. Bratt, 21 Md. 583; Chandler v. Kent, 8 Minn. 526.

²⁸ Zink v. Bohn, 3 N. Y. S. 4; Toan v. Pline, 60 Mich. 385. There must be a sufficient description of the premises (Dixon v. Finnegan, 182 Mo. 111, 81 S. W. Rep. 449); a present demise of the premises (Ver Steeg v. Becker-Moore Co.,) Mo. 1904, 80 S. W. Rep. 346; and an execution by the parties, to constitute a valid lease (Kuntz v. Marenholz, N. Y. 1904, 88 N. Y. S. 1002). In the execution of a lease to property held in trust all the trustees must join, or the lease is void. Baltimore & Ohio Co. v. Winslow, 188 U. S. 646, 47 L. Ed. 635. And, in West Virginia, if lessor's name does not appear in body of lease, although he signs it, it is not a good demise. Barnsball v. Boley, 119 Fed. Rep. 191.

²⁹ Rice v. Brown, 81 Me. 56. No seal is required in Illinois. Borgard v. Cole, 205 Ill. 511, 68 N. E. Rep. 1063.

parol power of attorney will be sufficient.³⁰ Whenever a lease is reduced to writing, parol evidence is inadmissible to vary or add to the terms of the lease as set forth in the writing.³¹

§ 135. **Form of instrument.**—In the execution of a lease, a general form of deed, more fully explained hereafter, is usually followed, and certain terms and forms of expression are used. But any form of deed, and any terms or mode of expression will be sufficient for the creation of an estate for years, which shows the intention of the lessor to transfer to the lessee the possession of the land during a certain determinate period of time.³² If the lease is delivered as an escrow, no title passes to the tenant until the condition has been performed.³³ The words of grant usually employed are “grant,” “demise,” and “farm-let.” “Do lease, demise, and farm-let,” signify generally the creation of a present vesting term, and not a future or contingent one, but this implication may be controlled by the other provisions of the lease.³⁴ The lease must, of course, describe the land

³⁰ 1 Washburn on Real Prop. 448, note. The English rule has been adopted in Alabama, Arkansas, Georgia, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, South Carolina, and Wisconsin. *Cheesebrough v. Ringrel*, 72 Mich. 438.

³¹ *Stevens v. Pierce* (Mass.), 23 N. E. Rep. 1006; *McLean v. Nicoll*, 43 Minn. 169; *Snead v. Tiejer* (Ariz.), 24 Pac. Rep. 324; *Kline v. McLain*, 33 W. Va. 32; *Pike v. Leiter*, 26 Ill. App. 531; *Leiter v. Pike*, 127 Ill. 287; *Stoddard v. Nelson*, 17 Or. 418.

³² *Wells v. Sheerer*, 78 Ala. 142; *Dunck Co. v. Webber* (Mass.), 24 N. E. Rep. 1082; *Collyer v. Collyer*, 113 N. Y. 442; *Houston v. Smythe*, 66 Miss. 118; *Oliver v. Moore*, 53 Hun 472; *Rice v. Brown*, 81 Me. 56.

³³ *Gorsuch v. Rutledge*, 70 Ind. 272.

³⁴ So. Cong. Meet. *House v. Hilton*, 11 Gray 409; *White v. Livingston*, 10 Cush. 259; *Putnam v. Wise*, 1 Hill 244; *Jackson v. Delacroix*, 2 Wend. 438; *Walker v. Fitts*, 24 Pick. 181; *Doe v. Ries*, 8 Bing. 182; *Doe v. Benjamin*, 9 A. & E. 650. “Shall hold and enjoy” have also been held to be words of present demise. *Doe v. Ashburner*, 5 T. R. 168; *Moshier v. Reding*, 12 Me. 135; *Wilson v. Martin*, 1 Denio 602; *Watson v. O’Hern*, 6 Watts. 362; *Moore v. Miller*, 8 Pa. St. 272. See, for essentials of lease, *Kuntz v. Morenholz* (N. Y. 1904), 88 N. Y. S.

which is leased with sufficient accuracy to admit of its identification.³⁵ But an agent of the lessor may under parol authority³⁶ supply the deficiency of the description.³⁷ And if the tenant enters into possession under the lease, he cannot object to his liability under the covenant, on account of the deficiency of the description.³⁸

§ 136. Continued — Distinction between present lease and contract for future one.— It is sometimes difficult to determine whether the instrument is a present lease, or only a contract for a future one. If it is a present lease, the parties will be bound by its implied, as well as express, provisions, and their force and affect cannot be altered by parol evidence, showing the intentions of the parties to have been different.³⁹ Whereas, if the instrument was only a contract for a future lease, it is not the final repository of the wishes of the parties, and it can be altered or amended to effectuate their intention.⁴⁰ But in the absence of mutual agreements for alterations or amendments, neither party can insist on the insertion into the lease of terms and conditions, which are not imposed on the parties by law.⁴¹ The ordinary rule of construction is that where the agreement leaves nothing further to be done by the parties, and contains directly, or by reference to other papers or records, all the provisions that are necessary to a valid lease, the instrument will be treated as a present demise.⁴² And even where a fuller lease

1002; *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. Rep. 449; *Baltimore & Ohio Co. v. Winslow*, 188 U. S. 646, 47 L. Ed. 635.

³⁵ *Cluett v. Sheppard* (Ill.), 23 N. E. Rep. 582.

³⁶ See *post*, Sec. 548.

³⁷ *Bulkley v. Devine*, 27 Ill. App. 145, *s. c.* 127 Ill. 406.

³⁸ *Bulkley v. Devine*, 127 Ill. 406.

³⁹ *Kline v. McLain*, 33 W. Va. 32.

⁴⁰ 1 Washburn on Real Prop. 453.

⁴¹ *Hayden v. Lucas*, 18 Mo. App. 325.

⁴² *Kabley v. Worcester Gas Co.* 102 Mass. 394; *Shaw v. Farnsworth*, 108 Mass. 357. See *Weed v. Crocker*, 13 Gray 219; *Hallett v. Wylie*, 3 Johns. 47; *Jackson v. Delacroix*, 2 Wend. 433; *Averill v. Taylor*, 8

is stipulated for, although this clause standing alone would give to the agreement the character of a contract for a lease, yet if there are proper words of present demise, the covenant for a future lease will be treated merely as a covenant for further assurance, and the agreement will take effect as a present demise.⁴³ And where the agreement admits of either construction the acts and declaration of the parties may be introduced, as indications of their intention and their understanding of the agreement.⁴⁴ Entry into possession and payment of rent would create a tenancy under a written instrument, which otherwise would be construed to be only a contract for a future lease.⁴⁵

§ 137. **Acceptance of lease necessary.**—In order that the lessor may be divested of his possession and of his rights incident to possession, and the lessee be bound by the terms

N. Y. 44; *Morgan v. Bissell*, 3 Taunt. 65; *Haven v. Wakefield*, 39 Ill. 509.

⁴³ *Alderman v. Neate*, 4 M. & W. 719; *Jackson v. Kisselbrack*, 10 Johns. 336; *The People v. Gillis*, 24 Wend. 201; *Jackson v. Myers*, 3 Johns. 395; *Bacon v. Bowdoin*, 22 Pick. 401; *Jackson v. Eldridge*, 3 Story 325; *Aiken v. Smith*, 21 Vt. 272. In *Buell v. Cork*, 4 Conn. 238, it was held to be a contract for a lease, because the consent of a third person was required to make a valid lease; and in *Jackson v. Delacroix*, 2 Wend. 433, where the instrument contained a statement that alterations were expected to be made in the terms, it was held to be a contract for a future lease. See *Poole v. Bently*, 12 East 168; *Jones v. Reynolds*, 1 Q. B. 517; *Doe v. Benjamin*, 9 A. & E. 644; *Chapman v. Towner*, 6 M. & W. 100. In *Thornton v. Payne*, 5 Johns. 74, the court say: "In every case decided in the English courts where agreements have been adjudged not to operate by passing an interest, but to rest in contract, there has been either an express agreement for a future lease, or construing the agreement to be a lease *in presenti* would work a forfeiture, or the terms have not been fully settled, and something further was to be done." The presumption is always in favor of its being a present lease, in stead of a contract for a future lease.

⁴⁴ *Chapman v. Black*, 4 Bing. N. C. 187; *Alderman v. Neate*, 4 M. & W. 704; *Doe v. Ashburner*, 5 T. R. 163.

⁴⁵ *Chenny v. Newberry*, 67 Cal. 125; *Austin v. Coal Co.*, 72 Mo. 535; *Ver Steeg v. Becker-Moore Co.* (Mo. 1904), 80 S. W. Rep. 346.

of the lease, acceptance by the latter must be shown. Where it operates entirely to his benefit, his acceptance may be presumed; while in other cases it may be inferred from acts, such as entry into possession and the like, as well as established by words of formal acceptance.⁴⁶

§ 138. *Relation of landlord and tenant.*—As soon as a lease has been delivered and accepted by parties competent to contract,⁴⁷ a relation is established between the lessor and lessee which is known as that of landlord and tenant. A privity of estate and a tenure are established, which bind the parties to each other in respect to the duties imposed by the law and the implied covenants. This obligation exists no longer than does the relation of landlord and tenant, while the obligation imposed and created by the express terms and provisions of the instrument rest upon privity of contract, and survive the dissolution of such relation.⁴⁸ The lessee, however, does not become liable on his covenant to pay rent until the lessor has put him into possession of the premises.⁴⁹

§ 139. *Assignment and subletting.*—Unless restrained by a covenant or changed by statute, the lessee can assign his term or grant a sublease of the same without let or hindrance of the lessor.⁵⁰ And a restriction against assignment does not

⁴⁶ *Maynard v. Maynard*, 10 Mass. 456; *Hedge v. Drew*, 12 Pick. 141; *Kramer v. Cook*, 7 Gray 550; *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Jackson v. Bodle*, 20 Johns. 184; *Jackson v. Richards*, 6 Cow. 617.

⁴⁷ See *post*, Secs. 549, 550, 551, 569-571, for a discussion of the subjects, delivery and competency of parties.

⁴⁸ 1 Washburn on Real Prop. 468, 469.

⁴⁹ *Kean v. Kolkschneider*, 21 Mo. App. 538; *Austin v. Coal Co.*, 72 Mo. 535; 4 Kent's Com. (11 ed.) 106; 1 Platt's Leas. 22; *Townsend v. Nickerson Co.*, 117 Mass. 501.

⁵⁰ *King v. Aldborough*, 1 East 597; *Roe v. Sales*, 1 M. & Sel. 297; *Taylor's L. & T.* 22; 1 Washburn on Real Prop. 507, 508; *Cottee v. Richardson*, 7 Ex. Rep. 143; *Brown v. Powell*, 25 Pa. St. 329; *Shannon v. Burr*, 1 Hilt. 39; *Den v. Post*, 35 N. J. L. 285; *Robinson v. Perry*, 21 Ga. 183; *Crommelin v. Thiess*, 31 Ala. 421. An unauthorized assign-

prevent a subletting, and vice versa. The restriction must apply expressly to both in order to restrain both.⁵¹ The assignment or sublease is subject to the same requirements of the Statute of Frauds, as the original lease.⁵² An assignment is effected, whenever the entire term is disposed of, leaving nothing in the lessee by way of a reversion. And a grant will be considered and treated as an assignment, whether it be in the form of a new lease, or merely a transfer of the old lease. The reservation of a different rent does not make the transfer a subletting.⁵³ The decisive question is, whether there is a reversion left in the lessee; and a grant of a portion of the premises for the entire term would be an assignment, and not a sublease of such portion.⁵⁴ But if the whole, or only a part of the premises be demised for a term of shorter duration than that of the lessee, it is a sub-

ment or subletting of the leased premises, is voidable, at the option of the lessor. *Scott v. Slaughter* (Tex. 1904), 80 S. W. Rep. 643; *Granite Bldg. Corp. v. Green*, 25 R. I. 586, 57 Atl. Rep. 649; *Calvert v. Hobbs*, 107 Mo. App. 7, 80 S. W. Rep. 681; *Peer v. Wadsworth* (N. J. Ch. 1904), 58 Atl. Rep. 379; *Teater v. King*, 35 Wash. 138, 76 Pac. Rep. 688; *Slaughter v. Coke Co.* (Tex. 1904), 79 S. W. Rep. 863. But see, for estoppel of lessor to deny validity of assignment or subletting, *Warner v. Cochrane*, 128 Fed. Rep. 553, 63 Cir. Ct. App. 207.

⁵¹ *Greenaway v. Adams*, 12 Ves. 400; *Beardman v. Wilson*, L. R. 4 C. B. 57; *Lynde v. Hough*, 27 Barb. 415; *Den v. Post*, 25 N. J. L. 285; *Field v. Mills*, 33 N. J. L. 254; *Margrave v. King*, 5 Ired. Eq. 430. Taking boarders is neither a subletting nor an assignment according to a late case. *Stanton v. Allen* (S. C.), 10 S. E. Rep. 878. A covenant against assignment is not violated by the possession of a trustee in bankruptcy. *In re Bush*, 126 Fed. Rep. 878.

⁵² 1 *Washburn on Real Prop.* 508; *Williams on Real Prop.* 402.

⁵³ *Sexton v. Chicago Storage Co.*, 129 Ill. 318.

⁵⁴ *Palmer v. Edwards*, Dougl. 187, note; *Parmenter v. Webber*, 8 Taunt. 593; *Boardman v. Wilson*, L. R. 4 C. B. 56; *Wollaston v. Hake-well*, 3 M. & G. 323; *Plush v. Diggs*, 5 Bligh (N. S.) 31; *Pollack v. Stacy*, 9 Q. B. 1033; *Sanders v. Partridge*, 108 Mass. 558; *Lynde v. Hough*, 27 Barb. 145; *Patten v. Deshon*, 1 Gray 325; *Sands v. Hughes*, 53 N. Y. 293; *Bedford v. Terhune*, 30 N. Y. 457. But see *Fulton v. Stuart*, 2 Ohio 369, and *McNeil v. Kendall*, 128 Mass. 245, 35 Am. Rep. 373, where transfer of a part of premises for the whole term was considered a subletting.

letting. And the most inconsiderable reversion, such as the last day of the term, would be sufficient to give the grant the character of an under-lease.⁵⁵ It has been held and likewise denied, that the reservation of a right of entry for breach of a condition would be such a reservation of a reversion, as to make the demise a subletting. The better opinion is that a right of entry will have no such effect, if the whole term has been granted.⁵⁶ If the demise is an assignment, the assignee enters into the privity of estate with the original lessor and becomes thereby liable to him on the covenants of the original lease, which run with and bind the land. But his liability only continues during the continued maintainance of this privity of estate, and does not extend to breaches occurring before assignment to him, or after his alienation of the term.⁵⁷ But he cannot escape

⁵⁵ *Post v. Kearney*, 2 N. Y. 394; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Law Rep. 407; *Astor v. Miller*, 2 Paige 68; *Martin v. O'Connor*, 43 N. Y. 522; *Linden v. Hepburn*, 3 Sandf. 668; *Patten v. Deshon*, 1 Gray 325; *Parmenter v. Webber*, 8 Taunt. 593; *Pollock v. Stacy*, 9 Q. B. 1033; *Derby v. Taylor*, 1 East 502; *Sexton v. Chicago Storage Co.*, 129 Ill. 318.

⁵⁶ That the reservation of a right of entry upon failure to pay rent makes the transfer a subletting, see *Kearney v. Post*, 1 Sandf. 106; *Martin v. O'Connor*, 43 Barb. 522; *Linden v. Hepburn*, 3 Sandf. 670; *Sexton v. Chicago Storage Co.*, 129 Ill. 318. In the following cases the rule is denied. 2 Prest. Conv. 124, 125; *Palmer v. Edwards*, Dougl. 187, note; *Doe v. Bateman*, 2 B. & Ald. 168; *Lloyd v. Cozens*, 3 Ashm. 138; *Davis v. Morris*, 36 N. Y. 575; *Smiley v. Van Winkle*, 6 Cal. 605. See *Bedford v. Terhune*, 30 N. Y. 457; *Sanders v. Partridge*, 108 Mass. 558; *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601, 55 Am. Rep. 844. In a note to *King v. Wilson*, 5 Man. & R. 157, note, it is stated that there is "neither principle nor authority, to preclude such term or from making an *underlease* for a period commensurate in point of computation with the original term."

⁵⁷ *Stevenson v. Lombard*, 2 East 575; *Burnet v. Lynch*, 5 B. & C. 589; *University of Vermont v. Joslyn*, 21 Vt. 52; *Howland v. Coffin*, 12 Pick. 125; *Graham v. Way*, 38 Vt. 19; *Davis v. Morris*, 36 N. Y. 576; *McKeon v. Whitney*, 3 Denio 452; *Benson v. Bolles*, 8 Wend. 175; *Grandin v. Carter*, 99 Mass. 16; *Sanders v. Partridge*, 108 Mass. 556; *Walton v. Cronly*, 14 Wend. 62; *Armstrong v. Wheeler*, 9 Cow. 89; *Salisbury v. Shirley*, 66 Cal. 223; *Donelson v. Polk*, 64 Md. 501; *Os-*

liability for rent merely by abandonment of the possession. Nothing but alienation or a complete surrender to the lessor would relieve the assignee from the payment of rent.⁵⁸ The fact that the original lease contains a condition against assignment without consent of lessor does not make the assignee's liability depend upon such consent; the lessor may waive the performance of the agreement.⁵⁹ Actual entry into possession is not necessary to attach such liability to the assignee during the time that the term is vested in him, except that in some States actual entry is required in order to render the assignee liable on the covenant for rent.⁶⁰ Where the assignment is by way of a mortgage, actual entry is always necessary.⁶¹ If the assignment is in violation of a condition,

wald v. Mollett, 29 Ill. App. 449; *Reynolds v. Lawton*, 8 N. Y. S. 403; *Washington Nat. Gas Co. v. Johnson*, 123 Pa. St. 576; *Congregational Soc. v. Rix* (Vt.), 17 Atl. Rep. 719.

⁵⁸ *Dewey v. Payne*, 19 Neb. 540. An assignment does not relieve the original lessee from his covenant to pay rent. *Rector v. Hartford Devp. Co.*, 102 Ill. App. 554. But a re-assignment, or transfer by the assignee, relieves him from this duty. *Springer v. Chicago, etc., Co.*, 102 Ill. App. 294, 66 N. E. Rep. 850.

⁵⁹ *Sexton v. Chicago Storage Co.*, 129 Ill. 318.

⁶⁰ *Felch v. Taylor*, 13 Pick. 130; *Bagley v. Freeman*, 1 Hilt. 196; *Smith v. Brinker*, 17 Mo. 148. In New York, entry into possession is necessary, to render liable on covenant for rent. *Damainville v. Mann*, 32 N. Y. 197; *O'Rourke v. Brown*, 54 N. Y. Super. Ct. 384; *O'Rourke v. H. P. Cooper & Co.* 34 N. Y. Super. Ct. 389. In Massachusetts the assignee is liable for rent without entry, if the assignment is by deed. *Sanders v. Partridge*, 108 Mass. 556; *Guienzberg v. Claude*, 28 Mo. App. 258. In Illinois entry is never necessary. *Babcock v. Scoville*, 56 Ill. 466.

⁶¹ *Williams v. Bosanquet*, 1 Brod. & B. 238; *Felch v. Taylor*, 13 Pick. 133; *Pingrey v. Watkins*, 15 Vt. 488; *Graham v. Way*, 38 Vt. 24; *Walton v. Cronly*, 14 Wend. 63; *Astor v. Hoyt*, 5 Wend. 603; *Astor v. Miller*, 2 Paige 68; *McKee v. Angelrodt*, 16 Mo. 283. In Maryland, entry is not necessary. *Mayhew v. Hardisty*, 8 Md. 479. See also, *Calvert v. Bradley*, 16 How. (U. S.) 593; *Salisbury v. Shirley*, 66 Cal. 223; *Donelson v. Polk*, 64 Md. 501; *Oswald v. Mollett*, 29 Ill. App. 449; *Reynolds v. Lawton*, 8 N. Y. S. 403; *Washington Nat. Gas Co. v. Johnson*, 123 Pa. St. 576; *Congregational Soc. v. Rix* (Vt.), 17 Atl. Rep. 719.

the lessee cannot be compelled to assume the obligations of a tenant, if he abandons the possession or repudiates the tenancy.⁶² If the demise be only a sub-lease, the privity of estate between the lessee and the original lessor is still maintained, and the sublessee is only liable to the intermediate lessor on the covenants in the lease between them, although he takes his title subject to the right of the original lessor to effect a forfeiture of the estate for the breach of the lessee's covenant of rent.⁶³ [And a reservation of rent by the intermediate lessor, if it is an assignment, will not give him a right to distrain for it. His remedy is an action to recover on the covenant.⁶⁴]

In order that the assignee may be protected against any ouster by the original lessor, for failure of the lessee to pay the rent due to him, it has been held that, before the lessee can recover of his assignee, he must show that the lessor's claim has been satisfied. The assignor or original lessee is not released from his express covenant to pay rent, and hence he may still be required to pay the rent, notwithstanding the lessor's acceptance of the assignee as a tenant. But if he was required to pay it, the assignor could recover it of the assignee, on the principal of subrogation.⁶⁵ And if the rent reserved in the second lease be larger than what is reserved in the first, the parties may, by agreement, provide that the lessee shall recover only the difference, while the

⁶² *Hynes v. Ecker*, 34 Mo. App. 650. But see *contra*, *Chautauqua Assembly v. Alling*, 46 Hun 582. Collection of rent from an assignee in possession, under a voidable assignment, is a ratification of the assignment. *Anderson v. Comeor*, (N. Y. 1904) 87 N. Y. S. 449.

⁶³ *Hulet v. Stockwell*, 27 Mo. App. 328; *In re Strasburger's Estate*, 56 Hun 164; *Otis v. Conway*, 114 N. Y. 13.

⁶⁴ *Hicks v. Bowling*, 1 Ld. Raym. 99; *Parmenter v. Webber*, 8 Taunt. 593; *Davis v. Morris*, 36 N. Y. 574.

⁶⁵ *Lehman v. Dreyfus*, 37 La. An. 587; *Farrington v. Kimball*, 126 Miss. 313, 30 Am. Rep. 680. Collection of rent from an assignee does not effect lessor's right to proceed against his lessee, for rent. *Rector v. Hartford Co.*, 102 Ill. App. 554.

sublessee pays the original rent to the lessor.⁶⁶ Without express agreement, the lessor cannot sue the sublessee for rent. There is neither privity of estate nor privity of contract between them to sustain the action.⁶⁷ But if the original lease is surrendered to the lessor, without prejudice to under-lessees, the lessor may recover subsequently accruing rent from the sublessees.⁶⁸

§ 140. Involuntary alienation.— A leasehold estate is also subject to sale under execution, and under the bankrupt and insolvent laws passes to the assignee, like other personal property, for the satisfaction of the lessee's debts.⁶⁹ And such assignees become liable on the covenants of the lease, if they accept the assignment, and exercise the rights of ownership over it.⁷⁰ But the assignees have the right within a reasonable time to elect whether they shall accept or reject the lease. The mere fact that the lease is properly included in the assignment will not render them liable on the covenants.⁷¹ But the assignee's rejection of the lease does not release the lessee's liability under the lease, even though the lessor should enter into possession, in consequence of the abandonment of the premises.⁷² Involuntary alienation may be prevented, if it is explicitly stated in the lease, that such

⁶⁶ *Wollaston v. Hakewell*, 3 M. & G. 323; *Smith v. Mapleback*, 1 T. R. 441.

⁶⁷ *Halford v. Hatch*, Dougl. 187; *Grandin v. Carter*, 98 Mass. 16; see *Foster v. Reid* (Iowa), 42 N. W. Rep. 649.

⁶⁸ *Beal v. Boston, etc., Car. Co.*, 125 Mass. 157, 28 Am. Rep. 216; *Bailey v. Richardson*, 66 Cal. 416; *Appleton v. Ames* (Mass.), 22 N. E. Rep. 69; *Otis v. Conway*, 114 N. Y. 13.

⁶⁹ *Williams on Real Prop.* 404; *Williams on Pers. Prop.* (9 ed.) 56.

⁷⁰ *White v. Hunt*, L. R. 6 Exch. 32; *Quackenboss v. Clarke*, 12 Wend. 555; 1 *Washburn on Real Prop.* 523, 524.

⁷¹ *Smythe v. North*, L. R. 7 Exch. 242; *Carter v. Warne*, 4 C. & P. 191; *Copeland v. Stephens*, 1 B. & Ald. 593; *Pratt v. Levan*, 1 Miles 358; *Blake v. Sanderson*, 1 Gray 332; *Journegy v. Brackley*, 1 Hilt. 448; *Kendrick v. Judas*, 5 Caines 25; *Carter v. Hammett*, 18 Barb. 608; *Sparhawk v. Broome*, 6 Binn. 256; *Dorrance v. Jones*, 27 Ala. 630.

⁷² *Stewart v. Sprague*, 76 Mich. 184.

a mode of alienation will work a forfeiture of the term.⁷³ But a simple restriction against alienation does not apply to involuntary alienation. Nothing short of an actual and voluntary transfer of the lessee's estate will ordinarily be considered a breach of a condition or covenant against assignment.⁷⁴

§ 141. **Disposition of terms after death of tenant.**—A term, like other personal property, can be bequeathed, or if the tenant dies without making any disposition, it descends to the executor or administrator, who takes it and disposes of it like any other chattel, unless the restriction against alienation expressly includes the personal representatives in such prohibition.⁷⁵ And the right to devise a leasehold is not taken away by a general condition in restraint of alienation, although it may be by express limitation.⁷⁶

§ 142. **Covenants in a lease in general.**—In strict, technical language, a covenant is any agreement which is executed under the solemnity of a seal; but in this connection it is used to signify the agreements, which appear in a lease, and

⁷³ *Roe v. Galliers*, 2 T. R. 133; *Davis v. Eyton*, 7 Bing. 154. See *Doe v. Hawks*, 2 East 481; *Doe v. Clark*, 8 East 185; *Doe v. David*, 5 Tyrw. 125; *Cooper v. Wyatt*, 5 Madd. 482; *Yarnold v. Moorehouse*, 1 R. & Myl. 346.

⁷⁴ *Philpot v. Hoare*, 2 Atk. 219; *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Carter*, 8 T. R. 300; *Lear v. Leggett*, 1 Russ. & M. 690; *Smith v. Putnam*, 3 Pick. 221; *Jackson v. Corlis*, 7 Johns. 531; *Moore v. Pitts*, 53 N. Y. 85; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407; *Hargrave v. King*, 5 Ired. Eq. 430; *Munkwitz v. Uhlig*, 64 Wis. 380; *Farnum v. Hefner*, 79 Cal. 575. But see *contra*, *Holliday v. Achle*, 99 Mo. 273. But a voluntary assignment under the bankrupt and insolvent laws is not an involuntary alienation. See 1 Pars. Con. 506; *In re Bush* (1904), 126 Fed. Rep. 878.

⁷⁵ *Taylor's Land & T.*, Sec. 408; *Seers v. Hind*, 1 Ves. jr. 295; *Keating v. Condon*, 68 Pa. St. 75; 1 Washburn on Real Prop. 579; *Hellwig v. Bachman*, 26 Ill. App. 165; *Jacquat v. Bachman*, 26 Ill. App. 169.

⁷⁶ *Fox v. Swann*, Styles 483; *Berry v. Taunton*, Cro. Eliz. 331; *Dumpor v. Symmons*, *Id.* 816; *Charles v. Byrd*, 29 S. C. 544.

which bind the parties thereto, whether the lease is under seal or not.⁷⁷ And it may be said generally, that unless the performance of a covenant by one party to the lease is made, expressly or by necessary implication, to depend upon the performance of some other covenant by the other party, covenants in leases are independent of each other, and the breach of one covenant by one party is no bar to his action against the other party for the breach of another covenant.⁷⁸

§ 143. Continued — Express and implied covenants.—Covenants may be *express* or *implied*. There is apparently no restriction upon the number and character of the express covenants which may be inserted in a lease. The parties may by them change altogether their common-law liability under the lease and substitute for the general rule of law express limitations and obligations.⁷⁹ Implied covenants are those which arise by construction of law from the employment of certain words and forms of expression, such as “grant,” “lease,” “demise,” etc.⁸⁰ An important distinction exists

⁷⁷ *Hayne v. Cummings*, 16 C. B. (N. S.) 426. No reference is made here to the common-law form of the action to be used in the enforcement of covenants in leases. The action of covenant would lie only in the case of an agreement under seal, signed and sealed by the covenantor. See *Goodwin v. Gilbert*, 9 Mass. 510; *Pike v. Brown*, 7 Cush. 133; *Johnson v. Mussey*, 45 Vt. 419; *Hinsdale v. Humphrey*, 15 Conn. 431; *Gale v. Nixon*, 6 Cow. 445; *Maule v. Weaver*, 7 Pa. St. 329.

⁷⁸ *Strohmeyer v. Zeppenfeld*, 28 Mo. App. 268; *Butler v. Manney*, 52 Mo. 497. An assignee cannot sue the lessee for breach of a covenant to repair, where the violation occurred prior to his entry. *Foss v. Staunton* (Vt. 1904), 57 Atl. Rep. 942. The violation of a covenant to repair, will not support an action in tort, against the landlord. *Spero v. Levy*, 86 N. Y. S. 869, 43 Misc. Rep. 24; *Aiken v. Perry*, 119 Ga. 263, 46 S. E. Rep. 93. In Louisiana, while a lessor can be compelled to repair, he cannot be compelled to rebuild, in case of destruction of the buildings, by fire. *Jackson v. Doll*, 109 La. 230, 33 So. Rep. 207.

⁷⁹ 1 Washburn on Real Prop. 505.

⁸⁰ 1 Washburn on Real Prop. 487. But the tendency of modern decisions is against implying covenants, which might have been expressed, and this is particularly the case where the deed appears to contain all the stipulations and conditions which the parties intended. See *Aspen*

between express and implied covenants in respect to the effect of assignment of the lease upon the liability of the lessee. He remains bound by all the express covenants contained in the lease. His liability under them rests upon express personal obligation. But the liability under an implied covenant arises from the privity of estate created between the parties by the possession of the lessee under the lease. The lessee's liability, therefore, on implied covenants determines with the destruction of the privity of estate by assignment or otherwise.⁸¹ But acceptance of the assignee as a tenant by the original lessor is necessary in order to absolve the lessee from his liability for rent under an implied cove-

v. Austin, 5 Ad. & El. (N. S.) 684; *Sheets v. Selden*, 7 Wall. 423. It has been held that the covenant for quiet enjoyment is implied from the use of any operative words. *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506. But, generally, "lease" and "demise" are the only words which will raise implied covenants. See *Tone v. Bruce*, 8 Paige 597; *Mayor v. Mabie*, 14 N. Y. 160; *Maule v. Ashmead*, 20 Pa. St. 482; *Lovering v. Lovering*, 13 N. H. 518; *Hamilton v. Wright*, 28 Mo. 199; *Wake v. Halligan*, 16 Ill. 507; *Playter v. Cunningham*, 21 Cal. 233.

⁸¹ *Auriol v. Mills*, 4 T. R. 98; *Thursby v. Plant*, 1 Saund. 241 b; *Way v. Reed*, 6 Allen 364; *Kimpton v. Walker*, 9 Vt. 199; *Sutcliffe v. Atwood*, 15 Ohio St. 186; *Wall v. Hinds*, 4 Gray 250; *Post v. Jackson*, 17 Johns. 239; *Quackenboss v. Clark*, 12 Wend. 556; *Ghegan v. Young*, 23 Pa. St. 18; *Howland v. Coffin*, 12 Pick. 125; *Lodge v. White*, 30 Ohio St. 569, 27 Am. Rep. 492; *Whetstone v. McCartney*, 32 Mo. App. 430; *Guinzburg v. Claude*, 28 Mo. App. 258; *Foss v. Staunton* (Vt. 1904), 57 Atl. Rep. 942. There is an implied covenant that premises will be fit for occupancy at commencement of term, in New York. *Paugh & Co. v. Ceremido*, 88 N. Y. S. 1054. But see, for contrary rule, in Massachusetts, *Roth v. Adams*, 185 Mass. 341, 70 N. E. Rep. 445. In some States, where the premises demised are described as used for a particular purpose, there is an implied warranty of fitness for the purposes of the demise. *Hunter v. Porter* (Idaho 1904), 77 Pac. Rep. 434. But unless provided by contract or statute, there is no implied warranty of fitness in Montana (*Landt v. Schneider*, 1904, 77 Pac. Rep. 307); or New York (*Ducker v. Del Genovese*, 87 N. Y. S. 889, 93 App. Div. 575). And see, generally, as to implied covenants, *Clifton v. Montague*, 33 L. R. A. 449 and note.

nant.⁸² The following covenants are usually implied in every lease. *quiet enjoyment, rent, waste.*

§ 144. Implied covenant for quiet enjoyment.—This is a covenant for the quiet enjoyment of the premises by the lessee. It is not an absolute covenant for the protection of his possession against the acts of the whole world. It extends only to the acts of the landlord and of strangers asserting a paramount title. The lessor does not warrant against the acts of strangers who do not claim a superior title.⁸³ But in order that his own acts may constitute a breach of the covenant, they must amount to an eviction.⁸⁴ A mere fugitive trespass by the lessor does not work a breach of the covenant for quiet enjoyment.⁸⁵ But a landlord is guilty of neither trespass nor eviction when he enters for the purpose of making repairs.⁸⁶ When the covenant of

⁸² *Auriol v. Mills*, 4 T. R. 98; *Thursby v. Plant*, 1 Saund. 240; *Fletcher v. McFarlane*, 12 Mass. 43; *Wall v. Hinds*, 4 Gray 256; *Salisbury v. Shirley*, 66 Cal. 223.

⁸³ *Morse v. Goddard*, 13 Metc. 177; *Ross v. Dysart*, 33 Pa. St. 452; *Moore v. Webber*, 71 Pa. St. 429, 10 Am. Rep. 708; *Edgerton v. Page*, 1 Hilt. 333; *Dexter v. Manley*, 4 Cush. 24; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Branger v. Manciet*, 30 Cal. 626; *Schuykill, etc., R. R. v. Schmoele*, 57 Pa. St. 273; *Barneycastle v. Walker*, 92 N. C. 198; *Dunklee v. Webber* (Mass.), 24 N. E. Rep. 1082; *McAlester v. Landers*, 70 Cal. 79. There is an implied covenant for quiet enjoyment in the grant of an incorporeal, as well as of a corporeal, hereditament. *Mayor v. Mabie*, 13 N. Y. 157. To support the implied covenant, the lease must be a valid one. *Webster v. Conley*, 46 Ill. 17.

⁸⁴ See *post*, Sec. 609.

⁸⁵ *Avery v. Dougherty*, 102 Ind. 443.

⁸⁶ *International Press Ass'n v. Brooks*, 30 Ill. App. 114; *White v. Thurber*, 55 Hun 447. No breach of a covenant for quiet enjoyment arises where the entry is under eminent domain proceedings. *Pabst Brewing Co. v. Thorley*, 127 Fed. Rep. 439. There must be an actual or constructive eviction, to constitute a violation of the covenant for quiet enjoyment. *Roth v. Adams*, 185 Mass. 341, 70 N. E. Rep. 445; *Fuller Co. v. Manhattan Const. Co.*, 88 N. Y. S. 1049; *Mason v. Landeroth* (N. Y. 1903), 84 N. Y. S. 740, 88 App. Div. 38; *Greenwood v.*

quiet enjoyment is broken, the obligation for payment of rent is suspended, and the presumption in ordinary cases is, that the tenant suffers no damage, the rent being an equivalent of the use. If the lessee claims damage, he must show it.⁸⁷

§ 145. **Implied covenant for rent.**—The covenant for rent is implied from the very reservation in the lease of a certain stipulated sum. This implied covenant is, of course, separate and distinct from any express contracts the lessor may enter into.⁸⁸

§ 146. **Implied covenant against waste.**—By the very acceptance of the lease, the lessee assumes an implied obligation to use the premises in a husbandlike manner, and to keep the buildings and other structures in repair; and a failure on his part to do so, subjects him to an action of waste.⁸⁹ And where the lessor is obliged by the law to repair, in a case where the lessee has covenanted to repair, either expressly or by implication, the lessor can recover of the lessee in an appropriate action for the expense of such repairs.⁹⁰ For although the landlord is not under obli-

Wetterau, 84 N. Y. S. 287. A physical expulsion of the tenant is not always essential to constitute an eviction. The intent of the landlord is a question of fact for the jury. *Dennick v. Ekdahl*, 102 Ill. App. 199. When wrongfully evicted, a tenant can recover for all injury to his business and loss of profits, when established with reasonable certainty. *Murphy v. Bldg. Co.*, 90 Mo. App. 621.

⁸⁷ *Larkin v. Misland*, 100 N. Y. 212; *Duncklee v. Webber* (Mass.), 24 N. E. Rep. 1082.

⁸⁸ *Kimpton v. Walber*, 9 Vet. 198; *Van Rennselaer v. Smith*, 27 Barb. 140; *Royer v. Ake*, 3 Pa. 3 Pa. St. 461; 1 Washburn on Real Prop. 492. Unless the tenant is put in possession of all the demised premises, he can refuse to pay rent on the whole. *Sullivan v. Smitt*, 87 N. Y. S. 714, 93 App. Div. 469; *Smith v. Barber*, 89 N. Y. S. 317, 96 App. Div. 236.

⁸⁹ *Thorndike v. Burrage*, 111 Mass. 532; 1 Washburn on Real Prop. 492; *Fenton v. Montgomery*, 19 Mo. App. 156; *Hoyleman v. Kanawha, &c., Ry. Co.*, 33 W. Va. 489. See ante, Secs. 60-64, as to what acts constitute waste.

⁹⁰ *Hull v. Burns*, 17 Abb. N. C. 317.

gation to tenant to repair, if the tenant does not repair, and injury results to third persons, the landlord has been held liable.⁹¹ Where the leased premises consisted of a part of a tenement or other building, the general stairway and walls, and roof, are not included within the lease, so as to impose upon the lessee the duty of keeping them in repair. The lessor is liable for any damage which may result from such sources; not as lessor, but in general, as owner of the property.⁹² And in order that the lessor may in such a case be held liable, it need not be shown that he had knowledge of the need of repairs.⁹³ The lessor, in the absence of an express covenant, is not bound to make repairs upon the leased premises. But if he does undertake to make such repairs, he is bound by an implied covenant to do it in a workman like manner, without injury to the lessee.⁹⁴ The

⁹¹ *Marshall v. Cohen*, 44 Ga. 489, 9 Am. Rep. 170; *Riley v. Simpson*, 83 Cal. 217; *Catts v. Simpson*, 83 Cal. 217, s. o. 23 Pac. Rep. 294; *O'Sullivan v. Norwood*, 14 Daly 286; *Tomle v. Hampton*, 28 Ill. App. 142, s. c. 129 Ill. 379; *Folsom v. Lewis* (Ga.), 11 S. E. Rep. 606; *Hungerford v. Bent*, 55 Hun 3; *Timlin v. Standard Oil Co.*, 54 Hun 44. But see *contra*, *Kalis v. Shattock*, 69 Cal. 593; *Ahern v. Steele*, 115 N. Y. 203.

⁹² *Ward v. Eagan*, 28 Mo. App. 116; *O'Sullivan v. Norwood*, 14 Daly 286; *Fisher v. Jansen*, 30 Ill. App. 91, s. o. 128 Ill. 549; *McGuire v. Joslyn*, 10 N. Y. S. 384; *Dollard v. Roberts*, 8 N. Y. S. 432; *Lindsey v. Leighton*, 150 Mass. 285; *Brennan v. Lachat*, 14 Daly 197; *Sawyer v. McGillicuddy*, 81 Me. 318. But see *contra*, *Quinn v. Perham*, 23 N. E. Rep. 735.

⁹³ *Lindsey v. Leighton*, 150 Mass. 258.

⁹⁴ *Gott v. Gaudy*, 22 Eng. Law & Eq. 173; *Sheets v. Selden*, 7 Wall. 423; *Leavitt v. Fletcher*, 10 Allen 121; *Gill v. Middleton*, 105 Mass. 478; *Elliott v. Aiken*, 45 N. H. 36; *Doupe v. Gerrin*, 45 N. Y. 119, 6 Am. Rep. 47; *Post v. Vetter*, 2 E. D. Smith 248; *Dexter v. King*, 8 N. Y. S. 489; *Burnes v. Fuchs*, 28 Mo. App. 279; *Simons v. Seward*, 54 N. Y. Super. Ct. 406; *Cantrell v. Fowler* (S. C.), 10 S. E. Rep. 934; *Butler v. Cushing*, 46 Hun 521; *Weinstein v. Harrison*, 66 Tex. 546; *McLean v. Wunder* (Pa.), 19 Atl. Rep. 749, s. c. 26 W. N. C. 24; *Wisdom v. Newberry*, 30 Mo. App. 241; *Perez v. Rayband*, 76 Tex. 191; *Little v. Macadaras*, 29 Mo. App. 332, s. c. 38 Mo. App. 178; *Gregor v. Cady*, 82 Me. 131. There is no implied covenant on the part of the landlord, that the premises are in a tenantable condition. *Jaffe v. Harteau*, 56 N.

lessor, however, is not liable on his covenant to repair for its breach, unless he has been notified or learns of the need of repairs and fails to respond within a reasonable time after such notice.⁹⁵ But if the person injured be a social or business visitor of the tenant, or a boarder or sub-tenant, the lessor is not liable for the injury unless he was under a covenant to repair.⁹⁶ The lessor or lessee may enter into express covenants for the repair of the premises under all circumstances, and an unqualified covenant of this kind will obligate the covenantor to repair, whatever may have caused the damage.⁹⁷ But the implied covenant of the lessee extends

Y. 398, 15 Am. Rep. 438; *Fisher v. Lightall*, 4 Mackey 82, 54 Am. Rep. 258; *Lucas v. Coulter*, 104 Ind. 81; *Blake v. Ranous*, 25 Ill. App. 481; *Stevens v. Pierce* (Mass.), 23 N. E. Rep. 1006. But see *Snyder v. Gordon*, 45 Hun 538. But if the lessor knew at the time when the lease began that the premises were not in a healthful condition, he will be liable on an implied covenant. *Maywood v. Logan* (Mich.), 43 N. W. Rep. 1052; *Leonard v. Armstrong* (Mich.), 41 N. W. Rep. 695; *contra*, *Wasson v. Pettis*, 117 N. Y. 118. A removal by the lessee of any part of the demised premises, or a change or injury to buildings, is waste. *Palmer v. Young*, 108 Ill. App. 252; *Champ Spring Co. v. Roth Tool Co.* (Mo. 1903), 77 S. W. Rep. 344.

⁹⁵ *Thomas v. Kingsland*, 12 Daly 315; *O'Connor v. Gourand*, 14 Daly 64; *Alperir v. Earle*, 55 Hun 211. In the absence of agreement or statute, there is no duty on the landlord to repair the premises. *Landt v. Schneider* (Mont. 1904), 77 Pac. Rep. 307; *Fowler Cycle Works v. Fraser & Chalmers*, 110 Ill. App. 126; *Lyon v. Bauerman* (N. J. 1904), 57 Atl. Rep. 1009; *Mangolius v. Muldberg*, 88 N. Y. S. 1048. And a promise to repair, after commencement of term is void, as without consideration. *Fowler Cycle Works v. Fraser & Chalmers*, 110 Ill. App. 126. No agreement to repair was implied in the following cases: *Aiken v. Perry*, 119 Ga. 263, 46 S. E. Rep. 93; *Borggard v. Gale*, 205 Ill. 511, 68 N. E. Rep. 1063; *Whitehead v. Comstock Co.*, 25 R. I. 423, 56 Atl. Rep. 446.

⁹⁶ *O'Sullivan v. Norwood*, 14 Daly 286; *Sterger v. Van Sieden*, 7 N. Y. S. 805; *Fisher v. Jansen*, 30 Ill. App. 91, s. c. 128 Ill. 549; *Wilson v. Treadwell*, 81 Cal. 58; *Donaldson v. Wilson*, 60 Mich. 86.

⁹⁷ *Walton v. Waterhouse*, 2 Saund. 422; *Abby v. Billups*, 35 Miss. 618; *Warner v. Hitchins*, 5 Barb. 666; *Hoy v. Holt*, 91 Pa. Ct. 88, 36 Am. Rep. 558; *McIntosh v. Rector*, etc., *St. Phillip's Church*, 120 N. Y. 71. But where an ordinance of a city, passed subsequently, prohibits

only to repairs made necessary by the negligence of the lessee. If he uses the land in a husbandlike manner, he is not liable to repair any damage done by the elements or by strangers without his fault.⁹⁸ The lessee cannot hold the lessor liable for improvements made by the former, unless the landlord has expressly assented to the improvements being made at his expense.⁹⁹

§ 147. **Covenants running with land.**—If the covenant is beneficial only to the owner of the land, whether he be the tenant of the freehold or of the term, and relates to the preservation or improvement of the land, it runs with the land, passes to the assignee of the lessor or lessee, as the case may be, and can be enforced by him.¹ But the lessor may, in the sale of the reversion, reserve to himself the enforcement of any of the covenants which would otherwise

the erection of wooden buildings, the covenantor in a covenant to rebuild a wooden building is thereby released from the obligation to perform. *Cordes v. Miller*, 39 Mich. 581, 33 Am. Law Rep. 430. And a covenant to erect a new building does not, by implication, include the rebuilding of it after destruction by fire or otherwise. *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430.

⁹⁸ *Wells v. Castles*, 3 Gray 323; *Leavitt v. Fletcher*, 10 Allen 121; *Post v. Vetter*, 2 E. D. Smith 248; *Elliott v. Aikin*, 45 N. H. 36; *Bold v. O'Brien*, 12 Daly 160; *Carroll v. Rigney*, 15 R. I. 81; *Sheer v. Fisher*, 27 Ill. App. 464.

⁹⁹ *Pearson v. Sanderson*, 128 Ill. 88. As to tenant's right to remove trade fixtures, on termination of the tenancy, see, *Donnelly v. Frick & Co.*, 207 Pa. St. 597, 57 Atl. Rep. 60; *Linden Oil Co. v. Jennings*, 207 Pa. St. 524, 56 Atl. Rep. 1074. See also, *ante*, Sec. 18.

¹ *Spencer's Case*, 5 Rep. 16; 1 *Smith's Ld. Cas.* 139; *Vyvyan v. Arthur*, 1 B. & C. 410; *Patton v. Deshon*, 1 Gray 325; *Howland v. Coffin*, 12 Pick. 125; *Streaper v. Fisher*, 1 Rawle 161; *Cook v. Brightly*, 46 Pa. St. 445; *Scott v. Lunt*, 7 Pet. 606; *Crawford v. Chapman*, 17 Ohio 449. In Illinois, the assignee of the covenantor's estate cannot sue on the covenant in his own name unless the covenantee has attorned to him. *Fisher v. Deering*, 60 Ill. 114. And at no time has it been permitted of the assignee to sue for breaches of the covenant occurring before assignment. *Lewis v. Ridge*, Cro. Eliz. 863; *Gibbs v. Ross*, 2 Head 437; 1 *Washburn on Real Prop.* 498.

run with the land.² A covenant is said to run with the land, so as to bind assignees, when it relates to the management and conduct of the land, or where its performance forms a part of the original consideration upon which the lease rests.³ The usual covenants running with the land are those for quiet enjoyment;⁴ to insure;⁵ to repair;⁶ to pay rent;⁷ to pay taxes;⁸ to renew the lease.⁹ A covenant for lessor to pay for improvements, passes to the assignee of the lessee, but whether it binds the assignee of the reversion has been decided both in the affirmative,¹⁰ and in the negative.¹¹ Covenants which relate to a subject-matter not *in esse*, as for the erection of a new building upon the premises, do not run with the land so as to bind assignees, unless they are ex-

² *Payne v. James* (La.), 7 So. Rep. 457.

³ *Morse v. Aldrich*, 19 Pick. 749; *Piggot v. Mason*, 1 Paige Ch. 412; *Norman v. Wells*, 17 Wend. 136; *DeForrest v. Byrne*, 1 Hilt. 43; *Jackson v. Langhead*, 2 Johns. 75; *Blackmore v. Boardman*, 28 Mo. 410; *Gordon v. George*, 12 Ind. 408; *Chautauqua Assembly v. Alling*, 46 Hun 582. A covenant that the lessee will not sell intoxicants on the demised premises, is a covenant running with the land. *Granite Building Cor. v. Green*, 25 R. I. 586, 57 Atl. Rep. 649; *Spear v. Fuller*, 8 N. H. 174, 28 Amer. Dec. 391; *Brown v. Bragg*, 22 Ind. 122; *Burns v. McCubbin*, 3 Kan. 221, 87 Amer. Dec. 468.

⁴ *Campbell v. Lewis*, 3 B. & Ald. 392; *Williams v. Burrell*, 1 C. B. 433; *Shelton v. Codman*, 3 Cush. 318; *Markland v. Cramp*, 1 Dev. & B. 94.

⁵ *Vernon v. Smith*, 5 B. & Ald. 1.

⁶ *Spencer's Case*, 5 Rep. 16; 1 Smith Ld. Cas. 139; *Demarest v. Willard*, 8 Cow. 206; *Pollard v. Shaffer*, 1 Dall. 210; *Taffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Foss v. Staunton* (Vt. 1904), 57 Atl. Rep. 942.

⁷ *Graves v. Potter*, 11 Barb. 592; *Main v. Feathers*, 21 Barb. 646; *Demarest v. Willard*, 8 Cow. 206; *Howland v. Coffin*, 12 Pick. 125; *Hurst v. Rodney*, 1 Wash. C. Ct. 375; *McElroy v. Brooks*, 104 Ill. App. 220.

⁸ *Astor v. Miller*, 2 Paige 68; *Host v. Kearney*, 2 N. Y. 394.

⁹ *Piggot v. Mason*, 1 Paige, 412; *Renond v. Daskam*, 34 Conn. 512. But see *West. Transp. Co. v. Landing*, 49 N. Y. 499; *Kolasky v. Mickles*, 120 N. Y. 535.

¹⁰ *Ecke v. Fetzner*, 65 Wis. 55.

¹¹ *Hunt v. Danforth*, 2 Curt. 592. See next note.

pressly named therein.¹² On the other hand, if the covenant be of a collateral nature, *i. e.*, to the land, it is a personal obligation, and does not run with the land. And if it is incapable in law of attaching to the estate, it will not bind or inure to assignees, even though they are expressly named.¹³

§ 148. Conditions in leases.—In connection with the covenants in a lease, it may be provided that the breach of the covenant will work a forfeiture of the estate, and give the covenantee the right of entry upon the land. But the breach of a covenant will not work a forfeiture, unless the right of entry is expressly reserved.¹⁴ Nor will a covenant to pay rent in advance operate as a condition precedent unless expressly declared to be a condition.¹⁵ The attachment of a condition of forfeiture to a covenant does not, however, interfere with a resort to the ordinary remedies on the covenant.¹⁶ Like all other conditions, they can only be reserved to the landlord and his assigns, and they alone can take advantage of the breach. If they elect to waive the forfeiture,

¹² *Spencer's Case*, 5 Rep. 16; 1 Smith Ld. Cas. 189; *Congleton v. Patison*, 10 East 138; *Sampson v. Easterly*, 9 B. & C. 505; *Bean v. Dickerson*, 2 Humph. 126; *Hanson v. Meyer*, 81 Ill. 321, 25 Am. Rep. 282.

¹³ *Spencer's Case*, 5 Rep. 16; 1 Smith's Ld. Cas. 139; *Keppell v. Bailey*, 2 Mylne & R. 517. See *Vyvyan v. Arthur*, 1 B. & C. 410; *Aiken v. Albany R. R.*, 26 Barb. 289; *Winton's Appeal*, 111 Pa. St. 387.

¹⁴ *Doe v. Jepson*, 3 B. & Ald. 402; *Jones v. Carter*, 15 M. & W. 718; *Clark v. Jones*, 1 Denio 516; *Delancey v. Ganong*, 9 N. Y. 9; *Wheeler v. Earl*, 5 Cush. 31; *Den v. Post*, 25 N. J. L. 292; *Dennison v. Reed*, 3 Dana 586; *Pickard v. Kleis*, 56 Mich. 604. But the presumption of law is always against the attachment of a condition; the condition must be clearly expressed, in order to attach to the covenant. *Doe v. Phillips*, 2 Bing. 13; *Spear v. Fuller*, 8 N. H. 174; *Wheeler v. Dascombe*, 3 Cush. 285; *Langley v. Ross*, 55 Mich. 163. And conditions are always liberally construed in favor of the covenantor or tenant, and strictly against the grantor. *Doe v. Bond*, 5 B. & C. 855; *Pillot v. Boosey*, 11 C. B. (N. S.) 885; *Mattice v. Lord*, 30 Barb. 38; *Palethorp v. Bergner*, 52 Pa. St. 149; *Mackubin v. Whetcroft*, 4 Harr. & McH. 135.

¹⁵ *Hilsendegen v. Scheich*, 55 Mich. 468.

¹⁶ See *Rowe v. Williams*, 97 Mass. 165.

the estate continues with all the obligations attached thereto.¹⁷ And if the lessor conveys the absolute title to the reversion, with the merger of the leasehold in the fee the conditions become extinguished.¹⁸ The subject of estates upon condition is treated more specifically in a subsequent chapter, to which reference must be made to ascertain in detail the effect of a breach of a condition.¹⁹

§ 149. Rent reserved—Necessity of consideration.—Authorities are not required for the statement that a lease without consideration cannot be enforced as long as it remains

¹⁷ *Morton v. Woods*, L. R. 4 Q. B. 303, 18 Am. Law Rep. 525; *Shumway v. Collins*, 6 Gray 231; *Way v. Reed*, 6 Allen 364; *Bemis v. Wilder*, 100 Mass. 446; *Clark v. Jones*, 1 Denio 517; *McIntosh v. Rector*, etc., *St. Phillips Church*, 120 N. Y.; *Will's Appeal*, 30 Pa. 222; *Creveling v. West End Iron Co.*, 51 N. J. L. 34. An express license to break the covenant will constitute an absolute waiver of the condition, and the covenantee cannot enter for any subsequent breach. *Dumpor's Case*, 4 Rep. 119; *Cartwright v. Gardner*, 5 Cush. 281; *Bleecker v. Smith*, 13 Wend. 530; *Murray v. Harway*, 56 N. Y. 343; *Dickey v. McCullough*, 2 Watts. & S. 88; *Chipman v. Emesic*, 5 Cal. 49. And so will a prayer for a mandatory injunction. *Chautauqua Assembly v. Alling*, 46 Hun 582. But a mere acquiescence in the breach, or a failure to enter for it, will not discharge the condition. *Doe v. Bliss*, 4 Taunt. 735; *Ireland v. Nichols*, 46 N. Y. 413; *McIntosh v. St. Phillips Church*, 34 N. Y. Super. Ct. 291. Unless the tenant should be able to claim the protection of an estoppel. *Young v. Gay*, 41 La. An. 758. See *post*, Sec. 208.

¹⁸ *St. Phillips Church v. Zion Presb. Church*, 23 S. C. 297.

¹⁹ Sec. 207 as to assignment of conditions. Covenants of forfeiture, for breach of conditions, being regarded with disfavor, the lessor, to enforce such forfeiture, must show a strict compliance with the conditions on which such right accrued. *Johnson v. Lehigh Valley Co.*, 130 Fed. Rep. 932; *Schwoerer v. Connolly* (1904), 88 N. Y. S. 818; *West Shore Co. v. Wenner* (N. J. 1904), 57 Atl. Rep. 408. But see as to condition to pay taxes, *Gordon v. Richardson*, 185 Mass. 492, 70 N. E. Rep. 1027. And for waiver of forfeiture, see, *McConnell v. Peirce*, 210 Ill. 627, 71 N. E. Rep. 622; *Granite Bldg. Corp. v. Green*, 25 R. I. 586, 57 Atl. Rep. 649; *Metropolitan Land Co. v. Manning* (Mo. 1902), 71 S. W. Rep. 696. A forfeiture cannot, generally, be worked, without a notice or hearing, by arbitrary proceedings of the lessor. *Murphy v. Century Co.*, 90 Mo. App. 621.

executory. But as soon as it becomes executed by the transfer of possession to the lessee, the lease is as valid and the relation of landlord and tenant is as definitely established, as if it had been given for a valuable consideration of some sort.²⁰ Although not necessary to the validity of a lease, it is customary and usual to reserve a rent to be paid by the lessee, and its payment is enforced by the insertion of an express covenant, or such a covenant is implied from its reservation. The rent may consist of anything of value, things or service.²¹ The covenant for rent passes with the assignment of the reversion to the assignee.²² But if there has been a prepayment of the rent in good faith to the original lessor, before it was due, the validity of the payment as a quittance of the liability for rent is in nowise affected by the assignment of the reversion before the actual accrument of such rent. The lessor's receipt for the rent is a good defense to an action for the same by the assignee.²³ If the reversion be divided up, and portions of the same are assigned to different parties, the rent will be apportioned between them.²⁴ The same rule of apportionment prevails

²⁰ *Allen v. Koepsel*, 77 Tex. 505.

²¹ *Gilpin v. Adams* (Cal.), 24 Pac. Rep. 566.

²² *Scott v. Lunt*, 7 Pet. 590; *Gale v. Edwards*, 52 Me. 365; *Van Rensselaer v. Smith*, 27 Barb. 140; *Main v. Feathers*, 21 Barb. 646; *Howland v. Coffin*, 12 Pick. 125; *Burden v. Thayer*, 3 Metc. 76; *Demarest v. Willard*, 8 Cow. 206; *Hurst v. Rodney*, 1 Wash. C. Ct. 375; *Van Rensselaer v. Gallup*, 5 Denio 450; *Farley v. Craig*, 10 N. J. L. 262; *Wilson v. Delaplaine*, 3 Harr. 499; *Snyder v. Riley*, 1 Spears 272; *Gibbs v. Ross*, 2 Head 437.

²³ *Dreyfus v. Hirt*, 82 Cal. 621.

²⁴ *Montague v. Gay*, 17 Mass. 439; *Mellis v. Lathrop*, 22 Wend. 121; *Burns v. Cooper*, 31 Pa. St. 428; *Reed v. Ward*, 22 Pa. St. 144; *Peck v. Northrup*, 17 Conn. 217; *Sampson v. Grimes*, 7 Blackf. 176; *Breeding v. Taylor*, 13 B. Mon. 477. The apportionment is never made between several successive holders of the reversion according to the length of holding. Whoever owns the reversion when the rent is due receives the entire sum. *Burden v. Thayer*, 3 Metc. 76; *Bank of Pennsylvania v. Wise*, 3 Watts 394; *Martin v. Martin*, 7 Md. 368; *Anderson v. Robbins*, 82 Mo. 422; see *ante*, Sec. 55. A landlord is entitled to recover rent

where the reversion descends to, and is partitioned between, two or more heirs.²⁵ In such cases it is questionable, if the assignee of a part of the reversion can sue for his aliquot share of the rent in his own name, without joining with the others.²⁶ But the reversioner may sever the right to the rent from the reversion. He may assign them to different parties, or he may assign one and retain the other, and the holder of the rent may sue on the covenant even though he has no reversion in him.²⁷ But in the assignment of the

for the period of the occupancy of premises, although the lease is not valid. *Ascarete v. Pfaff* (Tex. 1903), 78 S. W. Rep. 974; *Merchants Bank v. Routtell* (N. D. 1903), 97 N. W. Rep. 953. A covenant to pay rent for the whole term, is not effected by a clause, that on certain contingencies the time may be shortened. *McElroy v. Brooks*, 104 Ill. App. 220. The right to distrain for rent still exists in Illinois (*Hill v. Coats*, 109 Ill. App. 266); Louisiana (*Millott v. Conrad*, 112 La. 928, 36 So. Rep. 807); and Georgia (*Brooks v. Augusta Warehouse Co.*, 119 Ga. 946, 47 S. E. Rep. 341; *Hardy v. Poss*, 120 Ga. 385, 47 S. E. Rep. 947).

²⁵ *Jaques v. Gould*, 4 Cush. 484; *Cole v. Patterson*, 25 Wend. 456; *Bank of Pennsylvania v. Wise*, 3 Watts 394; *Reed v. Ward*, 22 Pa. St. 144; *Crosby v. Loop*, 13 Ill. 625. If the administrator collects the rent falling due after the death of the ancestor, he holds it as trustee for the heirs and the widow. *Mills v. Merryman*, 49 Me. 65; *Drinkwater v. Drinkwater*, 4 Mass. 358; *Robb's Appeal*, 41 Pa. St. 45; *King v. Anderson*, 20 Ind. 386.

²⁶ See *Martin v. Crompe*, 1 Ld. Raym. 340; *Wall v. Hinds*, 4 Gray 256; *Porter v. Bleiler*, 17 Barb. 155; *Decker v. Livingston*, 15 Johns. 479; *Ryerson v. Quackenbush*, 26 N. J. L. 254. But see *Jones v. Felch*, 3 Bosw. 363. But the assignees may, and should, sue in their own names. The rent passes as a vested interest in land, and is not a *chose in action*. *Demarest v. Willard*, 8 Cow. 200; *Van Rensselaer v. Hays*, 19 N. Y. 99; *Ryerson v. Quackenbush*, 26 N. J. L. 254; *Dixon v. Niccolls*, 39 Ill. 384; *Abercrombie v. Redpath*, 1 Iowa 111; *Crosby v. Loop*, 13 Ill. 625.

²⁷ *Co. Lit.* 47 a; *Baker v. Gostling*, 1 Bing. N. C. 19; *Allen v. Bryan*, 5 B. & C. 572; *Patten v. Deshon*, 1 Gray 325; *Hunt v. Thompson*, 2 Allen 342; *Kendall v. Carland*, 5 Cush. 74; *Van Rensselaer v. Read*, 26 N. Y. 577; *Ryerson v. Quackenbush*, 26 N. J. L. 254; *Dixon v. Niccolls*, 39 Ill. 384; *Ala. Gold Life Ins. Co. v. Oliver*, 78 Ala. 158; *Toan v. Pline*, 60 Mich. 385; *Trulock v. Donahue*, 76 Iowa 758. See *ante*, Sec. 55.

rent without the reversion, the lessor cannot divide it up among several without the consent of the lessee by attornment, although a devise of a part may be good without attornment.²⁸ }

§ 150. **Rent reserved — Condition of forfeiture.**— It is also often provided that the estate shall be subject to forfeiture if the rent is not paid. But in order that nonpayment of rent may work a forfeiture of the lease, the common law requires that a demand should be made of the lessee for the precise amount of rent, on the day when it falls due, at a convenient time before sunset, and on the land, at the most prominent place upon it,—usually the front door of the dwelling-house, if there be any. A demand at an improper place, or at the wrong time, would not give the lessor right of entry for forfeiture of the estate.²⁹ But the parties may by agreement do away with any of the requirements, or even render a previous demand unnecessary; in which case, the right of entry accrues immediately upon the breach of the covenant.³⁰

§ 151. **How relation of landlord and tenant may be terminated.**— The relation of landlord and tenant, and therewith the liability upon the covenants of the lease, can only be terminated by eviction, release or surrender of the premises.³¹

²⁸ *Ards v. Watkins*, Cro. Eliz. 637; *Ryerson v. Quackenbush*, 20 N. J. L. 254. See *ante*, Sec. 55.

²⁹ *Doe v. Windlass*, 7 T. R. 117; *Doe v. Paul*, 3 C. & P. 613; *Conner v. Bradley*, 1 How. (U. S.) 211; *McQuestess v. Margan*, 34 N. H. 400; *Bradstreet v. Clark*, 21 Pick. 389; *Kimball v. Rowland*, 6 Gray 224; *Chapman v. Harney*, 100 Mass. 354; *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Jackson v. Kipp*, 3 Wend. 230; *Jackson v. Harrison*, 17 Johns. 66; *Jenkins v. Jenkins*, 63 Ind. 415, 30 Am. Rep. 229; *Chapman v. Wright*, 20 Ill. 120; *Chapman v. Kirby*, 49 Ill. 121; *Byrane v. Rogers*, 8 Minn. 282.

³⁰ *Doe v. Masters*, 2 B. & C. 490; *Fifty Associates v. Howland*, 5 Cush. 214; *Byrane v. Rogers*, 8 Minn. 282. For estoppel, waiver and release from forfeiture see note to Sec. 148.

³¹ *Sheets v. Selden*, 7 Wall. 224; *Fuller v. Ruby*, 10 Gray 290; *Bain*

Fear of an eviction is no ground for refusing to pay rent or to perform the other covenants of the lease.³² The destruction, total or partial, of the premises, or their becoming untenable, from any cause except the acts of the lessor, will not relieve the parties from their covenants.³³ Nor is the lessor's performance of his covenant to repair a condition precedent to the tenant's liability on his covenant for rent.³⁴ The covenants for rent, repair, and restoration in good condition, are still binding. Destruction by fire or inevitable accident is no ground of defense, unless exceptions to that effect are inserted in the lease, or the State statute changes the liabilities of the parties.³⁵

v. Clark, 10 Johns. 424; *Gates v. Green*, 4 Paige Ch. 355; *Dyer v. Wightman*, 66 Pa. St. 427.

³² *Pickett v. Anderson*, 45 Ark. 177.

³³ *Burns v. Fuchs*, 28 Mo. App. 279; *Simons v. Seward*, 54 N. Y. Super. Co. 406; *Cantrell v. Fowler* (S. C.), 10 S. E. Rep. 934; *Weinstein v. Harrison*, 66 Tex. 546; *McLean v. Wunder* (Pa.), 19 Atl. Rep. 749; *Turrer v. Mantonya*, 27 Ill. App. 500; *Reliable Steam-Power Co. v. Solidarity Watch Co.*, 10 N. Y. S. 525; *Smith v. McLean*, 22 Ill. App. 451, s. c. 123 Ill. 210; *Daly v. Wise*, 7 N. Y. S. 902.

³⁴ *Newman v. French*, 45 Hun 65.

³⁵ *Hill v. Woodman*, 14 Me. 38; *Kramer v. Cook*, 7 Gray 550; *Wells v. Castles*, 3 Gray 325; *Hallet v. Wylie*, 3 Johns. 44; *Graves v. Beedan*, 29 Barb. 100; *Joffe v. Harteau*, 56 N. Y. 398, 15 Am. Rep. 438; *Dyer v. Wightman*, 66 Pa. St. 427; *Smith v. Ankrum*, 13 Serg. & R. 39; *Peterson v. Edmonson*, 5 Harr. 378; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 430. If the tenant has covenanted "to repair and deliver up" he would have to rebuild in the case of destruction by fire. *Bullock v. Dommitt*, 5 T. R. 650; *Hoy v. Holt*, 91 Pa. St. 88; *Maggort v. Hansbarger*, 8 Leigh 536; *Nave v. Berry*, 22 Ala. 382. And where the lessor had insured the premises, in the absence of a covenant, he is not obliged to apply it to the reconstruction of the building, in case of loss by fire. He may refuse, and still recover rent of the tenant. *Magaw v. Lambert*, 3 Pa. St. 444; *Bussman v. Ganster*, 72 Pa. St. 289; *Sheets v. Selden*, 7 Wall. 424; *Pope v. Garrard*, 39 Ga. 477; *Masury v. Southworth*, 9 Ohio St. 348. But now, as already stated in the text, the common law has in most of the States been changed so that if the premises are destroyed by fire or other casualty, so far as to render them untenable, the tenant will be absolved from his liability for rent. See *Graves v. Berdan*, 26 N. Y. 502, 16 Am. Rep. 659; *Ripley*

§ 152. What constitutes eviction.— Evictions are of two kinds,—*actual* or *constructive*. Actual eviction is where the tenant is actually ousted of his possession of the premises, either by a stranger under a paramount title, or by acts of dispossession by the lessor.³⁶ But a disturbance of the possession by a stranger without claim of paramount title will not be an eviction.³⁷ Nor will the dispossession in the exercise of the right of eminent domain be such an eviction as will relieve the lessee from the liability on his covenant for rent. It gives, however, an action for damages against the public for land so confiscated.³⁸ Nor would dispossession by the public enemy abate the rent.³⁹

v. Wightman, 4 McCord 447; *Whittaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277; *Leavett v. Fletcher*, 10 Allen 121; *Stow v. Russell*, 36 Ill. 35; *Alger v. Kennedy*, 49 Vt. 109; *Smith v. McLean*, 22 Ill. App. 351, *a. c.* 123 Ill. 210; *Chesebrough v. Pingree* (Mich.), 40 N. W. Rep. 747. But a temporary uninhabitableness due to a partial destruction of the buildings by fire, will not in any case justify an action, if the landlord exercises reasonable diligence in restoring the premises to a good condition. *Conn. Mut., etc., Ins. Co. v. United States*, 21 Ct. of Cl. 195; *Bonnecaze v. Beer*, 27 La. An. 531; *McClenahan v. New York*, 102 N. Y. 75; *Spalding v. Munford*, 37 Mo. App. 281. Lease is not terminated by a destruction of the building, by fire, in the absence of such a covenant in the lease. *Moran v. Bergen* (1903), 111 Ill. App. 313; *Roman v. Taylor* (1904), 87 N. Y. S. 653, 93 App. Div. 449.

³⁶ *Robinson v. Deering*, 56 Me. 358; *Russell v. Fabyan*, 27 N. H. 543; *Boardman v. Osborn*, 23 Pick. 295; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 372.

³⁷ *Wells v. Castles*, 3 Gray 326; *Schuykill, etc., R. Co. v. Schmoele*, 57 Pa. St. 273; *Moore v. Webber*, 71 Pa. St. 429, 10 Am. Rep. 705; *Palmer v. Wetmore*, 2 Sandf. 316; *Royce v. Suggenhiem*, 106 Mass. 205, 8 Am. Rep. 322; *Hazlett v. Powell*, 30 Pa. St. 293.

³⁸ *Parks v. Boston*, 15 Pick. 198; *Patterson v. Boston*, 20 Pick. 159; *Folts v. Huntley*, 7 Wend. 210; *Peck v. Jones*, 70 Pa. St. 85; *McLarren v. Spalding*, 2 Cal. 510. In Missouri and elsewhere a different rule is laid down, and if a part of the premises is appropriated to public use, the rent is reduced *pro tanto*. *Biddle v. Hussman*, 23 Mo. 597; *Kingland v. Clark*, 24 Mo. 24; *Leiter v. Pike*, 127 Ill. 287; see *Gillespie v. Thomas*, 15 Wend. 468.

³⁹ *Clifford v. Watts*, L. R. 5 C. P. 568; *Wagner v. White*, Harr. & J. 564; *Schilling v. Holmes*, 23 Cal. 230; *contra*, *Bayley v. Lawrence*,

§ 153. **Constructive eviction.**— Constructive eviction results when the lessor, by his own act or by his own procurement, renders the enjoyment of the premises impossible, or diminishes such enjoyment to a material degree.⁴⁰ In short, any acts of omission or commission, or breaches of the lessor's covenants which destroy the premises, or render them useless or less enjoyable, may operate as a constructive eviction.⁴¹ It is, however, not a constructive eviction if the lessee of a mine exhausts the ore before the termination of his tenancy, unless the lessor has expressly covenanted that the mine contained a given quantity of ore, and the amount mined fell short of that quantity.⁴² It is, however, a constructive eviction where the covenant of the lessor that the premises are suitable for certain uses, is broken. The lessee in such a case is absolved from liability for rent.⁴³ Slight acts of tres-

1 Bay 499. As to eviction by paramount title, under condemnation proceedings, see, *Babas & Co. v. Thorley*, 127 Fed. Rep. 439. A failure to repair by landlord is not an eviction of the tenant so as to excuse the payment of rent. *Roth v. Adams*, 185 Mass. 341, 70 N. E. Rep. 445. But see, for removal of buildings, *Rice Fisheries Co. v. Pac. Realty Co.*, 35 Wash. 535, 77 Pac. Rep. 839.

⁴⁰ Thus, the renting of a part of a house to prostitutes is a constructive eviction of the tenant of the other part of the house. *Dyett v. Pendleton*, 8 Cow. 727; but see *contra*, *Dewett v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58. Erections by the lessor, or with his consent, so near the premises as to seriously diminish the enjoyment, would constitute a constructive eviction. *Royce v. Guggenheim*, 100 Mass. 201, 8 Am. Rep. 322; *Sherman v. Williams*, 113 Mass. 481, 18 Am. Rep. 522; *Wright v. Lattin*, 38 Ill. 293; *Roth v. Adams*, 185 Mass. 341, 70 N. E. Rep. 445.

⁴¹ *Tallman v. Murphy*, 120 N. Y. 345; *Riley v. Pettis County*, 96 Mo. 318; *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124; *St. John v. Palmer*, 5 Hill 599; *Bennett v. Bittle*, 4 Rawle 339; *Pier v. Carr*, 69 Pa. St. 326; *Lawrence v. French*, 25 Wend. 443; *Fuller v. Ruby*, 10 Gray 290; *Wilson v. Smith*, 5 Yerg. 399; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 127; *Lawrence v. Burrell*, 17 Abb. N. C. 312; *Jackson v. Odell*, 12 Daly 345; *Bradley v. De Goicouria*, 12 Daly 393.

⁴² *Clark v. Midland Blast Furnace Co.*, 21 Mo. App. 58.

⁴³ *Young v. Collett*, 63 Mich. 331; *Dermick v. Ekdahl*, 102 Ill. App. 199.

pass, which do not by their material interference with the enjoyment of the premises compel the tenant to abandon the possession, is not a constructive eviction. The lessor is liable for them, however, like any other trespasser.⁴⁴ It is also no ground for claiming exemption from liability in consequence of the emission of gases and odors from an adjacent building.⁴⁵ And to relieve the tenant from liability for rent on account of a constructive eviction, he must abandon the possession of the premises. Retention of possession will keep alive his liability on the covenants even though his enjoyment of the premises is taken away altogether.⁴⁶

§ 154. Partial eviction.— In the case of partial eviction, if it results from the acts of strangers, in violation of the lessor's covenant for quiet enjoyment the tenant will be relieved from the covenant for rent to the extent of the eviction, while he remains liable to the lessor for the remainder.⁴⁷ But if it be by procurement of the lessor, the entire rent is suspended during the continuance of such eviction and the lessee may elect to abandon the premises, thus terminating the tenancy and his liability for rent altogether.⁴⁸ If the

⁴⁴ *Edgerton v. Page*, 20 N. Y. 281; *Gardner v. Ketelas*, 3 Hill. 330; *Elliott v. Aiken*, 45 N. H. 35; *Bennett v. Bittle*, 4 Rawle 339; *Briggs v. Hall*, 4 Leigh 485; *Wilson v. Smith*, 5 Yerg. 399; *Day v. Watson*, 8 Mich. 535. See *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124. See, also, *Fuller Co. v. Manhattan Co.*, 88 N. Y. S. 1049; *Mason v. Landeroth*, (N. Y. 1903), 84 N. Y. S. 740, 88 App. Div. 38.

⁴⁵ *Franklin v. Brown*, 53 N. Y. Super. Ct. 474; *Sutphin v. Seebas*, 12 Daily 139; *Franklin v. Brown*, 118 N. Y. 110.

⁴⁶ *Edgerton v. Page*, 20 N. Y. 281; *Hurlbut v. Post*, 1 Bosw. 28; *Dyett v. Pendleton*, 8 Cow. 727; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 127, and cases in preceding note. *Young v. Collett*, 63 Mich. 231.

⁴⁷ *Morrison v. Chadwick*, 7 C. B. 283; *Hegeman v. Arthur*, 1 E. D. Smith 147; *Lawrence v. French*, 25 Wend. 443; *Dyett v. Pendleton*, 8 Cow. 727; *Martin v. Martin*, 7 Md. 375.

⁴⁸ *Lewis v. Paig*, 4 Wend. 323; *Christopher v. Austin*, 11 N. Y. 216; *Shumway v. Collins*, 6 Gray 227; *Leishman v. White*, 1 Allen 489; *Reed v. Reynolds*, 37 Conn. 469; *Colburn v. Morrill*, 117 Mass. 262, 19

partial occupation is retained under an agreement with the lessor that the rent should be proportionately reduced, there can be no claim for complete exemption from liability on the ground of partial eviction, even where the time of dispossession is continued beyond what had been expected.⁴⁹ In all cases of eviction the tenant is exempt from the payment of rent from the last pay-day prior to such eviction; but the liability for rent revives if the tenant, after the eviction, should resume possession of the premises.⁵⁰ If the eviction is only partial, the resumption of possession will not render the tenant liable for the intermediate rent for the part which he continued to occupy during the continuance of such eviction.⁵¹

§ 155. **Surrender and merger.**—If the tenant gives up his term to the immediate reversioner, he is said to surrender his estate, and the estate is merged or becomes lost in the reversion; the effect of which is to extinguish all liability on the covenants of the lease.⁵² But if an estate intervenes

Am. Rep. 415; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Smith v. Stigleman*, 58 Ill. 141; *Wilson v. Smith*, 5 Yerg. 379; *Pier v. Carr*, 69 Pa. St. 326; *Schilling v. Holmes*, 23 Cal. 230. But neither total nor partial eviction will prevent the lessor from recovering rent already due, when the eviction takes place. *Giles v. Comstock*, 4 N. Y. 270; *Kessler v. McConachy*, 1 Rawle 435; *Kitchen Bros. v. Philbin* (Neb. 1901), 96 N. W. Rep. 487; *Moore v. Mansfield*, 182 Mass. 302, 65 N. E. Rep. 398. But see *Soloman v. Fantozzi*, 86 N. Y. S. 754.

⁴⁹ *Kella v. Miles*, 38 Hun 6.

⁵⁰ *Morrison v. Chadwick*, 7 C. B. 283; *Chatterton v. Fox*, 5 Duer 64; *Boardman v. Isborn*, 23 Pick. 295; *Russell v. Fabyan*, 27 N. H. 543; *Colburn v. Morrill*, 117 Mass. 262, 19 Am. Rep. 415; *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Corning v. Gould*, 16 Wend. 538; *Smith v. Stigleman*, 58 Ill. 141.

⁵¹ *Upton v. Greenlees*, 17 C. B. 30; *Fuller v. Ruby*, 10 Gray 285; *Leishman v. White*, 1 Allen 489; *Lawrence v. French*, 25 Wend. 443; *Anderson v. Chicago Ins. Co.*, 21 Ill. 601.

⁵² Co. Lit. 388 a; 1 Washb. on Real Prop. 552; *Curtis v. Miller*, 17 Barb. 477; *Greider's Appeal*, 5 Pa. St. 422; *Bailey v. Wells*, 8 Wis. 158; *Smiley v. Van Winkle*, 6 Cal. 605; *Dennis v. Miller* (N. J. 1902), 53 Atl. Rep. 394; *McDonald v. May* (Mo. 1902), 69 S. W. Rep. 1059.

between the two estates, neither surrender nor merger will take place.⁵³ In order to prevent a merger of the term in the reversion, it is a common custom, in England, to have the term conveyed to trustees, and conditioned to follow the reversion into whosoever hands the latter may come. This was called a term, attendant upon the inheritance, and may be done whenever there is fear of incumbrances which will affect the reversion while they are subject to the term.⁵⁴ Nor will merger—i. e., the dissolution of the term in the reversion—take place where the two come together into the possession of one person by act of the law,—as, where the husband has a term of years in his own right, and a term of years in his wife, or tenancy by curtesy through the freehold of his wife. They will continue to exist uninfluenced by their union in the one person.⁵⁵ Where two terms come together in one person, the first will merge in the second, even though the first be for a longer period; unless the second is created by way of remainder, when no merger will result. In the latter case, the person becoming possessed of both will have the benefit of both in succession.⁵⁶

⁵³ 1 Washburn on Real Prop. 553; *Burton v. Barclay*, 7 Bing. 745; *Williams on Real Prop.* 413, 415; *Springer's Appeal*, 111 Pa. St. 274; *Hobson v. Silva*, 137 Cal. 323, 70 Pac. Rep. 619. For merger from purchase of landlord's title, by tenant at foreclosure sale, see, *Mastin v. Stow*, 91 Mo. App. 554.

⁵⁴ *Williams on Real Prop.* 16, 417.

⁵⁵ 1 Washburn on Real Prop. 554; *Williams on Real Prop.* 415; 3 *Prest. Conv.* 276; *Jones v. Davies*, 5 Hurlst. & N. 766; *Doe v. Pett*, 11 Ad. & El. 848; *Clift v. White*, 19 Barb. 70.

⁵⁶ Co. Lit. 273 b; 3 *Prest. Conv.* 201; 1 Washburn on Real Prop. 553, 554; *Hughes v. Robotham*, Cro. Eliz. 303; *Stephens v. Bridges*, 6 Madd. 66; *Chamberlain v. Dunlap*, 8 N. Y. S. 125. This doctrine of merger is applicable to all classes of estates, and provides for the dissolution of the inferior in the greater estate. The superiority of estates in this connection is determined by their legal value, and not their pecuniary or market value. Thus, an estate for one thousand years is less than, and becomes merged in, a life estate, when the two come together in one person. For merger of estates, generally, see Sec. 50 and note.

§ 156. **How surrender may be effected.**—As a general proposition, a surrender which will operate as an extinguishment of the lessee's liability for rent and on the other covenants of the lease, requires the same formalities of execution, under the Statute of Frauds, as are necessary in the creation of the lease. A lease in writing, therefore, can, as a general rule, only be terminated by a surrender in writing; and if the lease was required to be under seal, the surrender must be also.⁵⁷ But if the lessee takes a new lease, the enjoyment of which is incompatible with the continuance of the old lease,⁵⁸ or if the lessee abandons the possession, and the lessor actually enters into possession, or leases the premises to other parties, such acts will be sufficient to work a surrender of the premises, so far, at least, as to relieve the tenant from liability on his covenants.⁵⁹ But an abandonment

⁵⁷ *Ward v. Lumley*, 5 Hurlst. & N. 88; *Brady v. Peiper*, 1 Hilt. 61; *Jackson v. Gardner*, 8 Johns. 404; *Allen v. Jaquish*, 21 Wend. 628; *M'Kinney v. Reader*, 7 Watts 123; *Breher v. Reese*, 17 Ill. App. 545. But the lessee's surrender will in nowise affect the rights of third parties, such as sublessees. They will still hold their rights or interests in the estate; but after such a surrender, they must perform their covenants to the surrenderee. He can, for example, compel the sublessee to pay the rent to him. *Adams v. Goddard*, 48 Me. 212; *Beal v. Boston, etc., Car. Co.*, 125 Mass. 157, 28 Am. Rep. 216; *Piggott v. Stratton*, 1 Johns. Ch. 355; *McKenzie v. Lexington*, 4 Dana 129; *Hessel v. Johnson*, 128 Pa. St. 173.

⁵⁸ *Lyon v. Reed*, 13 M. & W. 304; *McDonnell v. Pope*, 9 Hare 705; *Shepard v. Spaulding*, 4 Metc. 416; *Brewer v. Dyer*, 7 Cush. 339; *Livingston v. Potts*, 16 Johns. 28; *Van Rensselaer v. Penniman*, 6 Wend. 569; *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120; *Bailey v. Wells*, 8 Wis. 141; *Stuebben v. Granger*, 63 Mich. 306. And where the second lease is parol, while the first is written, the acceptance of the second will constitute a surrender of the first, if the second lease is valid under the Statute of Frauds. *Thomas v. Cook*, 2 B. & Ald. 119; *Smith v. Niver*, 2 Barb. 180; *Bedford v. Terhune*, 30 N. Y. 463. But there will be no surrender where the second lease is from one of the two original lessors. (*Sperry v. Sperry*, 8 N. H. 477; *Chamberlain v. Dunlap*, 8 N. Y. S. 125), or the release of the first is executed by one of the two original lessees. *Baker v. Pratt*, 15 Ill. 568.

⁵⁹ *Dodd v. Acklom*, 6 Mann & G. 673; *Walker v. Richardson*, 2 M. & W. 891; *Brewer v. Dyer*, 7 Cush. 337; *Talbot v. Whipple*, 14 Allen

of possession by the tenant will not work a surrender of the premises, unless it is assented to by the lessor, and such acceptance must be shown by word or acts,—such, for example, as entry into possession.⁶⁰ A surrender may also be made to operate *in futuro*.⁶¹

180; *Hegeman v. McArthur*, 1 E. D. Smith 149; *Brady v. Peiper*, 1 Hilt 61; *Statesbury v. Vail*, 13 N. J. L. 390; *M'Kinney v. Reader*, 7 Watts 123; *Wool v. Walbridge*, 19 Barb. 136; *Van Rensselaer v. Freeman*, 6 Wend. 569; *Cline v. Black*, 4 McCord 431; *Wallace v. Kennelly*, 47 N. J. L. 242. In *Fifty Associates v. Grace*, 125 Mass. 161 (28 Am. Rep. 218), it was held that where the lease is expressly non-assignable, and the lessor assents to an assignment and a different use of the premises, this assent, together with acceptance of rent from the assignee, is in effect the creation of a new tenancy, and the original lessee is no longer liable on his covenant for rent. See also *Bailey v. Delaphine*, 1 Sandf. 5; *Logan v. Anderson*, 2 Dougl. (Mich.) 101; *Levering v. Langley*, 8 Minn. 107. But the mere oral agreement to substitute another in the place of the tenant will not have the effect of a surrender, unless the agreement has been carried into effect, and evidenced by some act,—such as acceptance of rent from the new tenant. See *Brewer v. Dyer*, 7 Cush. 337; *Whitney v. Myers*, 1 Duer 266; *Vandekar v. Reeves*, 40 Hun 430; *Wallace v. Kennelly*, 47 N. J. L. 242; *Kedney v. Rohrbach*, 14 Daly 54. But see, *contra*, *Ballou v. Carton*, 8 N. Y. S. 15; *Winant v. Hines*, 14 Daly 187. Where the term ends at a fixed time, no notice to terminate the tenancy is necessary. *Butts v. Fox*, 96 Mo. App. 437, 70 S. W. Rep. 515.

⁶⁰ *Thomas v. Cook*, 2 B. & Ald. 119; *Whitehead v. Clifford*, 3 Taunt. 318; *Hegeman v. McArthur*, 15 N. Y. 149; *Elliott v. Aiken*, 45 N. H. 36; *Stobie v. Dills*, 62 Ill. 432; *Statesbury v. Vail*, 13 N. J. L. 390; *Boyle v. Teller*, 132 Pa. St. 56; *Koehler v. Scheider*, 10 N. Y. S. 101.

⁶¹ *Allen v. Joquish*, 21 Wend. 628; but an acceptance of notice that the tenant is to quit at a future time, without acceptance of, or entering into, possession, when the tenant abandons the premises, is not such a surrender as will relieve the tenant from liability on his express covenant for rent. *Johnstone v. Huddleston*, 4 B. & C. 922; *Jackson v. Gardner*, 8 Johns. 404; *Schiefelin v. Carpenter*, 15 Wend. 400. Where the lessor and lessee agree upon a termination of the tenancy, if there are any acts thereunder, giving this agreement effect, there is a surrender of the term, in law. *Dennis v. Miller* (N. J. 1902), 53 Alt. Rep. 394; *Drew v. Billings Drew Co.* (Mich. 1902), 92 N. W. Rep. 774.

§ 157. **Right of lessee to deny lessor's title.**—As a consequence of the tenure existing between landlord and tenant, if one person accepts a lease from another, and enters into possession under the lease, he is estopped from denying the lessor's title, by setting up a title in himself or in a third person adverse to the right of the lessor to grant the original lease, in any action for the recovery of the rent, or of the possession.⁶² And this principle is applied to any land, the title to which the tenant may have acquired by purchase or by disseisin during the continuance of the term, and which he occupied and used in connection with the leased land, whether adjacent or at a distance, unless the presumption of holding for the benefit of the landlord is rebutted by strong and clear evidence of a contrary intention.⁶³

This estoppel, however, exists only during the continuance of the term, and the tenant, if he has acquired a superior title, may enforce it against the lessor, after he has delivered

⁶² *Cooke v. Loxley*, 5 T. R. 4; *Delaney v. Fox*, 2 C. B. (N. S.) 768; *Blight's Lessee v. Rochester*, 7 Wheat. 548; *Willison v. Watkins*, 3 Pet. 43; *Russell v. Fabyan*, 27 N. H. 529; *Longfellow v. Longfellow*, 54 Me. 249; *Boston v. Binney*, 11 Pick. 8; *Coburn v. Palmer*, 8 Cush. 124; *Towne v. Butterfield*, 97 Mass. 106; *Franklin v. Merida*, 35 Cal. 558; *Wells v. Sheerer*, 78 Ala. 142; *Morris v. Apperson* (Ky.), 13 S. W. Rep. 441; *Oliver v. Gray*, 42 Kans. 623; *Killoren v. Murtaugh*, 64 N. H. 51; *Palmer v. Nelson*, 76 Ga. 803; *Doherty v. Matsell*, 119 N. Y. 646. But the tenant is not estopped from setting up a tax-title purchased by him during the tenancy, unless he is under obligation to pay the taxes. *Weichelsbaum v. Carlett*, 20 Kan. 709; *Bettison v. Budd*, 17 Ark. 546; *Haskell v. Putnam*, 42 Me. 244. The mere taking of a lease does not estop the lessee. Entry into possession is necessary to create the estoppel. *Chattle v. Pound*, 1 Ld. Raym. 746; *Nerhath v. Althouse*, 8 Watts 427. A showing, in an action for rent, that the lessor has conveyed the premises, is not a denial of the lessor's title. *Allan v. Hall* (Neb. 1902), 92 N. W. Rep. 171.

⁶³ *Doe v. Jones*, 15 M. & W. 580; *Doe v. Rees*, 6 C. & P. 610; *Doe v. Tidbury*, 14 C. B. 304; *Kingsmill v. Millard*, 11 Exch. 813; *Dixon v. Baty*, L. R. 1 Exch. 259; *Lisburne v. Davies*, L. R. 1 C. P. 260; *Doe v. Murrell*, 8 C. & P. 134. See *contra*, *Holmes v. Turner's Falls, etc., Co.*, 150 Mass. 535, 23 N. E. Rep. 305.

up possession to him at the expiration of the lease.⁶⁴ And during the continuance of the lease, if the tenant has been evicted by a stranger under the claim of a paramount title, the tenant may attorn to such claimant, and deny the lessor's right to recover the rent or the possession. But in order to be able to set up such a defense, he must give his lessor notice of the claim, and the eviction must be actual; although he need not wait to be actually put out of possession before attorning to the stranger claimant.⁶⁵ He may also show that the lessor's title has since been determined, and that he has acquired the title to the reversion, although such determination of the lessor's title is not a good defense, if the reversion is held by a stranger, unless the lessee has been actually or constructively evicted.⁶⁶ He may also show that

⁶⁴ *Accidental Death Ins. Co. v. Mackenzie*, 10 C. B. (N. S.) 870; *Wilson v. Watkins*, 3 Pet. 43; *Longfellow v. Longfellow*, 54 Me. 249; *Page v. Kinsman*, 43 N. H. 331; *Sharpe v. Kelly*, 5 Denio, 431; *Elliot v. Smith*, 23 Pa. St. 131; *Shields v. Lozear*, 34 N. J. L. 496; *Williams v. Garrison*, 29 Ga. 503; *Russell v. Erwin*, 38 Ala. 50; *Duke v. Harper*, 6 Yerg. 280; *Hodges v. Shields*, 18 B. Mon. 832; *Stout v. Merrill*, 35 Iowa 47; *Bonds v. Smith*, 109 N. C. 333; *Outtun v. Dulin* (Md.), 20 Atl. Rep. 134; *Robinson v. Hall* (Ala.), 7 So. Rep. 441. And disclaimer of tenancy, with abandonment of possession, will have the same effect. *Fuller v. Sweet*, 30 Mich. 237, 18 Am. Rep. 122; *Arnold v. Woodward* (Col.), 23 Pac. Rep. 444.

⁶⁵ *Mayor v. Whitt*, 5 M. & W. 571; *Simers v. Salters*, 3 Denio 214; *Whalin v. White*, 25 N. Y. 465; *Hilbourne v. Fogg*, 99 Mass. 1; *Towne v. Butterfield*, 100 Mass. 189; *Stewart v. Roderick*, 4 Watts & S. 188; *Shields v. Lozear*, 34 N. J. L. 496; *Devacht v. Newsam*, 3 Ohio 57; *Lowe v. Emerson*, 48 Ill. 160; *Casey v. Gregory*, 13 B. Mon. 506; *Lunsford v. Turner*, 5 J. J. Marsh. 104; *Voss v. King*, 33 W. Va. 236; *Thomas v. Black* (Del.), 18 Atl. Rep. 771; *Hibbard v. Ramsdell*, 118 N. Y. 38; *Ratcliff v. Belfort Iron Co.*, 87 Ky. 559. See *O'Donnell v. McIntyre*, 118 N. Y. 156.

⁶⁶ *Walton v. Waterhouse*, 2 Saund. 418 n; *Stack v. Seaton*, 26 Mann & R. 729; *Jackson v. Rowland*, 6 Wend. 666; *Despard v. Wallbridge*, 1 E. D. Smith 374; *Hilbourn v. Fogg*, 99 Mass. 11; *Lamson v. Clarkson*, 113 Mass. 348, 18 Am. Rep. 498; *Pierce v. Brown*, 124 Vt. 105; *Duffer v. Wilson*, 69 Pa. St. 316; *Shields v. Lozear*, 34 N. J. L. 496; *Franklin v. Palmer*, 50 Ill. 202; *Wild's Lessee v. Serpell*, 10 Gratt. 415; *Horner v. Leeds*, 25 N. J. L. 106; *Wolf v. Johnson*, 30 Miss. 513; *Beall v.*

he has been induced to accept the lease through misrepresentation or fraud, or that the lessor was not in possession at the creation of the lease.⁶⁷

The same doctrine of estoppel applies to the assignees, devisees and heirs of the lessor. The lessee cannot dispute the title of the original lessor, but he may deny the validity of the assignment, the devise or the descent.⁶⁸ And in case of assignment, he may dispute the original lessor's present title, by setting up the title of the assignee to whom he has attorned.⁶⁹

§ 158. Effect of disclaimer of lessor's title.—If the lessee illegally denies the lessor's title to the land, it is virtually an act of disseisin. But it will not work a rupture of the relation of landlord and tenant except at the option of the lessor. If he so elects, he may consider the lease as for-

Davenport, 48 Ga. 165, 15 Am. Rep. 656; *Pickett v. Ferguson*, 45 Ark. 177 (55 Am. Rep. 545); *Rhyne v. Guevara* (Miss.), 6 So. Rep. 736; *Hibbard v. Ramsdell*, 118 N. Y. 38.

⁶⁷ *Accidental Death Ins. Co. v. McKenzie*, 10 C. D. (N. S.) 871; *Tewksbury v. Magraff*, 33 Cal. 237; *Jackson v. Spear*, 7 Wend. 401; *Alderson v. Miller*, 15 Gratt. 279; *Hockenbury v. Snyder*, 2 Watts & S. 240; *Killoren v. Murtaugh*, 64 N. H. 51; *Voss v. King*, 33 W. Va. 236; *Hammons v. McClure*, 85 Tenn. 65; *Crockett v. Althouse*, 33 Mo. App. 404.

⁶⁸ *Tuttle v. Reynolds*, 1 Vt. 80; *Russell v. Allard*, 18 N. H. 225; *Blantin v. Whittaker*, 11 Humph. 313; *Beall v. Davenport*, 48 Ga. 155, 15 Am. Rep. 656.

⁶⁹ *Delaney v. Fox*, 2 C. B. (N. S.) 778; *Kimball v. Lockwood*, 6 R. L. 138; *Mass. Ins. Co. v. Wilson*, 10 Metc. 126; *Pierce v. Brown*, 24 Vet. 165; *Beall v. Davenport*, 48 Ga. 165, 15 Am. Rep. 656; *Claffin v. Brockmeyer*, 33 Mo. App. 92. The estoppel to deny landlord's title binds an assignee or subtenant equally with the original lessee. *Owen v. Brookport*, 208 Ill. 35, 69 N. E. Rep. 952; *Simpson v. Morehead* (N. J. 1904), 56 Atl. Rep. 887; *Adams v. Shirk*, 117 Fed. Rep. 8. As long as the lessee is in possession, under the lessor, he cannot dispute his title. *Harvin v. Blackman* (La. 1904), 112 La. 24, 36 So. Rep. 213; *Morga v. Dalton*, 112 La. 9, 36 So. Rep. 208; *Fuller v. Construction Co.* (N. Y. 1904), 88 N. Y. S. 1049; *Mineral R. & M. Co. v. Flaherty*, 24 Pa. Super Ct. 236.

feited, and treat the lessee as a disseisor. Otherwise the relation of landlord and tenant continues, with all the attending liabilities and duties.⁷⁰ The Statute of Limitations will not run against the lessor's title, until due notice has been given to the lessor of the claim of adverse possession, and will ripen into a good title only when the lessor fails within the statutory period to exercise the rights of an owner over the land. The payment of rent, whether voluntary or involuntary, will be a sufficient acknowledgment of the tenure and the lessor's title to prevent its being barred by the Statute of Limitations.⁷¹ And if the lessee has the superior title, the lessee's possession under the lease, it matters not how long it is continued, will not operate under the Statute of Limitations to bar the lessee's title. In such a case, the lessor cannot be considered to have the seisin in law.⁷²

§ 159. Options of purchase and for renewal.—It is quite customary of recent years, for demises of real estate to contain options, on the part of the lessee, or tenant, on com-

⁷⁰ *Sherman v. Champlain Transp. Co.*, 31 Vt. 110; *Greene v. Munson*, 9 Vt. 37; *Jackson v. Vincent*, 4 Wend. 633; *Jackson v. Collins*, 11 Johns. 5; *Russell v. Fabyan*, 34 N. H. 223; *Newman v. Rutter*, 8 Watts 5; *Wild's Lessee v. Serpell*, 10 Grant 405; *Wadsworthville School v. Meetze*, 4 Rich. 50; *Doe v. Reynolds*, 27 Ala. 376; *Montgomery v. Craig*, 3 Dana 101; *Arnold v. Woodward (Col.)*, 23 Pac. Rep. 444; *Tobin v. Young (Ind.)*, 24 N. E. Rep. 121; *Willison v. Watkins*, 3 Pet. 43. No notice to quit is required before ejectment. *Sims v. Cooper*, 106 Ind. 86.

⁷¹ *Willison v. Watkins*, 3 Pet. 49; *Zeller v. Eckhart*, 4 How. 289; *Sherman v. Champlain Transp. Co.*, 31 Vt. 110; *Bedford v. McElheron*, 2 Serg. & R. 49; *Jackson v. Wheeler*, 6 Johns. 272; *Whaley v. Whaley*, 1 Speers 225; *Deane v. Gregory*, 3 B. Mon. 619; *Lee v. Netherton*, 9 Yerg. 315.

⁷² *Smythe v. Henry*, 41 Fed. Rep. 705. Possession of a tenant, under a lease, can never form the basis of a title by adverse possession. *Dixon v. Finnegan*, 182 Mo. 111, 81 S. W. Rep. 449; *Morgan v. Dalton*, 112 La. 9, 36 So. Rep. 208; *Miller v. Warren (N. Y. 1904)*, 87 N. Y. S. 1011, 94 App. Div. 192. But see, for possession taken independently and not as lessee, *Cambridge Lodge v. Routh (Ind. 1904)*, 71 N. E. Rep. 148.

pliance with certain conditions precedent, to purchase the leased premises, for a fixed sum, at a fixed time, or during the continuance of the term. Where a lease contains an option to sell, at a fixed price, this is generally held to be such a continuing offer, by the lessor, or landlord, as will, on acceptance of the terms, by the lessee, constitute a complete contract of sale and bind the lessor to convey the premises, on the terms agreed upon in the lease.⁷³ And it is not infrequent that covenants to renew the tenancy are incorporated in the lease, and these covenants are also enforced, by the courts, if sufficiently definite to form the basis of an action for specific performance, or for damages, in case of the violation of such promises by the landlord.⁷⁴

§ 160. Letting land upon shares.—It is also common in this country for the owner of land to let it to persons for the purpose of cultivating it, with the agreement that the parties should each have a share in the crops. Such contracts create between the parties different relations, accord-

⁷³ Where a lease contains an option to sell at a fixed price, this is such a continuing offer, that, on acceptance, by the lessee, there is a complete contract of sale. *King v. Raab*, 123 Iowa 632, 99 N. W. Rep. 306; *Tilton v. Coal Co.* (Utah 1904), 77 Pac. Rep. 758. But see, where there are conditions precedent to be performed, to the right to exercise the option to purchase. *Frank v. Stratford-Hancock* (Wyo. 1904), 77 Pa. Rep. 134.

⁷⁴ A covenant for renewal will be enforced in equity, where lessee elected to renew. *Kaufman v. Liggett*, 209 Pa. St. 87, 58 Atl. Rep. 129; *Neiderstein v. Cusick* (N. Y. 1904), 178 N. Y. 543, 71 N. E. Rep. 100; *Tischner v. Rutledge*, 35 Wash. 285, 77 Pac. Rep. 388. And as assignee or subtenant can enforce the covenant to renew. *Warner v. Cochrane*, 128 Fed. Rep. 553, 63 C. C. A. 24. A clause that the premises were demised for a period of one year, with the privilege of longer, is too indefinite to be enforced. *Howard v. Tomichie* (Miss. 1903), 33 So. Rep. 493. Remaining in possession is generally sufficient evidence of an election to renew the lease. *Jackson v. Doll*, 109 La. 230, 33 So. Rep. 207; *Brown v. Samuels* (Ky. 1902), 70 S. W. Rep. 1047; *Montgomery v. Co. Com.*, 76 Ind. 362; *Kimball v. Cross*, 136 Mass. 300; *Harding v. Seley*, 148 Pa. St. 20, 23 Atl. Rep. 1118; *Mershon v. Williams*, 62 N. J. Law 779, 42 Atl. Rep. 778.

ing to their intentions, as expressed in their agreements. If the intention appears to be, that the land-owner shall lease the land to the farmer and that his share of the crop shall be received in *lieu* of, or as, rent, the relation of landlord and tenant is created. Under these circumstances the tenant has such a vested interest in the land, as that he may convey by a recorded deed the future crops, and the grantee's title will prevail against an attachment by his creditors.⁷⁵ The tenant is in possession of the land, and the landlord has no vested interest in the crop, as a crop. His rights in, or to, any part of the crop attach only upon a division and delivery of the same,⁷⁶ and the landlord has no action against the tenant for the delivery of his share of the crop until demand has been made of the tenant for such delivery.⁷⁷ If the tenant abandons the farm while the crop is growing, and rescinds his agreement thereby, he loses all his interest in the growing crop under the law of emblements.⁷⁸ But if one

⁷⁵ *Walworth v. Jennes*, 58 Vt. 670; *Yates v. Kinney*, 19 Neb. 275.

⁷⁶ *Aiken v. Smith*, 21 Vt. 181; *Caswell v. Districh*, 15 Wend. 379; *Herskell v. Bushnell*, 37 Conn. 43; *Burns v. Cooper*, 31 Pa. St. 420; *Rinehart v. Olwine*, 5 Watts & S. 457; *Butterfield v. Baker*, 5 Pick. 522; *Newcomb v. Ramer*, 2 Johns. 421; *Hatchell v. Kinsbrough*, 4 Jones (N. C.) 163; *Jordan v. Bryan*, 103 N. C. 59; *Pelton v. Draper*, 61 Vt. 364. And until division, they may be attached by creditors as the property of the lessee. *Kelly v. Weston*, 20 Me. 232; *Deaver v. Rice*, 4 Dev. & B. 431; *Ross v. Swaringer*, 9 Ired. 481. In some of the States it is provided by statute that the lessor will in such case have a lien on the undivided crop for his rent. *Hopper v. Haines*, 71 Md. 64. The parties may also expressly provide for a lien. *Koeleg v. Phelps* (Mich.), 45 N. W. Rep. 350.

⁷⁷ *Johnson v. Shank*, 67 Iowa 115. A provision that crops are to remain the property of the lessor, until harvested, is valid, in California. *Summerville v. Stockton Co.*, 142 Cal. 529, 76 Pac. Rep. 243. A leasing of land, for farm purposes, on shares, in Wisconsin, is held to create the relation of landlord and tenant. *Rowlands v. Voehchting*, 115 Wis. 352, 91 N. W. Rep. 990. See also, *Northness v. Hillstead*, 87 Minn. 304, 91 N. W. Rep. 1112; *Alexander v. Zeigler* (Miss. 1904), 36 So. Rep. 536.

⁷⁸ *Kiplinger v. Meeks*, 61 Mich. 341; *Pelton v. Draper*, 61 Vt. 364. The tenant, under a lease on the shares, can assert a laborer's lien on

is employed to work a farm, with the understanding that the crop shall be divided between him and the land-owner, and there is no apparent intention of leasing the lands and taking the share for rent, the farmer has no estate in the land beyond a license to go upon it for the purposes of cultivation; the land-owner is in possession of the land, and must maintain all suits for trespass and other injuries to the land. The parties are tenants in common of the crop to the amount of their respective shares, from the time of planting until a division and settlement is made;⁷⁹ and the share of each in the crop is at all times, after planting, subject to the claims of creditors.⁸⁰ A third relation may exist between the parties, viz.: that of employer and employee, where the farmer is given his share of the crop, not as a partner or tenant in common, but as wages. Whenever that relation was intended by the parties, the farmer has no title to any part of the crop until his share has been set apart for him,⁸¹ and he may be discharged for cause. His rights in

the crops, in Georgia. *DeLoach v. Delk*, 119 Ga. 884, 47 S. E. Rep. 204.

⁷⁹ *Tanner v. Hills*, 48 N. Y. 362; *Bradish v. Schenk*, 8 Johns. 151; *Foot v. Colvin*, 3 Johns. 216; *Chandler v. Thurston*, 10 Pick. 205; *Daniels v. Brown*, 34 N. H. 454; *Esdon v. Colburn*, 28 Vt. 631; *Jordan v. Staples*, 57 Me. 455; *Guest v. Opdyke*, 30 N. J. L. 544; *Steel v. Frick*, 56 Pa. St. 172; *Walker v. Fitts*, 24 Pick. 191; *Delaney v. Root*, 99 Mass. 550; *Reynolds v. Reynolds*, 48 Hun 142; *Adams v. State*, 87 Ala. 89; *Woodward v. Conder*, 33 Mo. App. 147. If the farmer is a minor the presumption is against a tenancy of the land, and he will be held to be a tenant in common with the land-owner of the crop. *Loomis v. O'Neal*, 73 Mich. 582. The tenant may in such a case assign his interest in the crop. *Aiken v. Smith*, 21 Vt. 182. But see *Kelly v. Watson*, 20 Me. 232; *Brown v. Lincoln*, 47 N. H. 469; *Harris v. Frink*, 49 N. Y. 21. If the land-owner ejects the farmer before the crop is ripe for the harvest, the latter's right in the crop is not thereby disturbed. He can sue the land-owner for his share in trover or replevin. *Loomis v. O'Neal*, 73 Mich. 582.

⁸⁰ *Schell v. Simon*, 66 Cal. 264; *Stickney v. Stickney*, 77 Iowa 699; *Hoppenn v. Haines* (Ind.), 18 Atl. Rep. 29.

⁸¹ *Hammock v. Creekmore*, 48 Ark. 264; *Hendricks v. Smith* (Ark.), 12 S. W. Rep. 781.

the contract are of a personal nature, and cannot be assigned to another, at least while the contract remains executory.⁸² It is very often difficult to determine which of these relations such a contract creates. The only guide is the intention of the parties, and no general rules can be given except those above presented, unless, it may perhaps be added, that it seems to be a presumption of law that the relation is one of landlord and tenant, unless the contrary intention appears.⁸³ If the farmer should purchase the reversion to the land under a judgment against the owner, the claims of such owner, under the contract for working the land on shares, would pass to the purchaser as an apurtenant, and would become merged in the farmer's general ownership of the land.⁸⁴

§ 161. Actions between landlords and tenants.— Under the landlord and tenant statutes of many States, the rights of the respective parties to a lease are regulated by statute and specific remedies are provided for any interference with

⁸² *Jeter v. Penn*, 28 La. An. 230.

⁸³ *Birmingham v. Rogers*, 46 Ark. 254.

⁸⁴ *Culverhouse v. Worts*, 32 Mo. App. 419. Where the interest of the landlord, in a renting on shares in certain crops is specified, the same interest attaches in those not so mentioned, if of the same nature and value. *Black v. Golden* (Mo. 1904), 78 S. W. Rep. 301. The effect of a farm lease, in Pennsylvania, where the share of the tenant in several crops was specified, was held to vest that share of those crops in him absolutely and the whole of all other crops not so specified. *In re Luckinbill*, 127 Fed. Rep. 984. The tenant, under a renting on shares, has such an interest in the crops as to enable him to sue for any injury to his crops. *Parker v. Hale* (Tex. 1903), 78 S. W. Rep. 555; *Sowles v. Martin* (Vt. 1904), 56 Atl. Rep. 979; *Northness v. Hillstead*, 87 Minn. 304, 91 N. W. Rep. 1112; *Vincent v. Crane* (Mich. 1903), 97 N. W. Rep. 34. The landlord is given a lien on crops raised on the shares in Missouri (*Crane v. Murray*, 106 Mo. App. 697, 80 S. W. Rep. 280); Texas (*Planters Compress Co. v. Howard*, 80 S. W. Rep. 119); Iowa (*Stabler v. Collins*, 100 N. W. Rep. 527); South Carolina (*State v. Ellmore*, 68 S. C. 140, 46 S. E. Rep. 939); Illinois (*Springer v. Lipsis*, 209 Ill. 261, 70 N. E. Rep. 641), and several other States.

the rights of the tenant by the landlord and *vice versa*; actions are sometimes afforded for the enforcement of a lien for the rent by the landlord and for the recovery of possession, under summary proceedings, wherein the service of process is shortened and other essentials of the common law actions are dispensed with.⁸⁵ A consideration of these various actions will not be attempted here, for the student and practitioner would necessarily have to consult the best evidence of such statutory provisions, the statutes themselves, as to the specific provisions of each. At common law, the lessor was generally held liable for injuries to the lessee or his family, from known defects in the demised premises, existing at the time of the demise,⁸⁶ but for injuries either to persons or property, arising from defects which come to the leased premises, subsequent to the demise, the lessee, in the absence of covenant by the landlord, would be responsible⁸⁷ and for all injuries to the freehold the right of action

⁸⁵ See 3 Joyce Dam., Secs. 1841-2229, for full discussion of these various statutory remedies.

⁸⁶ A landlord is generally liable to a tenant for injuries from defects in premises when demised. *Udder v. O'Reilly*, 180 Mo. 650, 79 S. W. Rep. 691; *Donk Bros. Coal Co. v. Leavitt*, 109 Ill. App. 385. But landlord must generally know of defect to render him liable. *Whitely v. McLaughlin*, 183 Mo. 160, 81 S. W. Rep. 1094; *Schoppel v. Daly*, 112 La. 201, 36 So. Rep. 322. For liability of landlord for known demise of defective premises see, *Davis v. Smith*, 26 R. I. 129, 58 Atl. Rep. 630; *Minor v. Sharon*, 112 Mass. 477, 17 Amer. Rep. 122, 1 L. R. A. 429; *Sternberg v. Wilcox*, 96 Tenn. 163, 33 S. W. Rep. 917, 34 L. R. A. 615; *Anderson v. Hays*, 101 Wis. 538, 77 N. W. Rep. 891, 70 Amer. St. Rep. 930.

⁸⁷ The lessee alone and not the lessor is liable for an injury to his employees and others, from a failure to keep the leased premises in repair, in the absence of a covenant on the lessor's part. *King v. Creekmore* (Ky. 1903), 77 S. W. Rep. 689; *McConnell v. Lemley*, 34 L. R. A. 609; *Ocean S. S. Co. v. Hamilton*, 112 Ga. 901, 38 S. E. Rep. 204; *Whitmore v. Paper Co.*, 91 Me. 297, 39 Atl. Rep. 1032, 40 L. R. A. 377, 64 Amer. St. Rep. 229; *Harrison v. Jelly*, 175 Mass. 292, 56 N. E. Rep. 283; *Griffin v. Manice*, 106 N. Y. 188, 59 N. E. Rep. 925, 52 L. R. A. 922, 82 Amer. St. Rep. 630; *Petterson v. Brewing Co.* (S. D.), 91 N. W. Rep. 336; *Fehlauer v. St. Louis*, 178 Mo. 635, 77 S. W. Rep. 843;

would be in the landlord, while the lessee alone could sue for injuries to his possession.^{ss}

Lyon v. Bauerman (N. J. 1904), 57 Atl. Rep. 1009; *Prahar v. Tausey*, 87 N. Y. S. 845; *Sheridan v. Forsee*, 106 Mo. App. 495, 81 S. W. Rep. 494; *Kenny v. Barnes*, 67 Mich. 336, 34 N. W. Rep. 587; *White v. Montgomery*, 58 Ga. 204.

^{ss} For all injuries to the freehold the landlord may sue, during the continuance of the term. *Arnold v. Bennett*, 92 Mo. App. 156. But for all injuries to the possession, not amounting to injuries to the freehold, the right of action is in the tenant. *Southern Ry. Co. v. State*, 116 Ga. 276, 42 S. E. Rep. 508.

In Colorado by statute the courts are directed to construe any estate as an estate at will unless the contrary is ~~not~~ proved by implication or otherwise. C

SECTION II.

ESTATES AT WILL AND TENANCIES FROM YEAR TO YEAR.

SECTION 162. Estates at will.

163. How estates at will may be determined.

164. Estates at will distinguished from tenancy from year to year.

165. Tenancy at will — What now included under that term.

166. Tenancy at will — Arising by implication of law.

167. Qualities of tenancies from year to year.

168. What notice is required to determine tenancy from year to year.

169. How notice may be waived.

§ 162. Estates at will.— Estates at will are those estates which are determinable at the will of either party, and arise only upon actual possession being taken by the tenant.⁸⁹ The tenant at will has no interest in the land which he can convey to others. The relation and tenure of landlord and tenant exists between the original parties to the demise, but it does not pass to the tenant's assignee. The landlord may treat such assignee as a disseisor, unless he accepts rent accruing subsequent to the assignment. By acceptance of rent the assignment would be confirmed, and the assignee recognized as tenant.⁹⁰ The estate of the lessor of a tenant at

⁸⁹ Co. Lit. 55 a, 57 a; 1 Washburn on Real Prop. 581; 2 Prest. Abst. 26; Pollock v. Kittell, 2 Tayl. 152. The mere occupation of land with the knowledge of the owner, but without his consent, does not create a tenancy at will, in Missouri. Center Cr. Min. Co. v. Frankenstein, 179 Mo. 564, 78 S. W. Rep. 785.

⁹⁰ Co. Lit. 57 a; 1 Washburn on Real Prop. 582; Cunningham v. Houlton, 55 Me. 33; Cunningham v. Horton, 57 Me. 422; King v. Lawson, 98 Mass. 309; Hilbourn v. Fogg, 99 Mass. 12; Holbrook v. Young, 108 Mass. 85; Reckow v. Schanck, 43 N. Y. 448. While a tenant at will has not such an interest as to enable him to make a valid as-

will is not strictly a reversion, for the interest of the tenant is "a mere scintilla of interest, which a landlord may determine by making a feoffment upon the land with livery, or by a demand of possession." A remainder cannot be limited upon an estate at will.⁹¹ The tenant, however, is entitled to estovers, and also to emblements, when the tenancy is determined by the landlord.⁹² And he will also be liable in damages for the commission of waste, although the technical action of waste might not lie.⁹³

§ 163. How estates at will may be determined.—An estate at will may be determined by any act of either party which indicates an intention to put an end to the tenancy, or which is inconsistent with the continuance of the relation of landlord and tenant.⁹⁴ The death of either party determines the estate. If the lessor dies, the estate becomes a tenancy at sufferance, and the lessee's personal representatives, in case of his death, have no right to possession under the tenancy.⁹⁵ The tenancy will, however, survive, if only one of

signment thereof, if the landlord elects to recognize his assignee, such assignment will be valid. *Cunningham v. Holten*, 55 Me. 33. The possession of a tenant at will, is a rightful possession, as he is in with the consent of the landlord, either express or implied. *Willis v. Harrell*, 118 Ga. 906, 45 S. E. Rep. 794.

⁹¹ 1 Washburn on Real Prop. 584; *Ball v. Cullimore*, 2 Crompt. M. & R. 120.

⁹² Co. Lit. 55 b; 1 Washburn on Real Prop. 584; *Davis v. Thompson*, 13 Me. 209; *Brown v. Thurston*, 56 Me. 126. A tenancy at will arises whenever there is a holding over by the lessee and all the rights of such tenancies, such as the right to take ice from a pond on the premises, attaches to such tenancy. *Walker Ice Co. v. American Steel Co.*, 185 Mass. 463, 70 N. E. Rep. 937.

⁹³ Co. Lit. 57 a; *Campbell v. Proctor*, 6 Me. 12; *Daniels v. Pond*, 21 Pick. 369; *Phillips v. Covert*, 7 Johns. 1.

⁹⁴ *Turner v. Doe*, 9 M. & W. 643; *Doe v. Prince*, 9 Bing. 356; *Walden v. Bodley*, 14 Pet. 162; *Esty v. Baker*, 50 Me. 325; *Curl v. Lowell*, 19 Pick. 25; *Pratt v. Farrar*, 10 Allen 519; *Jackson v. Aldrich*, 13 Johns. 66; *Den v. Howell*, 7 Ired. 496; *Hildreth v. Conant*, 10 Meta. 298; *Curtis v. Galvin*, 1 Allen 215.

two or more lessees dies.⁹⁶ Any assignment or conveyance of the reversion, whether voluntary or involuntary, will destroy the tenancy.⁹⁷ The assignment or conveyance by the tenant will have the same effect, as soon as the landlord has received notice of it. Until notice, the landlord may continue to treat the lessee as his tenant.⁹⁸ The estate at will in the cases above enumerated would be wholly determined, immediately upon the commission of the act, or occurrence of the event. But the tenant is allowed a reasonable time thereafter, within which to move his effects from the premises; and where he is entitled to emblements, he may still enter upon the land for the purpose of cultivating and harvesting the crops.⁹⁹ No notice to quit is ever required to determine the estate at will; this was the early common-law rule, and still obtains as an invariable incident of estates strictly at will.¹

⁹⁶ *James v. Dean*, 11 Ves. 391; *Morton v. Woods*, L. R. 4 Q. B. 306; *Reed v. Reed*, 48 Me. 388; *Howard v. Merriam*, 5 Cush. 563; *Ferrin v. Kenney*, 10 Metc. 294.

⁹⁶ 1 Washburn on Real Prop. 586; Co. Lit. 55 b.

⁹⁷ *Doe v. Thompson*, 6 Eng. Law & Eq. 487; *Hill v. Jordan*, 30 Me. 367; *Morse v. Goddard*, 13 Metc. 177; *Howard v. Merriam*, 5 Cush. 563; *Hemphill v. Tevis*, 4 Watts & S. 535; *Groustra v. Bourges*, 141 Mass. 71. Changes in the personnel of a tenant partnership, from a partnership to a corporation, acquiesced in by the lessor, does not end a tenancy at will, as there is no interruption of the occupancy. *Walker Ice Co. v. American Steel Co.*, 185 Mass. 463, 70 N. E. Rep. 937.

⁹⁸ Co. Lit. 57 a; *Pinhorn v. Souster*, 20 Eng. Law & Eq. 501; *Kelly v. Waite*, 12 Metc. 300; *Cooper v. Adams*, 6 Cush. 87; *Sprague v. Quin*, 108 Mass. 554; *Cole v. Lake Co.*, 54 N. H. 277; *Den v. Howell*, 7 Ired. 496. The tenancy may also be determined by the tenant's disclaimer of holding under his lessor. *Woodward v. Brown*, 13 Pet. 1; *Bennock v. Whipple*, 12 Me. 346; *Russell v. Fabyan*, 34 N. H. 223; *Towne v. Butterfield*, 99 Mass. 105; *Boston v. Binney*, 11 Pick. 1; *Chamberlain v. Donahue*, 45 Vt. 55; *Sharpe v. Kelly*, 5 Denio 431; *Harrison v. Middleton*, 11 Gratt. 527; *Duke v. Harper*, 6 Yerg. 280.

⁹⁹ Co. Lit. 56 b; *Doe v. McKaeg*, 10 B. & C. 721; *Turner v. Doe*, 9 M. & W. 647; *Ellis v. Paige*, 1 Pick. 43; *Rising v. Stannard*, 17 Mass. 282.

¹ *Hall v. Burgess*, 5 B. & C. 332; *Elliott v. Stone*, 1 Gray 571; *Stone*

§ 164. Estate at will distinguished from tenancy from year to year.—In consequence of the many hardships resulting from the uncertain tenure of estates at will, and the too often arbitrary and sudden determination of them by lessors, it became at an early day a rule of law that, where rent was reserved and paid by the lessee, the lessor could not terminate the tenancy without giving due notice of his intention to do so. Tenancies at will, where no rent was reserved, could be terminated immediately upon notice.² And it was obviously equitable that, in the institution of such a rule, notice to the lessor should be required in case the tenant should wish to determine the estate.³ In this way, by

v. Sprague, 20 Barb. 509; *Chilton v. Niblett*, 3 Humph. 404; *Brown v. Keller*, 32 Ill. 152. No notice is required where the tenancy is determined by the tortious acts of the tenant. *Larned v. Clark*, 8 Cush. 29; *Tuttle v. Reynolds*, 1 Vt. 80; *Jackson v. Deyo*, 3 Johns. 422; *Ross v. Garrison*, 1 Dana 35; *Clemens v. Bromfield*, 19 Mo. 118. And, likewise, there is no notice required where the tenancy at will is an estate upon condition or limitation, and the condition is broken, or the limitation expires. *Elliott v. Stone*, 1 Gray 575; *Ashley v. Warner*, 11 Gray 45; *Bolton v. Landers*, 27 Cal. 105. A tenant at will or sufferance either is entitled to notice to quit, under Michigan statute. *Simons v. Detroit Drill Co.* (1904), 99 N. W. Rep. 862. Notice is essential to terminate a tenancy at will, under the Minnesota statute. *Van Brunt v. Wallace*, 92 N. W. Rep. 521. At common law no notice was necessary to terminate either a tenancy at will or at sufferance. And such notice is not now required, unless a specific statute so requires. *Kenin v. Guvernator* (N. J. 1901), 48 Atl. Rep. 1023; *Joy v. McKay*, 70 Cal. 445, 11 Pac. Rep. 763; *McLeran v. Benton*, 73 Cal. 329, 14 Pac. Rep. 879; *Reed v. Reed*, 48 Me. 388; *Howard v. Carpenter*, 22 Md. 10; *Moore v. Smith*, 56 N. J. L. 446, 29 Atl. Rep. 159; *Anderson v. Brewster*, 44 Ohio St. 576, 9 N. E. Rep. 683. Although the Missouri statute provides for a thirty days' notice to end a tenancy at will, this provision does not apply, where, by agreement, a longer notice is provided for. *Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. Rep. 967.

² 1 Washburn on Real Prop. 583, 586, 597; *Dame v. Dame*, 38 N. H. 429; *Doe v. Watts*, 1 T. R. 83; *Doe v. Porter*, 3 T. R. 13; *Kingsbury v. Collins*, 4 Bing. (13 E. C. L. R.) 202; *Izon v. Gorton*, 5 Bing. N. C. (35 E. C. L. R.) 501.

³ *Kighly v. Bulkly*, Sid. 338; *Bessell v. Landsberg*, 7 Ad. & E. 638;

a course of judicial legislation, arose a class of estates which are for an uncertain period, but which differ from the common-law estates at will, in that they are tenancies for an uncertain number of fixed periods of time, their duration being regulated by the manner of paying the rent, *i. e.*, by the month, quarter or year, and which continue to exist as long as the required notice to quit is not given by either of the parties. These estates are called tenancies from year to year.⁴ The tests by which it is determined whether an estate for an uncertain period is a tenancy from year to year, and not one at will, are the reservation of rent and the necessity of giving notice in order to determine the tenancy. If the rent is reserved, and notice to quit is required, it is a tenancy from year to year, and the length of the fixed, indeterminate period of the tenancy is governed by the time of paying the rent.⁵ But it is always within the power of

Johnstone v. Huddleston, 4 Barn. & Cress. 923; *Cooke v. Neilson*, 10 Burr. 41; *Hall v. Wadsworth*, 28 Vt. 410; *Morehead v. Watkins*, 5 B. Mon. 228; *Holliday v. Achle*, 99 Mo. 273.

⁴ *Right v. Darby*, 1 T. R. 159; *Hamerton v. Stead*, 3 B. & C. 478; *Hall v. Wadsworth*, 28 Vt. 410; *McDowell v. Simpson*, 3 Watts 129; *Lesley v. Randolph*, 4 Rawle 123; *Jackson v. Salmon*, 4 Wend. 327; *Webber v. Shearman*, 3 Hill 547; *Patton v. Axley*, 5 Jones L. 440; *Den v. Drake*, 14 N. J. L. 523; *Godard v. Railroad Co.*, 2 Rich. L. 346; *Ridgley v. Stillwell*, 28 Mo. 400. A definite tenancy from year to year, does not require any notice to quit. *Cobb v. Stokes*, 8 East 358; *Preble v. Hay*, 32 Me. 456; *Dorrill v. Johnson*, 17 Pick. 263; *Allen v. Jacquish*, 21 Wend. 628; *Jackson v. McLeod*, 12 Johns. 182; *Den v. Adams*, 12 N. J. L. 99; *Lesley v. Randolph*, 4 Rawle 125; *Logan v. Herron*, 8 Serg. & R. 459; *Walker v. Ellis*, 12 Ill. 470. Under statute, in Georgia, any letting, where the period of the tenancy is not specified, is a tenancy for the calendar year. *Willis v. Harrell*, 118 Ga. 906, 45 S. E. Rep. 794. But in Nebraska, the intent of the parties controls. *Pusey v. Presbyterian Hospital*, 97 N. W. Rep. 475.

⁵ *Richardson v. Landridge*, 4 Taunt. 128; *Doidge v. Bowers*, 2 M. & W. 365; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Jackson v. Bradt*, 2 Caines 169; *McDowell v. Simpson*, 3 Watts 129; *Doe v. Baker*, 4 Dev. 220; *Shipman v. Mitchell*, 64 Tex. 174. In Maine and Massachusetts the doctrine of tenancies from year to year has never been adopted; and although notice is now required to determine those tenancies which,

the parties, by express agreement, to give to the estate the characteristics of a tenancy at will, even though the rent is reserved. And if in such a case the tenancy is determined by the lessor between the interval of payment of the rent, the landlord can only recover rent accruing up to the last pay-day.⁶ The term "year" in the tenancy from year to year is here used as a unit of time, and under the term *tenancy from year to year* are included tenancies from month to month, quarter to quarter, and the like, in the same manner as an estate for years includes an estate for one month.⁷ Mr. Washburn seems to exclude these estates from the tenancies from year to year, and calls them tenancies at will, in which notice to quit is required.⁸ There is no necessity for this distinction, and the classification here employed seems to bring out more prominently the distinctive features of estates at will, and tenancies from year to year.

in other States, would come under the name of tenancies from year to year, they are not recognized there as having the characteristics of durability, which are given to them elsewhere. See *Moore v. Boyd*, 24 Me. 242; *Withers v. Larrabee*, 48 Me. 513; *Rising v. Stannard*, 17 Mass. 282; *Furlong v. Leary*, 8 Cush. 409; *Walker v. Furbush*, 11 Cush. 366; *Bunton v. Richardson*, 10 Allen 260; *Hillbourn v. Foggy*, 99 Mass. 1.

⁶ *Richardson v. Landgridge*, 4 Taunt. 128; *Doe v. Cox*, 11 Q. B. 122; *Cameron v. Little*, 62 Me. 550; *Elliott v. Stone*, 1 Gray 571; *Harrison v. Middleton*, 11 Gratt. 527; *Sullivan v. Enders*, 3 Dana 66; *Withnell v. Petzold*, 17 Mo. App. 669.

⁷ See *Anderson v. Prindle*, 23 Wend. 610. A tenancy from month to month is usually treated as a tenancy from year to year and the same incidents attach, aside from the periods of payment and the time for notice to terminate such tenancies. *Taylor Land & Ten.*, 57; *Hollis v. Burns*, 100 Pa. St. 206; *Tiffany Real Prop.*, Sec. 57, p. 146.

⁸ 1 Washburn on Real Prop. 598, 599, 610.

⁹ *Richardson v. Landgridge*, 4 Taunt. 128; *Doe v. Wood*, 14 M. & W. 682; *Garrard v. Tuck*, 8 C. B. 231; *Rex v. Collett*, 1 Russ. & Ry. 498; *Melling v. Leak*, 16 C. B. 652; *Gould v. Thompson*, 4 Metc. 224; *Jackson v. Pierce*, 2 Johns. 226; *Bedford v. Terhune*, 30 N. Y. 465; *Matthews v. Ward*, 10 Gill & J. 456. And where tenant is in possession without agreement as to paying rent or the length of his holding, and he refuses to pay rent, the tenancy is strictly one at will, although he has

§ 165. **Tenancy at will** — What now included under that term.— As the law now stands, an express tenancy at will can only arise under two circumstances: *first*, where land is leased for an indefinite period, and no rent is reserved for its use and occupation,⁹ and, *secondly*, where there is rent reserved, and, by the express agreement of the parties, the tenancy is to have the characteristics of a tenancy at will. Parties may agree to waive the right to notice.¹⁰

§ 166. **Tenancy at will** — Arising by implication of law.— When a tenant enters upon the land for some other purpose than to create the relation of landlord and tenant, and his entry is under, and in pursuance of, a grant to him of a larger and more definite interest, until such interest is vested in him, the law treats and considers his possession as that of a tenant at will. Such would be the case where one is permitted to enter into possession under a contract for the purchase of the land, or for a future lease of the same.¹¹ The tenant would not be liable for rent for the time he

been in possession fourteen years, and the six months' notice required in cases of tenancies from year to year is not necessary to terminate his tenancy. *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 315; *Dunne v. Trustees, etc.*, 36 Ill. 518.

¹⁰ *Richardson v. Landgridge*, 4 Taunt. 128; *Doe v. Davies*, 7 Exch. 89; *Cudlip v. Randall*, 4 Modern 9; *Harrison v. Middleton*, 11 Gratt. 527; *Humphries v. Humphries*, 3 Ired. 362; *Sullivan v. Enders*, 3 Dana 56. Or a longer notice than that required by statute may be agreed upon. *Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. Rep. 967.

¹¹ *Hamerton v. Stead*, 3 Barn. & Cress. 478; *Howard v. Shaw*, 8 M. & W. 118; *Doe v. Chamberlain*, 5 M. & W. 14; *Gould v. Thompson*, 4 Metc. 224; *White v. Livingston*, 10 Cush. 589; *Silby v. Allen*, 43 Vt. 177; *Jackson v. Miller*, 7 Cow. 747; *Jackson v. Bradt*, 2 Caines 169; *Freeman v. Headley*, 33 N. J. L. 523; *Jones v. Jones*, 2 Rich. 542; *Carson v. Baker*, 4 Dev. 220; *Danne v. Trustees*, 39 Ill. 583; *Jennings v. McComb*, 112 Pa. St. 518; *Watson v. Pugh*, 51 Ark. 218; *Walker Ice Co. v. American Steel Co.* (1904), 185 Mass. 463, 70 N. E. Rep. 937. But the occupation must be with the owner's consent. *Center Cr. Min. Co. v. Frankenstein*, 179 Mo. 564, 78 S. W. Rep. 785.

has occupied the land, unless there is an express agreement to that effect.¹² But he will render himself liable for rent, if he retains possession after the executory contract, under which he entered, has come to an end, as well as where he surrenders his right of purchase and continues to hold possession, with the intention to become a tenant.¹³ And he will also be liable in an action for damages for use and occupation during the pendency of the contract, if the failure of such contract is the result of his own refusal or inability to fulfill his obligations under it.¹⁴ The rent is recovered in such a case, not on any implied contract to pay for the use and occupation in the event that the tenant fails to perform his part of the contract, but on the theory that, his possession being given with a view to the tenant's performance of the contract, his failure to perform makes his holding a trespass *ab initio*; or the rent may be asked for as damages suffered from the tenant's breach of the contract of sale.¹⁵ In a similar manner is the vendor liable as ten-

¹² *Winterbottom v. Ingham*, 7 Q. B. 611; *Howard v. Shaw*, 8 M. & W. 118; *Dennett v. Penobscot Company*, 57 Me. 425; *Cunningham v. Holton*, 55 Me. 33; *Woodbury v. Woodbury*, 47 N. H. 11; *Hough v. Birge*, 11 Vt. 190; *Little v. Pearson*, 7 Pick. 301; *Dakin v. Allen*, 8 Cush. 33; *Slyvester v. Ralston*, 31 Barb. 286; *Doolittle v. Eddy*, 7 Barb. 74; *Hasle v. McCoy*, 7 J. J. Marsh, 319; *Bell v. Ellis*, 1 Stew. & P. 294; *McKillsauk v. Bullington*, 87 Miss. 535; *Coffman v. Huck*, 24 Mo. 496.

¹³ *Barton v. Smith*, 66 Iowa 75.

¹⁴ *Howard v. Shaw*, 8 M. & W. 118; *Tancred v. Christy*, 12 M. & W. 324; *Gould v. Thompson*, 4 Metc. 228; *Hall v. West. Transp. Co.*, 34 N. Y. 291; *Wright v. Roberts*, 22 Wis. 161; *Pinero v. Judson*, 6 Bing. 206.

¹⁵ *Burdett v. Caldwell*, 9 Wall. 293; *Chamberlain v. Donahue*, 44 Vt. 59; *Kistland v. Pounsett*, 2 Taunt. 145; *Bancroft v. Wardwell*, 13 Johns. 489; *Smith v. Stewart*, 6 Johns. 46; *Vanderhuevel v. Storrs*, 3 Conn. 203; *Bell v. Ellis*, 1 Stew. & P. 204; *Brewer v. Conover*, 18 N. J. L. 215; *Johnson v. Beauchamp*, 9 Dana 124. But see *Forbes v. Smiley*, 56 Me. 174; *Boston v. Binney*, 11 Pick. 9; *Gould v. Thompson*, 4 Metc. 228; *Hull v. Vaughan*, 6 Price 157. See, also, *Cook v. Klenk* (1904), 142 Cal. 416, 76 Pac. Rep. 57; *Todhunter v. Armstrong* (Col.), 53 Pac. Rep. 446; *Kerraine v. People*, 60 N. Y. 224, 19 Amer. Rep. 158; *Chatard v. O'Donovan*, 80 Ind. 20, 41 Amer. Rep. 782.

ant at will for use and occupation, if he retains possession of the land, after the contract of purchase has been executed and the deed of conveyance delivered. If the vendor retains possession with consent of the vendee, the action will be on an implied contract for rent, while he would be liable in trespass for damages, if such holding was without the permission of the grantee.¹⁶

§ 167. Qualities of tenancies from year to year.—As a consequence of the rule requiring a certain notice of the intention to terminate the estate, before such termination can take place, the tenant was held to be possessed of a fixed and indefeasible estate for a definite period,* the length of which is controlled by the character and the terms of the contract for rent (if it be a yearly rental, this estate is for one year, and if the rental be monthly, it is for one month), together with an indefinite obligation to continue the relation of landlord and tenant, until it is determined by the proper notice from either of the parties.¹⁷ The tenant's estate survives the death of the tenant and goes to his personal representatives. It is also capable of assignment,¹⁸ and the tenant may maintain his action for trespass *quare clausum fregit* against all intruders, including the landlord.¹⁹ Nor

¹⁶ *Tew v. Jones*, 13 M. & W. 14; *Carrier v. Earl*, 13 Me. 216; *Nichols v. Williams*, 8 Cow. 13. But see *contra*, *Preston v. Hawley*, 101 N. Y. 586. See, *Boughton v. Boughton*, 77 Conn. 7, 58 Atl. Rep. 226.

¹⁷ *Hamerton v. Stead*, 3 B. & C. 478; *Roe v. Lees*, 2 W. Bl. 1173; *Rich v. Bolton*, 46 Vt. 84, 14 Am. Rep. 615; *Lockwood v. Lockwood*, 22 Conn. 425; *Jackson v. Bradt*, 2 Caines 169; *The People v. Darling*, 47 N. Y. 666; *Lesley v. Randolph*, 4 Rawle 123; 4 Dev. 220; *Williams v. Deriar*, 31 Mo. 1; *Secor v. Pestana*, 35 Ill. 528.

¹⁸ *Doe v. Porter*, 3 T. R. 13; *Batting v. Martin*, 1 Camp. 317; 1 Washb. on Real Prop. 604; 2 Prest. Abst. 25. See *Morton v. Woods*, L. R. 4 Q. B. 306; *Witt v. Mayor of New York*, 6 Robt. 447. An agreement by one co-tenant to pay his co-tenant for his share of the property, does not make him a mere tenant at will. *Smith v. Smith* (1904), 98 Me 597, 57 Atl. Rep. 999.

¹⁹ *Moore v. Boyd*, 25 Me. 242; *Cunningham v. Holton*, 55 Me. 33; *Dickinson v. Godspeed*, 8 Cush. 119; *French v. Fuller*, 23 Pick. 107;

is it determined by the grant of the reversion by the lessor.²⁰ In other words, the estate of the tenant from year to year cannot be determined, nor can the tenant relieve himself from liability for rent, except by giving a notice, having the requisites both as to length and the time of giving it, of his intention to determine the tenancy.

§ 168. What notice is required to determine tenancy from year to year.—The length of time required to be observed in giving notice is regulated by statute, and generally varies with the length of the periods between the payments of rent. If it be a yearly rental, the English rule, which is followed in some of the States, requires six months' notice;²¹ while in some other States, a shorter time, usually three months, is required.²² If the rental be for a period less than one year, as by the quarter, the month, etc., then, as a general rule, the notice must be for as long a time as the periods of payment.²³ If the statute requires notice, but the length of the

Clark v. Smith, 25 Pa. St. 437; *Cunningham v. Horton*, 57 Me. 422; *Fuller Co. v. Manhattan Const. Co.* (1904), 88 N. Y. S. 1049.

²⁰ *McDonald v. Hanlon*, 79 Cal. 442.

²¹ *Doe v. Watts*, 7 T. R. 83; *Bessell v. Landsberg*, 7 Q. B. 638; *Jackson v. Bryan*, 1 Johns. 322; *Den v. Drake*, 14 N. J. L. 523; *Den v. McIntosh*, 4 Ired. 291; *Moorehead v. Watkins*, 5 B. Mon. 228; *Trousdale v. Darnell*, 6 Yerg. 431; *Hunt v. Morton*, 18 Ill. 75. But see *Secor v. Pestana*, 35 Ill. 528.

²² *Currier v. Perley*, 24 N. Y. 219; *Logan v. Herron*, 8 Serg. & R. 459; *Floyd v. Floyd*, 4 Rich. 23. In West Virginia, a tenant from year to year must give notice to end the term and cannot avoid payment of rent by abandoning the possession. *Arbenz v. Exley & Co.*, 52 W. Va. 476, 44 S. E. Rep. 149, 61 L. R. A. 957. See, also, *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. Rep. 771.

²³ 1 Washburn on Real Prop. 610; *Taylor's Land & T.* 50; *Doe v. Hazell*, 1 Esp. 94; *Sanford v. Harney*, 11 Cush. 93; *Cunningham v. Horton*, 57 Me. 422; *Lloyd v. Cozens*, 2 Ashm. 131; *Godard v. S. C. R. R.*, 2 Rich. 346; *Secor v. Pestana*, 35 Ill. 528; *Grunewald v. Schaales*, 17 Mo. App. 324. In tenancies from month to month a notice to quit is usually required to be given during the current month, or at the first of the next month, in order for it to date from the first day of the succeeding month. *Teator v. King* (1904), 35 Wash. 138, 76 Pac. Rep. 688; *Drin-*

notice is not stipulated, it is held that a reasonable notice must be given.²⁴ And the parties may always by special agreement control the length and other provisions of the notice, the special agreement providing a substitute for the required notice.²⁵ The notice must not only be given for a certain length of time before the estate is to terminate, but the estate can only be determined at the expiration of the time during which the tenant may lawfully hold, i. e., at the end of each rental period; it can only be determined at the end of the year, quarter, or month, according as the tenancy is respectively a yearly, quarterly, or monthly rental.²⁶ This notice must be sufficiently clear in its terms as to the time when the tenancy is to expire;²⁷ and must, as a general rule, be served upon the tenant personally, although it may be left at the tenant's dwelling-house, with a servant or other person of discretionary age, who appears to be in charge of

kard v. Hempinstall (W. Va. 1904), 47 S. E. Rep. 72; *Wilson v. Wood* (Miss. 1904), 36 So. Rep. 609; *McDevitt v. Lambert*, 80 Ala. 537, 2 So. Rep. 438; *Steffens v. Earl*, 40 N. J. Law 128, 29 Amer. Rep. 214; *Hollis v. Burns*, 100 Pa. St. 206, 45 Amer. Rep. 379. All oral leaseings of city property, in Missouri, are tenancies from month to month. *Squire v. Ferd Heim Co.*, 90 Mo. App. 462.

²⁴ *Ludington v. Garloch*, 9 N. Y. 24; *Payton v. Sherburne*, 15 R. I. 213. A ten days' notice is held unreasonable and insufficient to terminate a tenancy by the year, in Arkansas. *Bromley v. Bromley*, 70 Ark. 351, 68 S. W. Rep. 32.

²⁵ *Woolsey v. Donnelly*, 5 N. Y. S. 238. *Roth Tool Co. v. Champ Spring Co.*, 93 Mo. App. 530, 67 S. W. Rep. 967.

²⁶ *Doe v. Morphett*, 7 Q. B. 577; *Cunningham v. Holton*, 55 Me. 33; *Currier v. Barker*, 2 Gray 224; *Sanford v. Harvey*, 11 Cush. 93; *Oakes v. Monroe*, 8 Cush. 285; *Godard v. S. C. R. R.*, 2 Rich. 346; *Lloyd v. Cozens*, 2 Ashm. 131; *Waters v. Young*, 11 R. I. 1, 23 Am. Rep. 409; *Steffens v. Earl*, 40 N. J. L. 128, 29 Am. Rep. 214; *Wilson v. Rodeman*, 30 S. C. 210; *Adams v. City of Cohoes*, 53 Hun 260; *Teator v. King* (1904), 35 Wash. 138, 76 Pac. Rep. 688; *Drinkard v. Hempinstall* (W. Va. 1904), 47 S. E. Rep. 72.

²⁷ *Mills v. Goff*, 14 M. & W. 72; *Hanchet v. Whitney*, 1 Vt. 311; *Currier v. Barker*, 2 Gray 224; *Granger v. Brown*, 11 Cush. 191; *Doe v. Morphett*, 7 Q. B. 577; *Doe v. Smith*, 5 A. & E. 350; *Doe v. Wilkinson*, 12 A. & E. 743.

the premises.²⁸ There may, of course, always be a surrender of the tenancy, with the consent of both parties, at any time during the tenancy, and without any previous notice.²⁹ And so, likewise, the notice is not required where the lease by its terms terminates upon the breach of a condition.³⁰

§ 169. How notice may be waived.—Such notice, when it fulfills all the requirements of the law, puts an end to the tenancy, unless the landlord accepts rent accruing after the expiration of the notice. Such acceptance of rent will generally constitute a waiver of the notice, and the tenancy becomes re-established.³¹ But in all such cases it is a matter depending upon the intention of the parties, and the receipt of such rent is open to explanation, and the evidence is admissible to show that the landlord had no intention of waiving the notice, provided the tenant also had knowledge of that fact.³² An express agreement to waive the notice and to permit the tenant to remain in possession is in effect a revival of the original tenancy with all its terms, conditions and limitations, which is equally binding upon both parties.³³

²⁸ *Doe v. Dunbar*, 1 Mood & M. 10; *Jones v. Marsh*, 464; *Hatstat v. Packard*, 7 Cush. 245; *Walker v. Sharpe*, 103 Mass. 154; *Birdsall v. Philips*, 17 Wend. 464; *Bell v. Bruhn*, 30 Ill. App. 300. If left upon the premises, without being placed in the hands of some responsible person, it will only be a good notice to quit, if it actually reaches the tenant.

²⁹ *Gallagher v. Reilly*, 10 N. Y. S. 536; *Ludington v. Garlock*, 9 N. Y. S. 24. As to acts amounting to a surrender, see, *Dennis v. Miller* (N. J. 1902), 53 Atl. Rep. 394; *Drew v. Billings Co.* (Mich. 1902), 92 N. W. Rep. 774.

³⁰ *Scott v. Willis*, 122 Ind. 1; *Witte v. Quenn*, 38 Mo. App. 681; *Shontz v. Reynolds*, 70 Mo. App. 669.

³¹ *Doe v. Palmer*, 16 East 53; *Tuttle v. Bean*, 13 Metc. 275; *Farson v. Goodale*, 8 Allen 202; *Norris v. Morrill*, 43 N. H. 218; *Prindle v. Anderson*, 19 Wend. 391; *Kimball v. Rowland*, 6 Gray 224.

³² *Doe v. Humphries*, 2 East 237; *Goodright v. Cordwent*, 6 T. R. 219; *Kimball v. Rowland*, 6 Gray 224; *Prindle v. Anderson*, 19 Wend. 391.

³³ *Supple v. Timothy*, 124 Pa. St. 375. A tenant for a year who holds

over is a tenant from year to year. *Baltimore Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. Rep. 771. But see, *Wood v. Page*, 24 R. I. 594, 54 Atl. Rep. 372, where a tenant by the year who holds over is held to be a tenant at will. In Illinois, where a tenant from year to year holds over, it is optional with the landlord to regard him as a tenant from year to year, or not. *Chicago v. Peck*, 98 Ill. App. 434, 63 N. E. Rep. 711. See, also, *Ridgeway v. Hannum* (Ind. 1902), 64 N. E. Rep. 44. Under a tenancy by the month, there is, in legal contemplation, a monthly letting, although the tenancy continues many months. *Donk Bros. Coal Co. v. Leavitt*, 109 Ill. App. 385. A holding over, under a monthly tenancy, continues such tenancy in force, in New Jersey. *Baker v. Kenney* (1903), 54 Atl. Rep. 526.

Tenant at sufferance liable for
triple damages in some states, in
some states he is open to criminal
prosecution

SECTION III.

TENANCY AT SUFFERANCE.

SECTION 170. Tenancy at sufferance, what is.

171. Incidents of tenancy at sufferance.

172. How the tenancy is determined.

173. The effect of forcible entry.

§ 170. Tenancy at Sufferance, what is.— When one who has come lawfully into the possession of lands under an agreement with the owner, retains such possession, after his right to it is determined, he is said to be a tenant at sufferance. His estate is an unlawful one; he has, in fact, no right to possession, but yet is not a trespasser.³⁴ And yet he has so far a vested interest in the land that any crop which he might plant and harvest during the continuance of the tenancy is his, free from the claims of the reversioner, and liable to execution for the debts of the former.³⁵ Such are all persons who continue in possession, after the determination of their particular estate, by and under which they originally acquired possession. Tenants for years after the expiration of their terms, tenants *pur autre vie* after the death of the *cestui que vie*, sublessees after the determination of the original lease and the like, are all tenants at sufferance.³⁶ But in the case of a tenancy from year to year, the

³⁴ 2 Bla. Com. 150; 1 Washburn on Real Prop. 616; Co. Lit. 57 b; Williams on Real Prop. 389; Doe v. Hull, 2 D. & R. 38; Russell v. Fabyan, 34 N. H. 218; Uridias v. Morrell, 25 Cal. 35.

³⁵ Walcott v. Hamilton (Vt.), 17 Atl. Rep. 39.

³⁶ Co. Lit. 57 b; 2 Bla. Com. 150; Simkin v. Ashhurst, 1 Crompt. M. & R. 261; Benedict v. Morse, 10 Metc. 223; Creech v. Crockett, 5 Cush. 133; Jackson v. Parkhurst, 5 Johns. 128; Hyatt v. Wood, 4 Johns. 150; Livingston v. Tanner, 12 Barb. 481; Smith v. Littlefield, 51 N. Y. 543;

tenancy at sufferance only begins at the expiration of the current rental period and after giving the required legal notice.³⁷ In order that a tenancy at sufferance may arise, the estate, under which possession was originally gained, must have been created by the agreement of the parties. If one enters into the possession by the act or authority of the law, as, for example, a guardian, and retains possession after the law ceases to authorize it, he is a trespasser and not a tenant at sufferance.³⁸ And a tenancy at sufferance would only exist, where the holding over is not in pursuance of an agreement between the parties. Such an agreement would change the relation from a tenancy at sufferance to one at will or from year to year.³⁹ And if the parties have not expressly agreed upon any other terms, the presumption is that the holding over is to be on the terms of the original lease.⁴⁰ A notice by the landlord, before the termination of the lease, that an advance in rent would be asked, if the tenant held possession after his term is at an end, will have the same effect as an express agreement in changing the liability of the tenant.⁴¹ And although an agreement in the

Perine v. Teague, 66 Cal. 446. A tenant by the year, who holds over, after his landlord's death, in Rhode Island, is a mere tenant by sufferance. *Wood v. Page*, 24 R. I. 594, 54 Atl. Rep. 372. Under Wyoming statute, one found in the possession of real estate, with no other showing of right, is held to be a tenant by sufferance. *Frank v. Stratford-Hancock* (1904), 77 Pac. Rep. 134. A tenancy by sufferance, in Georgia, is held to arise, by a holding over on the part of a tenant, who refused to execute a new lease within the time given him to do so. *Salis v. Davis* (1904), 120 Ga. 95, 47 S. E. Rep. 644. See, also, *Cook v. Klenk*, 142 Cal. 416, 76 Pac. Rep. 57; *Chatard v. O'Donovan*, 80 Ind. 20, 41 Amer. Rep. 786; *Kerrains v. People*, 60 N. Y. 224.

³⁷ *Thomas v. Black* (Del.), 18 Atl. Rep. 771.

³⁸ Co. Lit. 57 b; 1 Washburn on Real Prop. 618; *Merrill v. Bullock*, 105 Mass. 491.

³⁹ 1 Washburn on Real Prop. 618, 619.

⁴⁰ *Miller v. Ridgely*, 19 Ill. App. 306; *Vogely v. Robinson*, 20 Mo. App. 199; *McBrier v. Marshall*, 126 Pa. St. 390; *Dental Ass'n v. Fuller*, 101 Va. 627, 44 S. E. Rep. 771; *Baker v. Kenny* (N. J. 1903), 544 Atl. Rep. 526.

⁴¹ *Thorpe v. Philbin*, 22 State Rep. 27, 3 N. Y. S. 939.

original lease, to pay rent for the time that the tenant continues in possession after the expiration of his term, or after the demand for payment of rent, will not take away from such holding over the character of a tenancy at sufferance,⁴² yet the actual payment and receipt of rent, in pursuance of such an agreement or without any previous agreement, will make the holding a tenancy at will, or one from year to year, according to the attending circumstances.⁴³

§ 171. Incidents of tenancy at sufferance.—Unlike all other tenancies, it does not rest upon privity of contract. It is created by implication of law, for the purpose, perhaps the sole purpose, of establishing between the owner and the person holding over, the tenure, usually existing between landlord and tenant. As a consequence of this tenure, a tenant at sufferance cannot, in an action by the reversioner for the recovery of the possession, deny the title of his lessor, or set up in defense a superior title which he has acquired by purchase.⁴⁴ Nor can the tenant give to his holding the character of adverse possession, so as to bar the lessor's claim under the Statute of Limitations⁴⁵. It has been stated that the statute may run against the landlord in an estate for years, where the tenant gives actual notice by word or deed that he is claiming adverse possession, and that the

⁴² Condon v. Barr, 47 N. J. L. 113; Adler v. Mendelson, 74 Wis. 464.

⁴³ Russell v. Fabyan, 34 N. H. 223; Edwards v. Hale, 9 Allen 462; Emmons v. Scudder, 115 Mass. 367; Schuyler v. Smith, 51 N. Y. 309; Finney v. St. Louis, 39 Mo. 177; Bircher v. Parker, 40 Mo. 148; Hoffman v. Clark, 63 Mich. 175. See O'Brien v. Troxell, 76 Iowa 760. In Illinois, it is optional with the landlord to regard a tenant from year to year holding over, as a tenant by the year or at will. Chicago v. Peck, 98 Ill. App. 434, 63 N. E. Rep. 711.

⁴⁴ Jackson v. McLeod, 12 Johns. 182; Griffin v. Sheffield, 38 Miss. 930; 1 Washburn on Real Prop. 618, 619; Dixon v. Finnegan, 182 Mo. 111, 81 S. W. Rep. 449; Miller v. Warren (1904), 87 N. Y. S. 1011, 94 App. Div. 192.

⁴⁵ 1 Washburn on Real Prop. 620; Doe v. Hull, 2 D. & R. 38 Sec. Edwards v. Hale, 9 Allen 464; Gwynn v. Johns, 2 Gill & J. 173.

statute will run from the time that such notice is given. Such, presumably, is the law also in respect to tenancies at sufferance. The tenure existing between the lessor and his tenant at sufferance, is identical, in character and scope, with that between landlord and tenant for years. For the details of the doctrine, reference may be had to the chapter on estates for years.⁴⁶ The tenant at sufferance has, however, no estate which he may assign, and if he attempts an assignment, his assignee upon entry into possession becomes a trespasser or disseisor, and has neither the rights nor the obligation of a tenant at sufferance,⁴⁷ unless by the acceptance of rent and other recognitions of a tenancy, the relation of landlord and tenant is impliedly established between the assignee and the lessor, when the assignee will become a tenant at will or a tenant from year to year, according to the attending circumstances.⁴⁸

§ 172. *How the tenancy is determined.*—The tenancy is determined by the entry of the lessor upon the land, and then the *quondam* tenant is a trespasser, and may be treated as such.⁴⁹ And although the tenant at sufferance is not

⁴⁶ See *ante*, Sec. 158.

⁴⁷ *Nepeau v. Doe*, 2 M. & W. 911; *Thunder v. Belcher*, 3 East 451; *Reckhow v. Schanck*, 43 N. Y. 448; *Layman v. Throp*, 11 Ired. 352; 1 Washb. on Real Prop. 261.

⁴⁸ *De Pere Co. v. Reynen*, 65 Wis. 271. See, *Chicago v. Peck*, 98 Ill. App. 434, 63 N. E. Rep. 711; *Ridgeway v. Hammon* (Ind. 1902), 64 N. E. Rep. 44.

⁴⁹ Until entry is made, the land-owner cannot treat the tenant at sufferance as a trespasser. 2 Bla. Com. 150; Co. Lit. 57 b; *Carl v. Lowell*, 19 Pick. 27; *Butcher v. Butcher*, 7 B. & C. 399; *Newton v. Harland*, 1 Mann. & G. 644; *Rising v. Stanard*, 17 Mass. 282. The successful issue of an action of ejectment is equivalent to an entry. No notice to the tenant at sufferance is required to terminate his estate, or to bring an ejectment, unless a statute expressly requires it. *Hollis v. Pool*, 3 Metc. 350; *Mason v. Denison*, 11 Wend. 612; *Smith v. Littlefield*, 51 N. Y. 643; *Young v. Smith*, 28 Mo. 65; *Bennett v. Robinson*, 27 Mich. 32.

liable for rent (except by statute⁵⁰), yet he is liable to the lessor in an action for the mesne profits.⁵¹ But he is liable for neither rent nor mesne profits, if he holds over only for the time which is reasonably necessary to remove his goods.⁵²

§ 173. *The effect of forcible entry.*—A statute was passed in the reign of Richard II,⁵³ forbidding entries upon land in support of one's title "with strong hand or a multitude of people, but only in a peaceable and easy manner," and providing for the punishment of such offenses by indictment and arraignment in the criminal courts.⁵⁴ Similar statutes have been passed in most, if not all, of the States of this country. The question has been mooted from an early period, whether it was the purpose of the statute to take away the common-law right to recover one's lawful possession by force of arms, or simply to provide a punishment for the breach of the public peace thereby occasioned. Although there are decisions and some authorities, which maintain that the statute has this double effect, and that such forcible entry would lay the lawful owner open to civil actions for trespass, and for assault and battery,⁵⁵ yet the weight of

⁵⁰ *Cofran v. Shephard*, 148 Mass. 582.

⁵¹ *Sargent v. Smith*, 12 Gray, 426; *Merrill v. Bullock*, 105 Mass. 490; *Cunningham v. Holton*, 55 Me. 33; *Stockton's Appeal*, 64 Pa. St. 63; *Hogsett v. Ellis*, 17 Mich. 368; 1 Washburn on Real Prop. 619, 620; *Hammond v. Eckhardt*, 9 N. Y. S. 508; *Shanahan v. Shanahan*, 55 N. Y. Super. Ct. 339; *Johannes v. Kielgast*, 27 Ill. App. 576; *Lathrop v. Standard Oil Co. (Ga.)*, 9 S. E. Rep. 1041.

⁵² *Adler v. Mendelson*, 74 Wis. 464. The common-law rule that a tenant by sufferance is not liable for rents and profits, has been abrogated by statute, in Kansas. *Martin v. Allen* (1903), 67 Kan. 758, 74 Pac. Rep. 249. In Missouri a tenant at sufferance can be evicted without notice. *Wamsganz v. Wollf*, 86 Mo. App. 205. No notice is necessary to end a tenancy at sufferance in Georgia. *Willis v. Harrell*, 118 Ga. 906, 45 S. E. Rep. 794.

⁵³ 15 Rich. II, c. 2; *Sutton's Case*, 6 Mod. 91, 2 Ld. Raym. 1005, 9 Enc. Pl. & Pr. 29.

⁵⁴ 9 Eng. Stat. L. is beginning of civil remedy.

⁵⁵ *Reeder v. Pardy*, 41 Ill. 261; *Doty v. Burdick*, 83 Ill. 473; *Knight v.*

authority both in the courts of England and of this country is certainly in favor of confining the operation of the statute to a criminal prosecution for the prohibited entry. The decisions cited below maintain that the plea of liberum tenementum is a good plea to every action of trespass quare clausum fregit, and even if the tenant is forcibly expelled and suffers personal injuries therefrom, no civil action for any purpose will lie, unless the force used was greater than was necessary to effect his expulsion.⁵⁶

Knight, 90 Ill. 208; Dustin v. Cowdry, 23 Vt. 631; Whittaker v. Perry, 38 Vt. 107 (but see *contra*, Beecher v. Parmelee, 9 Vt. 352; Mussey v. Scott, 32 Vt. 82). See Moore v. Boyd, 24 Me. 247.

⁵⁶ Harvey v. Brydges, 13 M. & W. 437; Davis v. Burrell, 10 C. B. 821; Hilbourne v. Fogg, 99 Mass. 11; Churchill v. Hulbert, 110 Mass. 42; 15 Am. Rep. 578; Clark v. Kelliher, 107 Mass. 406; Stearns v. Sampson, 59 Me. 568; Sterling v. Warden, 51 N. H. 239; 12 Am. Rep. 80; The People v. Field, 52 Barb. 198; *s. c.* v. Lans. 242; Estes v. Kedsey, 8 Wend. 560; Todd v. Jackson, 26 N. J. L. 525; Krevet v. Meyer, 24 Mo. 107; Fuhr v. Dean, 26 Mo. 116. The exercise of sufficient force after a peaceable entry to eject a tenant, is lawful, and cannot sustain an action for assault and battery. Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442. For discussion and jurisdiction of forcible entries, as to mines and mining property, see White, Mines & Min. Rem., Sec. 538, *et seq.*

Joint tenancies may be formed in Colorado but in case of doubt estate ~~but~~ will be "in common".

CHAPTER IX.

JOINT ESTATES.

SECTION I. — *Classes of joint estates.*

II. — *Incidents common to all joint estates.*

III. — *Partition.*

SECTION I.

CLASSES OF JOINT ESTATES.

I. — Joint-tenancy.

II. — Tenancy in common.

III. — Estates in coparcenary.

IV. — Estates in entirety.

V. — Estates in partnership.

SECTION 174. Joint and several estates distinguished.

175. Joint-tenancy, what is.

176. Incidents of joint-tenancy.

177. Doctrine of survivorship,—how right of survivorship is destroyed.

178. Tenancy in common, what is.

179. Joint estates, when tenancies in common.

180. Tenancy in coparcenary.

181. Estates in entirety.

182. Estates in entirety in a joint-tenancy, or tenancy in common.

183. Tenancy in common between husband and wife.

184. Estates in partnership.

185. Several interests of partners.

§ 174. Joint and several estates distinguished.— After discussing the various estates which might be created in lands, in respect to their duration, it is necessary to inquire into their qualities, in respect to the number of owners. From

this standpoint, estates are divided into two classes,—estates in severalty and joint estates. An estate in severalty is, as the name implies, one which is held and enjoyed by one to the exclusion of all the world.¹ Joint estates are all other estates, the title to which is vested in two or more persons. These are again subdivided into joint tenancies, tenancies in common, estates in coparcenary, tenancies by the entirety and partnership estates.

§ 175. Joint-tenancy, what is.—A joint-tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits; but, upon the death of one, his share vests in the survivor or survivors, until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death.² There may be a joint-tenancy in any one of the estates before explained, in fee, for life, or for years and the like.³ But for a reason which will be made clear by a subsequent paragraph,⁴ a joint tenancy can only be created by purchase. It cannot be acquired by descent.⁵

§ 176. Incidents of a joint-tenancy.—It is said that for the creation of a joint-tenancy, the four unities of estate must be present, viz.: unity of interest, title, time, and possession.⁶ All the tenants must have the same interest in the land in respect to the duration of the estate. One cannot be

¹ 1 Washburn on Real Prop. 642; 2 Bla. Com. 179.

² 1 Washburn on Real Prop. 642; 1 Prest. Est. 130; 2 Bla. Com. 179, 183.

³ 1 Washburn on Real Prop. 642, 643; 2 Bla. Com. 179; *Glover v. Stillson* (Conn.), 15 Alt. Rep. 752.

⁴ See Sec. 180.

⁵ 1 Washburn On Real Prop. 643; 2 Bla. Com. 180.

⁶ 1 Washburn on Real Prop. 643; 2 Bla. Com. 180. A deed from cotenants to one of their number and a third party, vests an estate in joint tenancy, so that the survivor takes the estate. *Colson v. Baker* (1904), 87 N. Y. S. 238.

tenant for life, while another is tenant in fee. By unity of title is meant, that all must acquire their interests by the same title. One cannot hold by one deed, and another by a second deed. The estate must vest at the same time, otherwise there will be no unity of time. Two persons cannot be joint-tenants, where the estate is granted in remainder to the heirs of two living persons. The death of one, during the life of the other, would cause the shares of his heirs to vest before the others. Finally, the estate must take effect in possession at the same time. One cannot have an estate in possession, while the other has an estate in remainder. Joint-tenants, therefore, "have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same possession."⁷ And whenever these four unities were present in a joint estate, the estate was construed at common law to be a joint-tenancy, unless the grantor by express limitation gave the estate a different character.⁸ But the American law has been in opposition to joint-tenancy, and has shown more favor to tenancies in common. The doctrine of survivorship has been considered repugnant to the American sense of justice to the heirs. (A number of the States have by statute abolished joint-tenancy altogether) except in the case of trustees and other persons, holding a joint-estate

⁷ Bla. Com. 180, 181, 182.

⁸ 1 Washburn on Real Prop. 643; Williams on Real Prop. 132; Rigden v. Vallier, 3 Atk. 734. But sometimes the intention to create a tenancy in common is established by implication, as, for example, where the land was purchased with the intention of expending large sums in the improvement of the property, and there is no relationship between the co-tenants to support the contrary presumption, that the estate was intended to be a joint-tenancy. See *Lake v. Craddock*, 3 P. Wms. 158; *Cuyler v. Bradt*, 2 Caines 326; *Caines v. Grant's Lessee*, 5 Binn. 196; *Duncan v. Forrer*, 6 Binn. 196. Joint estates were never regarded with favor in equity and where the instrument creating the estate could be construed as creating other than a joint estate, equity so construed it. 4 Kent's Com. 361; *Rigden v. Vallier*, 2 Ves. 258; *Randall v. Philipps*, 3 Mason 378; *Hawes v. Hawes*, 1 Wils. 165, by Lord Hardwicke.

in a fiduciary capacity;⁹ while it may be stated as a general rule in the rest of the States, that a joint-estate will be presumed in every case, except that of trustees, etc., to be a tenancy in common, unless expressly declared to be a joint-tenancy, even though the four unities are present.¹⁰ Joint-mortgagees hold by joint-tenancy, until the property is sold under foreclosure, when they become tenants in common,¹¹ in the land, if strict foreclosure is had, and in the proceeds of sale, if it is an equitable foreclosure.

⁹ Statutes of this character exist in Virginia, North Carolina, South Carolina, Pennsylvania, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Texas, Ohio, and Connecticut. 1 Washburn on Real Prop. 644, note. See also *Phelps v. Jepson*, 1 Root 48; *Ball v. Deas*, 1 Strobb. Eq. 24; *Nichols v. Denny*, 37 Miss. 59; *Jenk's Lessee v. Backhouse*, 1 Binn. 91; *Baird's Appeal*, 3 Watts & S. 459; *Miles v. Fisher*, 10 Ohio 1; *Varn v. Varn* (S. C.), 10 S. E. Rep. 829.

¹⁰ This statutory rule prevails in Maine, Massachusetts, New Hampshire, Vermont, Rhode Island, New York, Delaware, Maryland, Michigan, Minnesota, Illinois, Wisconsin, Missouri, Indiana, Arkansas, Iowa, California. 1 Washburn on Real Prop. 644, note. See also *Webster v. Vandeverter*, 6 Gray 428; *Jones v. Crane*, 10 Gray 308; *Stimpson v. Buttermann*, 5 Cush. 153; *Hoffman v. Stigers*, 28 Iowa 302; *Orr v. Clark* (Vt.), 19 Atl. Rep. 929. In Missouri, by statute, any conveyance to two or more persons, not husband and wife, creates an estate in common. And where a husband purchases the interests of heirs and his wife's dower and his own interests are set off to them they are tenants in common, under this statute. *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. Rep. 120.

¹¹ *Kinsley v. Abbott*, 19 Me. 430; *Pearce v. Savage*, 45 Me. 90; *Donnels v. Edwards*, 2 Pick. 617; *Deloney v. Hutchison*, 2 Rand. 183. If the debt is joint, it goes to the survivor and he alone must sue. *Webster v. Vandeverter*, 6 Gray 428. But if the debts are several, belonging to different persons, who together constitute the joint-mortgagees, the doctrine of survivorship does not apply. In the event of the death of one of them, his personal representatives or heirs, according to the local law, must be made joint parties with the survivors. *Brown v. Bates*, 55 Me. 522; *Burnett v. Pratt*, 22 Pick. 551. And although joint-disseisors do not strictly hold in joint-tenancy, it is a familiar rule of the law of adverse possession that, if one abandons the property, the other takes the entire estate. *Putney v. Dresser*, 2 Metc. 583; *Allen v. Holton*, 20 Pick. 458.

§ 177. Doctrine of survivorship, — how right of survivorship is destroyed.— The chief incident of joint-tenancies, and that which distinguishes them from tenancies in common, is the right of survivorship. Although the estate is limited to two or more and their heirs, the entire estate falls to the survivor or survivors upon the death of one, to the exclusion of his heirs.¹² Nor does the wife or husband of the deceased joint-tenant have respectively dower or curtesy in the estate.¹³ For the reason that corporations cannot be said to die, therefore there can be no survivorship, and if two corporations hold land jointly, they are tenants in common, and not joint-tenants.¹⁴ Joint-tenants are said to hold the entire estate *per my et per tout*,¹⁵ individually and jointly. Upon the death of one, the others do not acquire a new interest in the land by descent from the deceased. Their interest is only indirectly increased by the extinguishment of the deceased joint-tenant's interest. For this reason, in a conveyance by one joint-tenant to another, a release is not only sufficient to vest in the latter the entire estate, but it is the only proper common-law mode of assignment.¹⁶ But the ordinary deeds of grant will operate, as well as a technical release, in conveying or extinguishing a joint-tenant's in-

¹² 1 Washburn on Real Prop. 643; 2 Bla. Com. 183; Williams on Real Prop. 134. But the administrator or executor of the deceased tenant has a right to the growing crop planted by the decedent under the law of emblements. *Pritchard v. Walker*, 22 Ill. App. 286; *s. c.* 121 Ill. 221.

¹³ 1 Washburn on Real Prop. 649; Co. Lit. 37 b.

¹⁴ 1 Washburn on Real Prop. 643; *Dewitt v. San Francisco*, 2 Cal. 289.

¹⁵ 1 Washburn on Real Prop. 642; 2 Bla. Com. 182. Blackstone translates *per my (mie) et per tout*, by the *half* or *moiety*, and by the whole. In Williams on Real Prop. 136, Mitchell's note, a note to *Murray v. Hall*, 7 Mann. Gr. & Sc. (62 Eng. C. L. R.) 455, is cited to the effect that the proper rendering of *mie* (*my*) is *nothing* or *not in the least*.

¹⁶ Williams on Real Prop. 134, 135; Co. Lit. 169 a; 1 Washburn on Real Prop. 648; 1 Prest. Est. 136; *Rector v. Waugh*, 17 Mo. 13.

terest.¹⁷ The survivor's estate will be subject to the same incumbrances as were imposed by him upon his share of the joint-tenancy before the death of his co-tenant.¹⁸ But a joint-tenancy, and therewith the right of survivorship, may be destroyed by a conveyance by one joint-tenant to a third person. Although he has not the power to devise his interest, and although there is a joint possession and interest in the estate, he may alien his share to a stranger. Such a stranger would at once become a tenant in common, and the alienation would thus destroy the right of survivorship.¹⁹ But if there be more than two joint-tenants, the conveyance by one of his share will not affect the right of survivorship of the other tenants between themselves. They would still be joint-tenants to each other.²⁰

§ 178. *Tenancy in common, what is.*—Tenancy in common is a joint estate, in which there is unity of possession, but

¹⁷ 1 Washburn on Real Prop. 648; *Eustace v. Scawen*, Cro. Jac. 896; *Chester v. Willan*, 2 Saund. 96 a.

¹⁸ 1 Washburn on Real Prop. 646; Co. Lit. 185 b; *Lord Abergraveny's Case*, 6 Rep. 78. Where one joint tenant denies his ratification of a sale of the joint estate, the fact that he has endorsed and received the proceeds of a check for his portion of the sale of the land, is sufficient evidence of his approval of the sale, although he protested when he signed the check. *Whittaker v. Hicks*, 123 Iowa 733, 99 N. W. Rep. 575. The purchase of a tax title by one of several joint tenants, enures to the benefit of all the joint tenants. *Bossier v. Herwig* (1904), 112 La. 539, 36 So. Rep. 557; *Alexander v. Light*, 112 La. 925.

¹⁹ 1 Washburn on Real Prop. 647, 648; Co. Lit. 273 b. One joint-tenant may mortgage his interest in the estate, and to that extent will the *jus accrescendi* be destroyed or rather suspended. *York v. Stone*, 1 Salk. 158; 1 Eq. Cas. Abr. 293; *Simpson v. Ammons*, 1 Binn. 175. But it cannot be taken away by a devise of the deceased co-tenant's share. Co. Lit. 185 b; *Duncan v. Forrer*, 6 Binn. 193. In *Hawes v. Hawes* (1 Wils. 165), Lord Hardwicke observes that with the abolition of feudal tenures, the reason for the favorable policy of the common law, toward joint estates ceased and because of the injustice of the right of survivorship, such estates should no longer be regarded with favor by the courts. See also; 4 Kent's Com. 361.

²⁰ 2 Bla. Com. 186; Co. Lit. Sec. 294.

separate and distinct titles. Joint estates are usually so limited as to be estates in fee. But there may be tenancies in common and other joint estates in estates for life or for years,²¹ and where an estate is given to two during their "natural lives" and there is a limitation over "after the decease of both" the limitation in remainder does not take effect until the survivor's death, and after the death of one of them, the survivor takes the whole of the estate.²² The tenants have separate and independent freeholds or leaseholds in their respective shares, which they manage and dispose of as freely as if the estate was one in severalty. There is no restriction upon their power of alienation.²³ And the tenant may dispose of it by will, while the heirs of each co-tenant will inherit the estate. In like manner, the husband or wife of a tenant in common will have, respectively, curtesy and dower in this species of joint estate.²⁴ The interest of

²¹ See *ante*, Sec. 175.

²² *Glover v. Stillson* (Conn.), 15 Atl. Rep. 752.

²³ 1 Washburn on Real Prop. 652, 653; *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Fry v. Scott* (Ky.), 11 S. W. Rep. 426; *Bush v. Gamble*, 127 Pa. St. 43. A co-tenant's interest may be mortgaged. *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466. And it can be levied upon in satisfaction of the co-tenant's debts. *Boylston Insurance Co. v. Davis*, 68 N. C. 17, 12 Am. Rep. 624; *Newton v. Howe and Drury*, 29 Wis. 531, 9 Am. Rep. 616; *Peabody v. Minot*, 24 Pick. 329; *Duncan v. Sylvester*, 24 Me. 482; *Whilton v. Whilton*, 38 N. H. 127; *Griswold v. Johnson*, 5 Conn. 363; *Prim v. Walker*, 38 Mo. 97; *McKey v. Welch*, 22 Texas 390. In the absence of evidence to the contrary, the interests of several tenants in common are presumed to be equal. *Jackson v. Moore* (1904), 87 N. Y. S. 1101, 94 App. Div. 504. One co-tenant, without his co-tenants' consent, cannot convey an easement in the common property. *Charleston & W. C. Co. v. Fleming*, 118 Ga. 699, 45 S. E. Rep. 664. And see, as to lease, *Snyder v. Harding* (Wash. 1904), 75 Pac. Rep. 812. An unauthorized conveyance by a tenant in common, is voidable, at the election of the co-tenants. *Kenoye v. Brown*, 82 Miss. 607, 35 So. Rep. 163. A lease of the entire estate by one co-tenant, is void, when made without authority. *Jackson v. O'Roark* (Neb. 1904), 98 N. W. Rep. 1068. But see, *Valentine v. Healey*, 178 N. Y. 391, 70 N. E. Rep. 913.

²⁴ 1 Washburn on Real Prop. 654.

one tenant in common is so independent of that of his co-tenant, that in a joint conveyance of the estate it would be treated as a grant by each of his own share in the estate.²⁵ And, unlike joint-tenancies, in order to convey the share of one co-tenant to another, the same formal deed is required as in a conveyance of it to a stranger. A simple technical release, without words of inheritance, would not be sufficient. Tenants in common are not seised of the entire estate. They do not hold it *per my et per tout*.²⁶

²⁵ 1 Washburn on Real Prop. 656; 2 Prest. Abst. 77. And in the same manner, if a covenant of warranty in the conveyance of a tenancy in common is broken, each co-tenant can sue individually for the breach. *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426. But they must join in an action for the recovery of the possession. *Co. Lit.* 200 a; *Rehoboth v. Hunt*, 1 Pick. 224; *Allen v. Gibson*, 4 Rand. 468; *Johnson v. Harris*, Hayw. 113; *Young v. Adams*, 14 B. Mon. 127; *Hines v. Frantham*, 27 Ala. 359; *Hughes v. Holliday*, 3 Greene (Iowa), 30; *Muller v. Boggs*, 25 Cal. 187. *Contra*, *Hillhouse v. Mix*, 1 Root 246. One tenant in common can maintain ejectment against a third person. *Shelton v. Wilson* (1903), 131 N. C. 106, 42 S. E. Rep. 937. One co-tenant of real estate can recover possession of the whole tract, as against all except his co-tenants. *Field v. Tanner* (Colo. 1904), 75 Pac. Rep. 916. But see, as to co-tenancy in personality, *Jackson v. Moore*, 87 N. Y. S. 1104, 94 App. Div. 504. A co-tenant can recover possession of the common property, without joining his co-tenants. *Griswold v. Minneapolis &c., Co.* (N. D. 1903), 97 N. W. Rep. 538; *Binswanger v. Hinnenger*, 1 Alaska 509. But see, *Armstrong v. Canady* (Miss. 1903), 35 So. Rep. 138. And in the same manner they must sue jointly for injuries to the possession, such as trespass, nuisance, etc. *Phillips v. Sherman*, 61 Me. 548; *Merrill v. Berkshire*, 11 Pick. 269; *Austin v. Hall*, 13 Johns. 286; *Dupuy v. Strong*, 37 N. Y. 372; *Doe v. Botts*, 4 Bibb. 420; *Parke v. Kilham*, 8 Cal. 77.

²⁶ 1 Co. Lit. 193 a, n. 80; 1 Washburn on Real Prop. 652. It will of course be understood that, when speaking of the necessity of words of limitation, reference is made only to the common-law rule. Where the necessity of words of limitation has been removed by statute, in the grant of one co-tenant to the other, an ordinary deed of release will operate to pass the estate in fee, without words of limitation. See *post*, Sec. 548. A lease to two or more, under New York statute, creates an estate in co-tenancy. *McPhillips v. Fitzgerald*, 78 N. Y. S. 631, 76 App. Div. 15.

§ 179. *Joint estates, when tenancies in common.*—The common-law rule was that all estates, acquired by purchase, under circumstances which prevented the presence and existence of the so-called *four unities*, were tenancies in common.²⁷ But, as has been explained above, the rule has now been changed and modified in this country, so that the general rule here is that all joint estates are held to be tenancies in common, where they are not expressly made joint-tenancies, whether acquired by purchase or by descent, except in the few localities where tenancy in coparcenary still exists.²⁸ In a tenancy in common the unity of possession is all that is required. The estates, the titles, and the times of enjoyment might all be different. One tenant may thus have a life-estate and another a fee, acquired by different titles. There may be a tenancy in common in a future estate, and their titles may vest and be executed in possession at different periods, provided at some time during the existence of both estates there is a unity of possession.²⁹

§ 180. *Tenancy in coparcenary.*—This tenancy is the joint estate which, according to common law, vested by descent in the heirs of an estate. It partakes of the characteristics of both joint-tenancies and tenancies in common. Like joint-tenancies, in a conveyance by one co-tenant to another of his share, a simple release was sufficient without words of limi-

²⁷ 2 Bla. Com. 191.

²⁸ 4 Kent's Com. 367; 1 Washburn on Real Prop. 653; *Miller v. Miller*, 16 Mass. 59; *Sigourney v. Eaton*, 14 Pick. 414; *Evans v. Brittain*, 3 Serg. & R. 135; *Partridge v. Colegate*, 3 Har. & McH. 339; *Johnson v. Harris*, 5 Hayw. 113; *Young v. DeBruhl*, 11 Rich. L. 638; *Briscoe v. McGee*, 2 J. J. Marsh, 370; *Church v. Church*, 15 R. L. 138; *Bishop v. McClelland's Exrs.* (N. J.), 16 Atl. Rep. 1; *Bowen v. Swander*, 121 Ind. 164; *Bush v. Gamble*, 127 Pa. St. 43; *Coudert v. Earl*, 45 N. J. Eq. As to what declaration is necessary to create a joint-tenancy, see *Hersky v. Clark*, 35 Ark. 17, 37 Am. Rep. 1.

²⁹ 1 Washburn on Real Prop. 652; 2 Bla. Com. 191; 1 Prest. Est. 139. That there may be a tenancy in common in a remainder, see *Coleman v. Lane*, 26 Ga. 515.

tation, since they were all seised in fee of the entire estate by descent.³⁰ And they were like tenancies in common, in that the doctrine of survivorship did not obtain in respect to the respective shares of the tenants. The heirs of a deceased tenant in coparcenary inherited his share.³¹ And a coparcenary may make a devise of his estate.³² But in this country the doctrine of coparcenary has never prevailed except in Maryland; in all other States joint estates by descent are treated as tenancies in common. The subject, therefore, is of very little importance to American students.³³

§ 181. *Estates in entirety.*— This is an estate arising in the conveyance to a man and wife jointly. They are not seised of moieties, but of entireties; hence the name, *estate in entirety*.³⁴ In those States where statutes have been passed, giving to married women, in respect to their property, the rights of *femes sole*, it has become a question of great doubt, whether tenancy in entirety has been abolished inferentially by the statute.³⁵ These tenancies resemble joint-tenancies in

³⁰ Co. Lit. 273 b, 1 Prest. Est. 138; *Gilpin v. Hollingsworth*, 3 Md. 190. See, for case discussing the character of the several co-tenants' interests, *Deavitt v. Ring*, 73 Vt. 298; 50 Atl. Rep. 1066. See, also, *Pope v. Brassfield* (Ky.), 61 S. W. Rep. 5; *Whitehead v. Slauss*, 197 Pa. St. 511, 47 Atl. Rep. 978. The possession of one of the several heirs is presumed to be for all. *Stull v. Stull*, 197 Pa. St. 243, 47 Atl. Rep. 240.

³¹ 2 Bla. Com. 188; 1 Washburn on Real Prop. 650.

³² 1 Washburn on Real Prop. 651; 2 Prest. Abst. 72.

³³ 1 Washburn on Real Prop. 651; 4 Kent's Com. 367; *Johnson v. Harris*, 5 Hayw. 113; *Hoffar v. Dement*, 5 Gill 132; *Gilpin v. Hollingsworth*, 3 Md. 190; *Bishop v. McClelland's Ex'rs* (N. J.), 16 Atl. Rep. 1; *Palms v. Palms* (Mich.), 36 N. W. Rep. 419; *Rowland v. Murphy*, 66 Tex. 534; *McPheeters v. Wright* (Ind.), 24 N. E. Rep. 734.

³⁴ 1 Prest. Est. 131; *Shaw v. Hearsey*, 5 Mass. 521; *Doe v. Howland*, 8 Cow. 277; *Den v. Branson*, 5 Ired. 426; *Babbit v. Scroggin*, 1 Duv. 272; *Paul v. Campbell*, 7 Yerg. 319; *Lux v. Hoff*, 47 Ill. 425; *Farmer's Bank v. Corder*, 32 W. Va. 233.

³⁵ In the following cases, it has been held that the statute has had no effect upon the estates in entirety and that a conveyance to man and wife makes them tenants in entirety now, as well as before the statute. *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Hulett v. Inlow*, 57 Ind.

that they have the quality of survivorship; the heirs of the survivor would take to the exclusion of the heirs of the first deceased.³⁶ But, unlike joint-tenancies, the right of survivorship cannot be destroyed by the action of either party. There can, therefore, be no partition of the estate.³⁷ During coverture the husband has the entire control of the estate, may convey it away, and it is liable to be sold under execution for his debts. If the husband survives the wife, his conveyance of it to a stranger will be as absolute, as if the estate had been one in severalty.³⁸ But if the wife survives the husband, she acquires, by the right of survivorship, the entire interest in the land, and is entitled to her proper action for the recovery of the possession.³⁹ The Statute of Limitations cannot run

412, 26 Am. Rep. 64; *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586; *McCurdy v. Canning*, 64 Pa. St. 39; *Diver v. Diver*, 56 Pa. St. 106; *Bennett v. Child*, 19 Wis. 305; *Fisher v. Provin*, 25 Mich. 347; *Garner v. Jones*, 52 Mo. 68; *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. Rep. 120; *Robinson v. Eagle*, 29 Ark. 202; *Goelett v. Gori*, 31 Barb. 314; *Shinn v. Shinn*, 42 Kan. 1; *Meeker v. Wright*, 75 N. Y. 26; *Gardinier v. Furey*, 50 Hun 82; *O'Connor v. McMahon*, 54 Hun 66. But a contrary conclusion is reached by the courts in the cases cited *post*. *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Steigers*, 28 Iowa 302; *Clark v. Clark*, 56 N. H. 105. Estates in entirety are abolished by statute in Kansas. *Stewart v. Thomas* (1902), 68 Pac. Rep. 70. Under Massachusetts statute, a conveyance to two or more, if husband and wife, creates a joint estate, or an estate by entirety. But if not, an estate in common. *McLaughlin v. Rice*, 185 Mass. 212, 70 N. E. Rep. 52. See also, for similar statute, in Missouri, *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. Rep. 120. And for similar act, in New York, see, *McPhillips v. Fitzgerald*, 177 N. Y. 543, 69 N. E. Rep. 1126. The right of a wife, as a tenant by entirety, cannot be effected by a statute, passed subsequent to the vesting of the estate, making all such estates tenancies in common. *Pease v. Inh. Whitman*, 182 Mass. 363, 65 N. E. Rep. 795.

³⁶ 1 Washburn on Real Prop. 672, 673; 1 Prest. Est. 132.

³⁷ 1 Washburn on Real Prop. 673; *Shinn v. Shinn*, 42 Kan. 1.

³⁸ 1 Prest. Est. 135; *Barber v. Harris*, 15 Wend. 615; *Needham v. Branson*, 5 Ired. 426; *Ames v. Norman*, 4 Sneed. 683; *Tane v. Campbell*, 7 Yerg. 319; *Bennett v. Child*, 19 Wis. 364.

³⁹ *Pierce v. Chase*, 108 Mass. 258; *French v. Mehan*, 56 Pa. St. 286; *McCurdy v. Canning*, 64 Pa. St. 39.

against her right of survivorship during the disability of coverture.⁴⁰

§ 182. **Estate in entirety in a joint-tenancy, or tenancy in common.**—As a consequence of the doctrine explained in the foregoing paragraph, if husband and wife, as such, are made joint-tenants or tenants in common with others, they will be considered as one co-tenant, and will take but one share between them, equal to the shares of the others. Thus if A. and B., *husband and wife*, are made joint-tenants with C., A. and B. will take a one-half interest, while C. will have the other half. And the death of the husband or wife would have no effect on C.'s share. On the other hand, if C. died, A. and B. would take the whole estate in entirety.⁴¹

§ 183. **Tenancy in common between husband and wife.**—Although the estate in entirety has met with general recognition in this country, yet in a number of States the estate does not exist, and a joint estate held by husband and wife is either treated as a tenancy in common, as in Ohio and Virginia, or as a joint-tenancy, as in Connecticut.⁴² And furthermore, if at any time a joint-tenancy or tenancy in common is desired to be created between man and wife, a joint estate will be treated as such, if that intention is clearly expressed in the deed or will.⁴³ An express limitation of the remainder

⁴⁰ 1 Washburn on Real Prop. 673; Co. Lit. 326 a.

⁴¹ 1 Washburn on Real Prop. 674; Williams on Real Prop. 225; 1 Prest. Est. 132; Barber v. Harris, 15 Wend. 615; Johnson v. Hart, 6 Watts & S. 319; Gordon v. Whieldon, 11 Beav. 170. But see Hampton v. Wheeler, 99 N. C. 222, where it is held that as to the other co-tenants, the husband and wife are simply individual co-tenants, each taking his and her proportionate share in the general estate, the only difference from the other interests being that the interests of the husband and wife upon the death of one of them became united in the survivor.

⁴² See 1 Washburn on Real Prop. 674, 675; Whittlesey v. Fuller, 11 Conn. 337; Wilson v. Fleming, 13 Ohio 68.

⁴³ 1 Washburn on Real Prop. 674; McDermott v. French, 15 N. J. Eq. 81; Cloos v. Cloos, 55 Hun 450. In Kentucky and Iowa, a conveyance to husband and wife gives them a tenancy in common, unless the estate

of the estate, after the death of both husband and wife, to the heirs of both, a provision being made for a division of the property between these two classes of heirs, will cut down the joint estate between husband and wife to a life estate, and thus prevent the right of survivorship from affecting the rights of the heirs to the remainder.⁴⁴

§ 184. Estates in partnership.—When a joint estate is vested in the members of a partnership, purchased with partnership funds and for partnership purposes, it is called an estate in partnership. The estate is treated in equity as personal property, and made liable to the satisfaction of the partnership's debts in preference to the claims of private creditors or of the widows and heirs of one of the partners. Real estate held by a partnership is subject to the partnership debts, and until they are satisfied no other claim can be made upon the share of any one of the partners.⁴⁵ And if one partner has paid more than his share of the debts, he also has a lien upon the real estate to protect his right of contribution for such over-payment.⁴⁶ Real estate, purchased by a firm, is expressly declared to be a tenancy in entirety. *Rogers v. Grider*, 1 Dana 242; *Hoffman v. Stigers*, 28 Iowa 302. See, also, *Stewart v. Thomas* (Kan. 1902), 68 Pac. Rep. 70; *McLaughlin v. Rice*, 185 Mass. 212, 70 N. E. Rep. 52; *McPhillips v. Fitzgerald*, 177 N. Y. 543, 69 N. E. Rep. 1126.

⁴⁴ *Hadlock v. Gray*, 104 Ind. 596.

⁴⁵ *Cox v. McBurney*, 2 Sandf. 561; *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Deming v. Colt*, 3 Sandf. 284; *Lane v. Tyler*, 49 Me. 252; *Galbraith v. Gedge*, 16 B. Mon. 631; *Howard v. Priest*, 5 Metc. 582; *Lang v. Waring*, 25 Ala. 625; *Marvin v. Trumbull*, Wright 386; *Coder v. Huling*, 27 Pa. St. 84; *Hunter v. Martin*, 2 Rich. L. 541; 1 Pars. on Con. 149. The interest of a partner in a partnership which was to divide "the proceeds and profits on sales of land," to be converted into money and "divided in proportion to their several interests," is held to be personalty and passes, under his will as such. *Barney v. Pike*, 87 N. Y. S. 1038, 94 App. Div. 199; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. Rep. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637.

⁴⁶ *Buffum v. Buffum*, 49 Me. 108; *Burnside v. Merrick*, 4 Metc. 537; *Howard v. Priest*, 5 Metc. 585; *Smith v. Jackson*, 2 Edw. Ch. 28; *Loubat v. Nourse*, 5 Fla. 350.

will have in equity all the characteristics of an estate in co-partnership, even though the legal title be taken in the name of one partner. He will hold the legal title in trust for the partnership. Of course, if the partner holding the legal title disposes of it to a purchaser for value without notice of the trust, the purchaser will take to the exclusion of the partnership claims.⁴⁷

§ 185. **Several interests of partners.**—When, however, the partnership debts have all been paid, the partners are tenants in common of the partnership lands. Their widows have dower, and their heirs are entitled to it upon the decease of the partners. It is also subject to partition.⁴⁸ In this country, at least, if the real estate had to be sold to liquidate the partnership debts, any surplus that might be found undisposed of would be treated as real property, and go to the widow and heirs of a deceased partner.⁴⁹

⁴⁷ *Smith v. Allen*, 5 Allen 456; *Moreau v. Saffersons*, 3 Sneed 595; 1 Pars. on Con. 153.

⁴⁸ *Sane v. Tyler*, 49 Me. 252; *Howard v. Priest*, 5 Metc. 582; *Whaling Co. v. Borden*, 10 Cush. 458; *Tillinghast v. Champlin*, 4 R. I. 173; *Olcott v. Wing*, 4 McLean, 15; *Deloney v. Hutcheson*, 2 Rand. 183; *Dilworth v. Mayfield*, 36 Miss. 40; *Buchan v. Sumner*, 2 Barb. Ch. 163; *Buckley v. Buckley*, 11 Barb. 43; *Piper v. Smith*, 1 Head 93; *Patterson v. Blake*, 12 Ind. 436. Where there are debts unsatisfied, equity regards the real estate as personalty, so far as to enable the surviving partner to dispose of it for the satisfaction of the partnership debts, and a court of equity will compel the widow and heirs of the deceased partner to execute the deeds of conveyance. *Delmonico v. Guillaume*, 2 Sandf. Ch. 366; *Boyce v. Coster*, 4 Strobb. Eq. 25; *Winslow v. Chiffelle*, Har. Eq. 25; *Boyers v. Elliott*, 7 Humph. 204; *Arnold v. Wainwright*, 6 Minn. 358.

⁴⁹ *Offut v. Scott*, 47 Ala. 105; *Foster's Appeal*, 74 Pa. St. 398; 22 Am. Law Reg. 300, notes 307-310. See also, generally, *Shearer v. Shearer*, 98 Mass. 107; *Jones' Appeal*, 70 Pa. St. 169; *Bopp v. Fox*, 63 Ill. 540; 1 Pars. on Con. 150. In England, the interest of the partner in partnership real estate is looked upon as personalty, and therefore, the surplus after satisfaction of the partnership debts, goes to the personal representative, instead of to the heirs. *Darby v. Darby*, 3 Drewry 495; 1 Pars. on Con. 149. And see *Rice v. Barnard*, 20 Vt. 479; *Lang v.*

Waring, 17 Ala. 145; *Barney v. Pike*, 87 N. Y. S. 1038, 94 App. Div. 199; *Darrow v. Calkins*, 154 N. Y. 503, 49 N. E. Rep. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637. A deed of partnership property by one partner, made in the firm name, vests an equitable title in the purchaser. *Conner v. Smith* (Tex. 1904), 80 S. W. Rep. 105. Without consent of the other partners one partner cannot mortgage firm property for his individual debt, as such property is a trust fund for firm creditors. *Lance v. Butler*, 135 N. C. 419, 47 S. E. Rep. 488; *Cunday v. Hall*, 208 Pa. St. 335, 57 Atl. Rep. 761; *Johnson v. Clark*, 18 Kan. 157; *Nat. Bank v. Bank*, 130 Mich. 332, 89 N. W. Rep. 941; *Parker v. Bowles*, 57 N. H. 491. For partnerships in land, relating to mines and mining property, see *White, Mines & Min. Rem.*, Secs. 328-352.

SECTION II.

INCIDENTS COMMON TO ALL JOINT ESTATES.

- SECTION 186. Disseisin by one co-tenant.
187. Adverse title acquired by one co-tenant.
188. Maintenance of actions against trespassers.
189. Alienation of joint estates.
190. Waste by co-tenants.
191. Liability of one co-tenant for rents and profits.

§ 186. Disseisin by one co-tenant.— As the possession of co-tenants is common to all, a tenure exists between them in respect thereto, so that if one co-tenant is in possession, his possession is generally held to be for the benefit of all; the sole possession by one does not constitute in itself a disseisin of the other co-tenants, notwithstanding it continues for the statutory period of limitation.⁵⁰ And where the tenancy in common rests upon a title by adverse possession the tenancy is established by proof of adverse possession by one of the alleged co-tenants under color of title to the co-tenants.⁵¹ But

⁵⁰ McClung v. Ross, 5 Wheat. 116; Clymer v. Dawkins, 3 How. 674; Colburn v. Mason, 25 Me. 434; Thomas v. Hatch, 3 Sumn. 170; German v. Machin, 6 Paige Ch. 288; Clowes v. Hawley, 12 Johns. 484; Lloyd v. Gordon, 2 Har. & McH. 254; Martin v. Quattelbaum, 3 McCord 205; Prage v. Chinn, 4 Dana 50; Story v. Saunders, 8 Humph. 663; Long v. McDow, 87 Mo. 197; Terrell v. Martin, 64 Tex. 121; Hamilton v. Redden (Kan.), 24 Pac. Rep. 76; Millis v. Roof, 121 Ind. 360; *In re Grider's Estate*, 81 Cal. 571, 22 Pac. Rep. 908; Grand Tower, etc., Co. v. Gill, 111 Ill. 541; Rhett v. Jenkins, 25 S. C. 453; Stevenson v. Anderson, 87 Ala. 228; Newman v. Bk. of California, 80 Cal. 368.

⁵¹ Lenoir v. Valley River Min. Co., 106 N. C. 473. The possession of a co-tenant is presumed to be for his co-tenants as well as himself and the statute will not run until his adverse claim is brought home to his co-tenants. Stevens v. Martin, 168 Mo. 407, 68 S. W. Rep. 347; Bentley v. Callahan, 79 Miss. 302, 30 So. Rep. 709; Bennett v. Peirce,

the husband of a tenant in common is not estopped from setting up adverse title to the land on a simple exclusive possession.⁵² To create a title by adverse possession in one co-tenant, he must not only have exclusive possession, but he must also deny the right of the others in the estate, and maintain such denial long enough for those rights to be barred by the Statute of Limitations; and this denial must expressly, or by necessary implication from its notoriety, be made known to the others.⁵³ Among the acts which produce such an ouster of the co-tenants, as to cause the statute to run against them, is the refusal to share in the profits, a conveyance of the entire estate to a third party who enters into possession, an entry into possession of part of the estate under an agreement that this shall be a practical partition, and many other acts which are inconsistent with their joint-ownership.⁵⁴ If the

50 W. Va. 604, 40 S. E. Rep. 395; *Stull v. Stull*, 197 Pa. St. 243, 47 Atl. Rep. 240. To constitute an adverse holding by a co-tenant, there must generally be some notorious act of exclusive ownership of such a nature as to impart notice of the adverse claim. *Golden v. Yver*, 180 Mo. 196, 79 S. W. Rep. 143; *Merryman v. Cumberland Paper Co.* (Md. 1903), 56 Atl. Rep. 364; *Soper v. Lawrence Bros.*, 98 Me. 268, 56 Atl. Rep. 908; *Guthrie v. Guthrie* (Ky. 1904), 78 S. W. Rep. 474; *Blankenhorn v. Lennox* (Iowa 1904), 98 N. W. Rep. 556.

⁵² *Cooper v. Fox* (Miss.), 7 So. Rep. 342.

⁵³ *Doe v. Bird*, 11 East 49; *Harpending v. Dutch Church*, 16 Pet. 455; *Presbrey v. Presbrey*, 13 Allen 284; *Jackson v. Tibbitts*, 9 Cow. 241; *Forward v. Deetz*, 32 Pa. St. 69; *Meredith v. Andres*, 7 Ired. L. 5; *Gray v. Givens*, Riley Ch. 41; *Corbin v. Cannon*, 31 Miss. 570; *Owen v. Morton*, 24 Cal. 377; *St. Louis, etc., Ry. Co. v. Prather*, 75 Tex. 53; *Coogler v. Rogers* (Fla.), 7 So. Rep. 391; *Stoddard v. Weston*, 6 N. Y. S. 34; *English v. Ouster*, 119 Ind. 93; *Mayes v. Manning*, 73 Tex. 43; *Peck v. Lockridge*, 97 Mo. 549; *Richards v. Richards*, 75 Mich. 408; *Golden v. Yver*, 180 Mo. 196, 79 S. W. Rep. 143; *Merrym v. Paper Co.* (Md. 1903), 56 Atl. Rep. 364; *Soper v. Lawrence*, 98 Me. 268, 56 Atl. Rep. 908; *Guthrie v. Guthrie* (Ky. 1904), 78 S. W. Rep. 474; *Blankenhorn v. Lennox* (Iowa 1904), 98 N. W. Rep. 556.

⁵⁴ *Thomas v. Pickering*, 13 Me. 337; *Bigelow v. Jones*, 10 Pick. 160; *Jackson v. Whitbeck*, 6 Cow. 632; *Bogardus v. Trinity Church*, 4 Paige 178; *Rider v. March*, 46 Pa. St. 380; *Cullen v. Motzer*, 13 Serg. & R. 356; *Frederick v. Gray*, 10 Serg. & R. 182; *Jones v. Weathersbee*, 4 Strobb. 50; *Gill v. Fauntleroy*, 8 B. Mon. 177; *Weisinger v. Murphy*,

co-tenant in possession refuses to recognize the rights of the others, by a refusal to share in the rents and profits, or resistance of their right to enter into possession, they may have either trespass or ejectment at their election for such ouster.⁵⁵ Neither action can be maintained against a co-tenant, as long as they both remain in possession, and the wrong complained of does not constitute a clear case of eviction or destruction of some part of the common property.⁵⁶ But there may be an ouster from one part of the land, while the tenant so evicted remains in possession of another part, and trespass would lie for such partial eviction.⁵⁷

§ 187. **Adverse title acquired by one co-tenant.**— So intimate is the relation of co-tenants that one cannot acquire by purchase an adverse and superior title, and set it up in opposition to his co-tenants, unless they refuse to contribute their share of the expense of procuring it. The title is held to be ac-

2 Head 674; *Miller v. Miller*, 60 Pa. St. 10; *Hinkley v. Green*, 52 Ill. 230; *Ward v. Farmer*, 92 N. C. 93; *Highstone v. Burdette*, 61 Mich. 54, 27 N. W. Rep. 852; *Streeter v. Shultz*, 45 Hun 406. Where a co-tenant occupies the common property, solely and exclusively, as his own, pays taxes and keeps the rents and profits, this is such an adverse claimer as will ripen into a title by limitation. *Cochrane v. Cochrane* (W. Va. 1904), 46 S. E. Rep. 924; *Rogers v. Miller* (W. Va. 1904), 47 S. E. Rep. 354. And so are acts of independent ownership; the execution of a deed to the land and describing oneself as owner, sufficient claims to start the statute to run. *Hendricks v. Musgrove*, 183 Mo. 300, 81 S. W. Rep. 1265.

⁵⁵ *Keay v. Goodwin*, 16 Mass. 1; *Bennett v. Clemence*, 6 Allen 18; *Erwin v. Olmstead*, 7 Cow. 229; *King v. Phillips*, 1 Lans. 421; *Austin v. Rutland*, etc., R. R., 45 Vt. 215; *Jones v. Chiles*, 8 Dana 163; *Jones v. DeLassus*, 84 Mo. 541; *Frakes v. Elliott*, 102 Ind. 47; *St. Louis*, etc., Ry. Co. v. *Prather*, 75 Tex. 53; *Southern Cotton Oil Co. v. Henshaw* (Ala.), 7 So. Rep. 760.

⁵⁶ *Jewett v. Whitney*, 43 Me. 242; *Silloway v. Brown*, 12 Allen 37; *Erwin v. Olmstead*, 7 Cow. 229; *Bennet v. Bullock*, 35 Pa. St. 364; *Filbert v. Hoff*, 42 Pa. St. 97.

⁵⁷ *Murray v. Hall*, 7 C. B. 441; *Bennett v. Clemence*, 6 Allen 10; *Carpentier v. Webster*, 27 Cal. 524.

quired by one for the benefit of all.⁵⁸ But one co-tenant may buy the others' interests at public sale, and hold the interest so acquired adversely.⁵⁹

§ 188. Maintenance of actions against trespassers.—If a third person should disturb the possession of the co-tenant, whether the disturbance should amount to an ouster or only a trespass, to such an extent are the interests of the co-tenants considered to be one interest, that a single tenant may successfully prosecute the suit against such trespasser for the

⁵⁸ *Braintree v. Battles*, 6 Vt. 395; *Van Horne v. Fonda*, 5 Ch. Johns. 407; *Wells v. Chapman*, 4 Sandf. Ch. 312; *Hussey v. Blood*, 29 Pa. St. 319; *Flagg v. Maun*, 2 Sumn. 490; *Venable v. Beauchamp*, 3 Dana 321; *Rothwell v. Dewees*, 2 Black 613; *Fallon v. Chidester*, 46 Iowa 588; 26 Am. Rep. 164; *Barker v. Jones*, 62 N. H. 497; *Menter v. Durham*, 13 Oreg. 470; *Holterhoff v. Mead*, 36 Minn. 42; *Todd v. Lunt*, 148 Mass. 322; *Battin v. Woods*, 27 W. Va. 58; *Calkins v. Steinbach*, 56 Cal. 117; *St. Louis, etc., Ry. Co. v. Prather*, 75 Tex. 53; *Gilchrist v. Boswick*, 33 W. Va. 168; *Richards v. Richards*, 75 Me. 408; *Moon v. Jennings*, 119 Ind. 130. It is a fraud for one tenant to let the taxes remain unpaid, and then buy in the tax-title, for the purpose of acquiring title to the whole premises. *Brown v. Hogle*, 30 Ill. 119. See *Preston v. Wright*, 81 Me. 306. But one co-tenant, who pays the taxes, can claim contribution against the others, and can enforce such claim by asserting a lien against the interests in the joint-estate of those who refuse to contribute. *Hurley v. Hurley*, 148 Mass. 444. A co-tenant paying taxes on the common property is held to have a lien on the interest of the co-owner therefor, in, *McClintock v. Fontaine*, 119 Fed. Rep. 448. But in the absence of express agreement, no contribution or recovery is allowed for services in caring for the common property. *Anderson v. Northrop* (Fla. 1902), 33 So. Rep. 419. Where two co-tenants agree to buy the interest of a third, the obligations of the purchasers are so far several, that one can disaffirm the sale, without effecting the status of the other. *Mylin v. King* (Ala. 1904), 35 So. Rep. 998. A re-location of a mining claim, on Government land, by a co-tenant, enures to the benefit of all. *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. Rep. 123. See, *White, Mines & Min. Rem.*, Sec. 24 and cases cited.

⁵⁹ *Peck v. Lockridge*, 97 Mo. 549. A purchase at a foreclosure sale is such an adverse claim as to set the statute of limitations in motion. *Francis v. Million* (Ky. 1904), 80 S. W. Rep. 486. But see *Bossier v. Harwig* (1904), 112 La. 539, 36 So. Rep. 557.

benefit of all, without joining the others as parties to the suit.⁶⁰

§ 189. **Alienation of joint estates.**—The co-tenants of all kinds of joint estates, except tenants in entirety, may alien their shares in the estate, without the participation or consent of the other tenants. Their deeds convey whatever interest they possess.⁶¹ The same rule would apply to a lease by one co-tenant. It would be valid as to every one except the co-tenants who had not joined in the lease, or authorized its execution by the tenant who did sign it.⁶² But a lease executed by one co-tenant, with the consent of all, and as their agent, is as binding upon all as if it had been executed by all in person.⁶³ If the co-tenancy is an estate-tail, the conveyance by one of the co-tenants will, under the Massachusetts statute, bar the entail as effectually as a joint conveyance.⁶⁴

§ 190. **Waste by co-tenants.**—If one co-tenant misuse or abuse the property, while in possession, he is liable to the others for waste. But as a general rule he is only liable, where the waste complained of results in an actual injury to the property. He must do something more than exercise the

⁶⁰ Corley v. Parton, 75 Tex. 98; Bounds v. Little, 75 Tex. 316; Voss v. King, 33 W. Va. 236; Shelton v. Wilson (1903), 131 N. C. 106, 42 S. E. Rep. 937; Field v. Tanner (Colo. 1904), 75 Pac. Rep. 916; Griswold v. Minneapolis & Co. (N. D. 1903), 97 N. W. Rep. 538. But see Armstrong v. Carmody (Miss. 1903), 97 So. Rep. 138.

⁶¹ Peabody v. Minot, 24 Pick. 329; Buttler v. Roys, 25 Mich. 53, 12 Am. Rep. 218; Brown v. Wellington, 106 Mass. 318, 8 Am. Rep. 300; York v. Stone, 1 Salk. 158; Simpson v. Ammons, 1 Binn. 175; Green v. Arnold, 11 R. I. 364, 23 Am. Rep. 330; Barnes v. Lynch (Mass.), 24 N. E. Rep. 783.

⁶² Grundy v. Martin, 143 Mass. 279; Tipping v. Robbins, 64 Wis. 546; McKinley v. Peters, 111 Pa. St. 283; Richey v. Brown, 58 Mich. 435; Omaha & Grant, etc., Co. v. Tabor, 13 Colo. 41.

⁶³ Harms v. McCormick (Ill.), 22 N. E. Rep. 511. For unauthorized conveyances by co-tenant, see note to Sec. 178. See also, Jackson v. O'Roark (Neb. 1904), 98 N. W. Rep. 1068.

⁶⁴ Coombs v. Anderson, 138 Mass. 376.

rights of ownership. He may therefore be held liable for negligence in keeping up the necessary repairs, or doing any affirmative act which injures the inheritance, such as flowing land, pulling down houses, and the like.⁶⁵ A tenant is guilty of technical waste in putting a house on the joint-estate without the consent of his co-tenant, and the latter can remove it from the premises without sustaining liability for doing so, if he exercise reasonable care.⁶⁶ If a co-tenant threatens wilful and malicious destruction of the property, he may be restrained by injunction.⁶⁷ But the tenant is under no obligation to make improvements, and if one co-tenant enters upon the land and makes improvements, he cannot hold the others liable for their share, nor can he claim the exclusive right to these improvements. But if the repairs are necessary to prevent the property from going to decay, he may either compel the others to join him in making the repairs, or, if he has notified them that such repairs are necessary, bring an action against them for their share of the expenses.⁶⁸ It has been

⁶⁵ *Hines v. Robinson*, 57 Me. 328; *Hutchinson v. Chase*, 39 Me. 508; *Hastings v. Hastings*, 110 Mass. 285; *McLellan v. Jennes*, 43 Vt. 183; 5 Am. Rep. 270; *Hayden v. Merrill*, 44 Vt. 336; 8 Am. Rep. 372; *Elwell v. Burnside*, 44 Barb. 454; *Anderson v. Meredith*, 3 Dev. & B. 199; *Farr v. Smith*, 9 Wend. 338; *Hyde v. Stone*, 9 Cow. 230; *Harmon v. Gartman*, Harper 430; *Shields v. Stark*, 14 Ga. 429; *Fightmaster v. Beasley*, 7 J. J. Marsh. 410.

⁶⁶ *Bijam v. Bichford*, 140 Mass. 31.

⁶⁷ 1 Washburn on Real Prop. 601; *Twort v. Twort*, 16 Ves. 128. See *Martin v. Knowlys*, 8 T. R. 146; *Wilbraham v. Snow*, 2 Saund. 47. The conflicting rights of co-tenants as to a tract of land will not be adjudicated, where they are none of them in possession, and the party in possession is not a party to the suit. *Wetherington v. Williams* (N. C. 1904), 46 S. E. Rep. 728.

⁶⁸ *Doane v. Badger*, 12 Mass. 65; *Coffin v. Heath*, 6 Metc. 79; *Calvert v. Aldrich*, 99 Mass. 78; *Mumford v. Brown*, 6 Cow. 475; *Scott v. Guernsey*, 48 N. Y. 106; *Taylor v. Baldwin*, 10 Barb. 582; *Crest v. Jacks*, 3 Watts 239; *Dech's Appeal*, 57 Pa. St. 472; *Ottumwa Lodge v. Lewis*, 34 Iowa 67; *Pickering v. Pickering*, 63 N. H. 468; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Davis v. Sawyer* (N. H.), 20 Atl. Rep. 100; *Rico Reduction, etc., Co. v. Musgrave* (Colo.), 23 Pac. Rep. 458; *Newmann v. Dreifurst*, 9 Colo. 228; *Johnson v. Blair*, 126 Pa. St. 426;

held in case of partition and sale he may in any case be reimbursed out of the proceeds of sale the fair value of such improvements.⁶⁹ Whenever the claim for contribution towards the expense of making the improvements is recognized, it is held to constitute an equitable lien on the undivided interest of the indebted co-tenant.⁷⁰

§ 191. Liability of one co-tenant for rents and profits.— If one tenant cuts timber upon the land, and sells it, the co-tenants are entitled to their share of the money so received. And so also would he be liable to account for rents, received by him from the tenant of the land, over and above his share.⁷¹

Alden v. Carleton, 81 Me. 358; *Redfield v. Gleason*, 61 Vt. 220; *Alleman v. Hawley*, 117 Ind. 532.

⁶⁹ *Moore v. Thorp* (R. I.), 19 Atl. Rep. 321.

⁷⁰ *Curtis v. Poland*, 66 Tex. 511. A co-tenant who pays more than his share of an incumbrance is entitled to contribution therefor. *Grove v. Grove* (Va. 1902), 42 S. E. Rep. 312; *Ballou v. Ballou*, 94 Va. 350, 26 S. E. Rep. 840, 64 Am. St. Rep. 733; *Downey v. Strause*, 43 S. E. Rep. 348.

⁷¹ *Miller v. Miller*, 7 Pick. 133; *Peck v. Carpenter*, 7 Gray 283; *Dickinson v. Williams*, 11 Cush. 258; *Gowen v. Shaw*, 40 Me. 56; *Webster v. Calef*, 47 N. H. 289; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372; *Izard v. Bodine*, 11 N. J. Eq. 403; *Israel v. Israel*, 30 Md. 126; *Holmes v. Best*, 58 Vt. 547; *Minter v. Durham*, 130 Reg. 473; *Alney v. Daniels*, 15 R. I. 312; *Bush v. Gamble*, 127 Pa. St. 43; *Fulmer's Appeal*, 128 Pa. St. 24; *Huff v. McDonald*, 22 Ga. 131; *Pico v. Columbet*, 12 Cal. 414. But replevin would not lie between two co-tenants. *Bohlen v. Arthurs*, 115 U. S. 482. One co-tenant may cut the grass, growing on the common estate, sell it, and apply the profits to his own use. *Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 130. See *Kean v. Connely*, 25 Minn. 222, 33 Am. Rep. 458. And *contra*, *Le Baren v. Babcock*, 46 Hun 598. Although ignorant of the title of his co-tenants, a tenant in common, who is in possession, must account for rents and profits. *Eighmer v. Thayer* (Mich. 1904), 98 N. W. Rep. 734; *Stephens v. Hewitt* (Tex. 1904), 77 S. W. Rep. 229. A tenant in common is only liable for the excess of rents, over and above what he was legally entitled to, as his share of the common property. *Bennett v. Bennett* (Miss. 1904), 36 So. Rep. 452; *Willes v. Loomis*, 87 N. Y. S. 1086, 94 App. Div. 67. In an accounting, between co-tenants, interest should be allowed on rents and profits from the time when they should be paid over, with a reasonable allowance of time for

But in order that a co-tenant may be held personally liable for rent through his own use and occupation of the land, a special agreement to that effect must be shown. An occupancy by one co-tenant without the interference of the others is not sufficient. He is merely exercising his right of ownership.⁷² But the one co-tenant cannot hold exclusive possession of the estate against the others, and if he attempts it, ejectment will lie against the tenant in possession, the judgment requiring the abandonment of exclusive possession.⁷³ And he is then liable in damages for the past exclusion of his co-tenant.⁷⁴ And when a co-tenant is liable for use and occupation, the claim is personal, and is not assigned with the grant of the claimant's estate.⁷⁵

settlement. *Sieger v. Sieger*, 209 Pa. 65, 58 Atl. Rep. 140. See also, *Hollahan v. Sowers*, 11 Ill. App. 263; *Heppe v. Sezepanski*, 209 Ill. 88, 70 N. E. Rep. 737.

⁷² *Sargent v. Parsons*, 12 Mass. 149; *Calhoun v. Curtis*, 4 Metc. 413; *Scots v. Guernsey*, 60 Barb. 163; *Kline v. Jacobs*, 68 Pa. St. 57; *Keisel v. Earnest*, 21 Pa. St. 90; *Israel v. Israel*, 30 Md. 120; *McMahon v. Burchell*, 2 Phil. Eq. 134; *Lyles v. Lyles*, 1 Hill Ch. 85; *Crow v. Mark*, 52 Ill. 332; *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169; *Pico v. Columbet*, 12 Cal. 414. But see *contra* *Holt v. Robertson*, *McMull*. 475; *Thompson v. Bostick*, *ib.* 75; *Hayden v. Merrill*, 44 Vt. 430, 8 Am. Rep. 372; *Belknap v. Belknap*, 77 Iowa 71; *Sailer v. Sailer*, 41 N. J. Eq. 398; *Boley v. Barutis*, 24 Ill. App. 515; *s. c.* 120 Ill. 192; *Almy v. Daniels*, 15 R. I. 312. And likewise, if one co-tenant plants a crop upon the common estate, it belongs to him exclusively, and his co-tenant would be liable as a trespasser, if he appropriated it to himself. *Calhoun v. Curtis*, 4 Metc. 413; *Bird v. Bird*, 15 Fla. 424, 21 Am. Rep. 296. See *Kean v. Connely*, 25 Minn. 222, 33 Am. Rep. 458; *Berry v. Whidden*, 62 N. H. 473; *Le Barren v. Babcock*, 46 Hun 588.

⁷³ *Jones v. De Lassus*, 84 Mo. 54; *Gilman v. Gilman*, 111 N. Y. 265.

⁷⁴ *Stephenson v. Cotter*, 5 N. Y. S. 749; *Bowen v. Swander* (Ind.), 22 N. E. Rep. 725, 121 Ind. 164.

⁷⁵ 1 Washburn on Real Prop. 663; *Hannan v. Osborn*, 44 Paige Ch. 33. The liability of a co-tenant to the others for his use and occupation of the land is in some of the States regulated by statute. *Woolley v. Schrader*, 116 Ill. 29. Tenants in common may establish the relation of landlord and tenant as between themselves. *Smith v. Smith*, 98 Me. 597, 57 Atl. Rep. 999. A co-tenant who fails to account for rents and profits cannot claim contribution for improvements made by him.

Eighmer v. Thayer (Mich. 1904), 98 N. W. Rep. 734; *Croesdale v. Von Borgoburg*, 206 Pa. 15, 55 Atl. Rep. 770. Generally, in co-tenancies in mines, the owner of the larger interest is entitled to work the mine, accounting to the co-owners for their share of the profit. *Sweeney v. Hanley*, 126 Fed. Rep. 97; *Binswanger v. Henninger*, 1 Alaska 509; *White, Mines & Min. Rem.*, Sec. 24. For action for accounting of rents and profits from mine held by co-tenants, see, *Gregg v. Roaring Spring Co.*, 97 Mo. App. 44, 70 S. W. Rep. 920. For accounting between co-tenants of mines, generally, see, *White, Mines & Min. Rem.*, Secs. 503, 512.

SECTION III.

PARTITION.

SECTION. 192. Definition of partition.

193. Voluntary partition.

194. Involuntary or compulsory partition.

195. Who can maintain action for partition.

196. Partial partition.

197. Manner of allotment.

198. Relief incidental to partition.

199. Effect of partition.

§ 192. **Definition of partition.**— Partition is the act of dividing up the joint estate into estates in severalty among the co-tenants, in the proportion of their undivided shares in the joint estate. This can be done with any joint estate in possession, except estates in entirety.⁷⁶

§ 193. **Voluntary partition.**— As co-tenants of joint estates generally have the unrestricted power of aliening their shares in the common estate, it is possible for them to make partition of the estate by mutual conveyances to each other of their share in different parts of the estate; that is, by dividing up

⁷⁶ *Bennett v. Child*, 19 Wis. 364; 1 Washburn on Real Prop. 673. Where there is an express condition against partition, partition cannot be had, for an attempt at it would result in a forfeiture of the estate. *Hunt v. Wright*, 47 N. H. 399. See *Fisher v. Demerson*, 3 Metc. 546. But the condition must be express, and clearly manifest an intention to prevent partition. *Spaulding v. Woodward*, 53 N. H. 573, 16 Am. Rep. 392. But apart from these exceptions, the general rule is, that partition may be had in all joint-estates, joint-tenancies, as well as tenancies in common. *Coleman v. Coleman*, 19 Pa. St. 100; *Holmes v. Holmes*, 2 Jones Eq. 334; *Witherspoon v. Dunlap*, Harper 390; *Higginbottom v. Short*, 25 Miss. 160.

the estate into several parcels, and making conveyance of one parcel to each, all joining in the deed or deeds, a partition can be made. But in order to be effectual, the partition must be done by mutual deeds. If all do not join in the execution of the mutual deed, it is a nullity and those who signed are not thereby prevented from subsequently bringing the action for partition.⁷⁷ But if it is a mutual deed, it cannot subsequently be revoked.⁷⁸ Parol partition would be void under the Statute of Frauds.⁷⁹ Tenants in coparcenary may make an effectual partition by parol, if it is followed by actual possession in severalty, at least in those States where tenancy in coparcenary is recognized.⁸⁰ And so, also, apparently will a parol partition be valid between joint devisees, especially where the deviser directs the division.⁸¹ But although a parol partition will not be effectual and binding upon the parties, yet if it is followed by actual possession, such partition will give to the parties the rights and incidents of exclusive possession, as long as the exclusive possession is permitted to continue. And this exclusive possession, if continued for a sufficient length of time, will ripen into an indefeasible title under the Statute of Limitations.⁸² So, also, if one of the co-ten-

⁷⁷ *Paterson v. Martin*, 33 W. Va. 494.

⁷⁸ *Walton v. Ambler* (Neb.), 45 N. W. Rep. 931.

⁷⁹ *Gardiner Man. Co. v. Heald*, 5 Me. 384; *Dow v. Jewell*, 18 N. H. 354; *Gratts v. Gratts*, 4 Ralle 411; *Coles v. Wooding*, 2 Patt. jr. & H. 189; *Slice v. Derrick*, 2 Rich. 627; *Piatt v. Hubbell*, 5 Ohio 243; *Manley v. Pettee*, 38 Ill. 128; *Willey v. Barney's Lessee*, 31 Miss. 644. But see *contra*, *Aycock v. Kimbrough*, 71 Tex. 330; *Tate v. Foshee*, 117 Ind. 322; *Smith v. Cole*, 39 Hun 248.

⁸⁰ 1 Washburn on Real Prop. 676.

⁸¹ *Knevals v. Prince*, 10 N. Y. S. 676.

⁸² *Keay v. Goodwin*, 16 Meas. 1; *Jackson v. Harder*, 4 Johns. 202; *Corbin v. Jackson*, 14 Wend. 619; *Gregg v. Blackmore*, 10 Watts 192; *Lloyd v. Gordon*, 2 Har. & McH. 254; *Slice v. Derrick*, 2 Rich. 627; *Drane v. Gregory*, 3 B. Mon. 619; *Wright v. Jones*, 105 Ind. 17; *Brazee v. Schofield*, 2 Wash. 209; *Campbell v. Laclede Gaslight Co.*, 84 Mo. 352; *McKnight v. Bell* (Pa.), 19 Atl. Rep. 1036; *Rountree v. Lane* (S. C.), 10 S. E. Rep. 941; *Patterson v. Martin*, 33 W. Va. 404; *Hamilton v. Phillips* (Ga.), 9 S. E. Rep. 606. In *Manley v. Pettee*, 38 Ill.

ants, relying upon the parol partition, enters into possession, and makes extensive improvements on the part allotted to him, the court, in a subsequent action for partition, in the exercise of a wise discretion, may, and probably would, simply confirm the former parol partition, instead of making any different one.⁸³

§ 194. *Involuntary or compulsory partition.*—At common law, no suit for partition of a joint estate could have been sustained against the will of any one of the co-tenants, except in the case of an estate in coparcenary, and it was not until the reign of Henry VIII that any legal action was provided for compulsory partition. Statutes were then passed creating the common-law writ of partition.⁸⁴ Similar statutes have been passed in the different States.⁸⁵ But apart from the common-law statutory remedies, the court of chancery has, since the reign of Elizabeth, maintained jurisdiction for partition, and this is now the only remedy in England, unless recent statutes have been passed; it exists also in most, if not all, of the States.⁸⁶ The court of chancery would after ex-128, a parol partition followed by occupation, has been held to be effectual against creditors and purchasers. See *Alldays v. Whittaker*, 66 Tex. 669; *Aycock v. Kimbrough*, 71 Tex. 330. A parol partition of land, in Missouri, by co-tenants, where each takes possession of his share and occupies it or uses it, is binding on the parties. *Edwards v. Latimer* (1904), 82 S. W. Rep. 109. See also, *Bonner v. Bonner* (Tex. 1904), 78 S. W. Rep. 535; *Mylin v. King* (Ala. 1904), 35 So. Rep. 998.

⁸³ *Wood v. Fleet*, 36 N. Y. 501.

⁸⁴ 1 Washburn on Real Prop. 651, 676; Williams on Real Prop. 103.

⁸⁵ The statutes vary in detail and cannot be given here. For an excellent compendium of these statutes, see Mr. Washburn's note, 1 Washburn on Real Prop. 690, note; 4 Kent's Com. 564. See also, generally, in reference to the common-law remedy, *Cook v. Allen*, 2 Mass. 462; *Champion v. Spence*, 1 Root 147; *McKee v. Straub*, 2 Binn. 1; *Witherspoon v. Dunlap*, 1 McCord 546.

⁸⁶ 1 Washburn on Real Prop. 677, 678; Williams on Real Prop. 103; Story's Eq. Jur., Sec. 647; *Moore v. Moore*, 47 N. Y. 469; *Bailey v. Sissan*, 1 R. I. 233; *Whitton v. Whitton*, 36 N. H. 326. But chancery did not entertain a suit for partition if there was a dispute concerning

amination by the master, allot particular parcels to each tenant, and make its decree effectual by compelling the parties to execute mutual deeds of conveyance. In the proceedings at common law, the judgment of the court vested the titles in severalty in each party, without the aid of the mutual conveyance.⁸⁷ The action for partition, whether it be in law or equity, is an action *in rem*, and must be brought in the county and State in which the land lies.⁸⁸

§ 195. Who can maintain action for partition.— Under the statute 31 Henry VIII, only tenants of a freehold estate of inheritance were empowered to compel a partition; but by statute 32 Henry VIII, the right was extended to tenants for life and for years, but partition between them would not affect the rights of reversioners. The general rule now is, that partition might be had between the co-tenants of any joint estate except estates in entirety, who have the seisin and immediate right of possession.⁸⁹ But a mortgagee of an undivided share

the title. 4 Kent's Com. 665; 1 Washburn on Real Prop. 678, 679; McCall's Lessee v. Carpenter, 18 How. (U. S.) 297; Hosford v. Merriam, 5 Barb. 51; Obert v. Obert, 10 N. J. Eq. 98; Tabler v. Wiseman, 2 Ohio St. 207; Shearer v. Winston, 33 Miss. 140. Under the Illinois statute it is essential for the plaintiff in partition to allege and prove that he is the owner of an undivided interest in the land, with the defendants in the suit. McConnell v. Peirce, 210 Ill. 627, 71 N. E. Rep. 622. See also, Shipley v. Institute (Md. 1904), 58 Atl. Rep. 200; Keith v. Carver (Minn. 1904), 100 N. W. Rep. 366.

⁸⁷ 1 Washburn on Real Prop. 678; Story's Eq. Jur., Secs. 652, 654. But now in most of the States the decree in equity has the same effect as a judgment at law. Hassett v. Ridgley, 49 Ill. 201; Hoffman v. Stigers, 28 Iowa 302.

⁸⁸ Bonner, Petitioner, 4 Mass. 122; Peabody v. Minot, 24 Pick. 333; Corwith v. Griffing, 21 Barb. 9; Brown v. McMullen, 1 Nott & M. 252.

⁸⁹ 1 Washburn on Real Prop. 680; Co. Lit. 167; Austin v. R. R., 45 Vt. 215; Riker v. Darkey, 4 Edw. Ch. 668; Brownwell v. Brownwell, 19 Wend. 367; Lamdert v. Blumenthal, 26 Mo. 471; Tabler v. Wiseman, 2 Ohio St. 207; Barker v. Jones, 62 N. H. 497; McGowan v. Reed (S. C.), 11 S. E. Rep. 685; West v. West (Ala.), 7 So. Rep. 830; Hendershot v. Lawrence (N. J.), 18 Atl. Rep. 774; Chastain v. Higdon, 84 Ga. 111; Welch v. Agar, 84 Ga. 583; Watson v. Sutro (Cal.), 24 Pac. Rep. 172,

in a joint estate cannot maintain an action for partition, even under the common-law theory of the character of a mortgagee's interest.⁹⁰ A difference in the duration of the estates of the co-tenants will not interfere with the right of partition.⁹¹ Partition, therefore, does not lie between tenants who are disseised either by a stranger or one of their own number,⁹² or who are tenants in remainder or reversion.⁹³ The

(an equitable title). Rents are but personalty and are not the subject of partition. *Thomas v. Hamil*, 106 Ill. App. 524. One having neither the actual or constructive possession cannot, generally, maintain partition. *Mersereau v. Camp* (1904), 86 N. Y. S. 1141, 92 App. Div. 616; *Adams v. Hopkins*, 144 Cal. 19; 77 Pac. Rep. 712. There can, generally, be no partition between life tenant and remaindermen. *Turner v. Barraud* (Va. 1904), 46 S. E. Rep. 318; *Smith v. Runnels*, 97 Iowa 55, 65 N. W. Rep. 1002; *Love v. Blauw*, 61 Kan. 496, 59 Pac. Rep. 1059, 48 L. R. A. 257, 78 Am. S. Rep. 334; *Seiders v. Giles*, 141 Pa. St. 93, 21 Atl. Rep. 514. Where a life-tenant consents to a partition in kind by remaindermen, or a sale of the property, he cannot afterwards question the jurisdiction of the court. *Brillhard v. Misch* (Md. 1904), 58 Atl. Rep. 28. In Missouri, the owner of a contingent remainder is held entitled to partition. *Reinders v. Koppelman*, 68 Mo. 482; *Godman v. Simmons*, 113 Mo. 130.

⁹⁰ *Bannon v. Comegys*, 69 Md. 411.

⁹¹ *Allen v. Libbey*, 140 Mass. 82; *Meyer v. Schurbruck*, 37 La. An. 373; *Tilton v. Vail*, 53 Hun 324.

⁹² *Bonneck v. Kennebeck Purchase*, 7 Mass. 475; *Marshall v. Crehore*, 13 Metc. 462; *Hunnewell v. Taylor*, 6 Cush. 472; *Brownell v. Brownell*, 19 Wend. 367; *Bradshaw v. Callaghan*, 8 Johns. 558; *Florence v. Hopkins*, 46 N. Y. 184; *Clapp v. Bromagham*, 9 Cow. 530; *Stevens v. Enders*, 1 Green (N. J.), 271; *Brock v. Eastman*, 28 Vt. 658; *Windsor v. Simpkins* (Or.), 23 Pac. Rep. 669; *Criscoe v. Hambrick*, 47 Ark. 235; *Fenton v. Steere*, 76 Mich. 405; *Rich v. Bray*, 37 Fed. 273; *Welch's Appeal*, 126 Pa. St. 297. But see *Holloway v. Holloway*, 97 Mo. 628. Partition as between co-tenants is never barred by adverse possession, short of the statutory period. *Adams v. Hopkins*, 144 Cal. 19, 77 Pac. Rep. 712.

⁹³ *Hodgkinson*, Petitioner, 12 Pick. 374; *Hunnewell v. Taylor*, 6 Cush. 472; *Nichols v. Nichols*, 28 Vt. 228; *Zeigler v. Grim*, 6 Watts 106; *Swanson v. Calhoun*, 81 Ga. 777; *Wood v. Sugg*, 91 N. C. 93, 49 Am. Rep. 639; *Osborne v. Mull*, 91 N. C. 203; *Eberts v. Fisher*, 54 Mich. 294; *Bragg v. Lyon*, 93 N. C. 151; *Moore v. Shannon*, 6 Mackay 157; *Appeal of Clarke* (Pa.), 23 Atl. Rep. 890. In New York and Illinois, there may be a partition of a vested remainder. *Blakely v. Colder*, 15 N. Y.

consent of the co-tenant or of any number of them is not required in order to secure a partition. Any one co-tenant may compel a partition by making the other co-tenants defendants.⁹⁴ Demand need not be made before bringing the suit.⁹⁵ And the right of partition cannot be taken away or suspended by a condition against alienation.⁹⁶ Partition will not be decreed where the defendants to the suit dispute the title of the plaintiff.⁹⁷ If the parties defendant, who dispute the title of the others, be dismissed from the suit, the partition may be decreed as to the others. A dispute over a title can not be settled in a partition suit.⁹⁸ Unsettled claims or incumbrances upon the land, or upon the share of one or more of the co-tenants, in the hands of strangers,—such as an outstanding claim of dower, or curtesy, or a mortgage of the premises, where the mortgagee is not in possession,—will not prevent the partition. But in order that the decree in partition shall bind the holders of these claims or incumbrances, existing at the time that the suit for partition is instituted, they must be made parties, in the absence of a statute to the contrary.⁹⁹ And if there is any owelty coming to the

617; *Hilliard v. Scoville*, 52 Ill. 449; *Hill v. Reno*, 112 Ill. 154; 54 Am. Rep. 222. See, also, *Smalley v. Isaacson*, 40 Minn. 450; *Preston v. Brant*, 196 Me. 556.

⁹⁴ *Sample v. Sample*, 34 Kan. 73; *Rohn v. Harris*, 130 Ill. 525.

⁹⁵ *Willard v. Willard*, 6 Mackey 559.

⁹⁶ *Whitney v. Kindall*, 63 N. H. 200.

⁹⁷ *Peterson v. Fowler*, 73 Tex. 254; *Carrigan v. Evans*, 31 S. E. Rep. 262; *Fenton v. Steere*, 76 Mich. 405; *Rich v. Bray*, 37 Fed. Rep. 273. The character of the plaintiff's title may be shown by the defendant to be incapable of supporting partition. *Thibodeaux v. Thibodeaux*, 112 La. 906, 36 So. Rep. 800. Where there are conflicting claims of title the one holding the legal title must generally prevail. *Lee v. Wysong* (1904), 128 Fed. Rep. 833, 63 C. C. A. 483.

⁹⁸ *Peterson v. Fowler*, 73 Tex. 524; *Carrigan v. Evans*, 31 S. C. 262; *Beebe v. Louisville, etc., R. R. Co.*, 39 Fed. 481. But see *Hay's Appeal*, 123 Pa. St. 110; *Simmes' Heirs v. Simmes* (Ky.), 11 S. W. Rep. 665; *Best v. Sanders*, 31 S. C. 602.

⁹⁹ *Call v. Barker*, 12 Me. 320; *Purvis v. Wilson*, 5 Jones L. 22; *Bradshaw v. Callaghan*, 8 Johns. 558; *Burhaus*, 2 Barb. Ch. 398; *Taylor v.*

mortgagor co-tenant, it must be paid to the mortgagees.¹ If claimants upon the shares of individual co-tenants have been properly brought before the court, the decree in partition will transfer the lien of the incumbrance to the part allotted to the tenant, whose share in the joint estate was incumbered.² The court may always, and by statute in some of the States, is obliged to, stay the decree in partition of any intestate's lands among the heirs, as long as the claim of the intestate's creditors have not been duly provided for.³ If the interest in the co-tenant's share is acquired after the commencement of the suit, the claimant takes the interest subject to the decree in partition, and need not be made a party. But all who were co-tenants at the time of bringing the suit must be joined as parties.⁴ If, however, trustees, in whom the

Blake, 109 Mass. 513; Colton v. Smith, 11 Pick. 311; Kilgour v. Crawford, 51 Ill. 249; De La Vega v. League, 64 Tex. 205; Morse v. Stockman, 65 Wis. 36; Childs v. Hayman, 72 Ga. 791; Simpson v. Stranghen (N. J.), 19 Atl. Rep. 667; Judgment Creditors: Owens v. Owens, 25 S. C. 155; Barclay v. Kerr, 110 Pa. St. 130; Widow's Dower, Appeal of Black, 130 Pa. St. 516; Claim of Curtesy: Grand Fomer, etc., Co. v. Gill, 111 Ill. 514; Stark v. Carroll, 66 Tex. 393; McKinney v. Moore, 73 Tex. 470; Fales v. Fales, 148 Mass. 42.

¹ Green v. Arnold, 11 R. I. 364; 23 Am. Rep. 466.

² Washburn on Real Prop. 682. In partition between the heirs of a decedent, the general creditors of decedent and the administrator are not, generally, proper parties to the suit. Sheehan v. Allen, 67 Kan. 712, 74 Pac. Rep. 245; Speer v. Speer, 14 N. J. Eq. 240; Lyon v. Register, 36 Fla. 273, 18 So. Rep. 589; Wood v. Bryant, 68 Miss. 198, 8 So. Rep. 518; Garrison v. Cox, 99 N. C. 478, 6 S. E. Rep. 124; Waldron v. Harvey (W. Va. 1904), 46 S. E. Rep. 60. But see, *contra*, McEvoy v. Leonard, 89 Ala. 455, 8 So. Rep. 40; Green v. Brown, 146 Ind. 1, 44 N. E. Rep. 805; Budde v. Rebenack, 137 Mo. 179, 38 S. W. Rep. 910; Bender v. Terwilliger, 166 N. Y. 590, 59 N. E. Rep. 1118; *Ex parte* Worley, 49 S. C. 41, 26 S. E. Rep. 949.

³ Alexander v. Alexander, 26 Neb. 68; Hendry v. Hollingdrake (R. I.), 17 Atl. Rep. 50.

⁴ Smith v. Brown, 66 Tex. 543; Jordan v. McMilty (Colo.), 23 Pac. Rep. 460; Grand v. Fomer, etc., Co. v. Gill, 111 Ill. 541; Stark v. Carroll, 66 Tex. 393; McKinney v. Moore, 73 Tex. 470; Fales v. Fales, 148 Mass. 42. But see Coombs v. Unknown Persons, 82 Me. 326.

legal title of an estate in common is vested, are properly made parties, it will not be necessary to make the *cestuis que trust* parties.⁵

§ 196. **Partial partition.**— Partition of a part of the joint estate cannot be asked for. The entire estate must be brought in for partition; but two or more of the co-tenants may ask for a decree setting out their shares in common, and apart from the others.⁶ This is likewise the rule where the property held as a joint estate consists of two or more parcels. If the relations of the parties are such that their rights cannot be adjusted, except by a partition of the entire property, the whole of it must be included in the decree.⁷

§ 197. **Manner of allotment.**— Commissioners are generally appointed by the court, whose duty it is to ascertain the best mode of dividing up the estate among the several tenants. And in performing this duty, they are to be guided by the circumstances of each case. If there are several lots or parcels of land, one parcel may be given to each, or, if it is a single tract, it is divided up, if possible, into equal parcels; but if in either case an equal division is impossible, the commissioner may direct the payment of a sum of money, called *owelty of partition*, in order to equalize the partition.⁸ But

⁵ *Railsback v. Lovejoy*, 116 Ill. 442. But trustees are not necessary parties to a suit for partition between the beneficiaries. *Welch v. Agar*, 84 Ga. 583. Mineral rights in land, being an estate in freehold, are the subject of partition. *McConnell v. Pierce* (1904), 210 Ill. 627, 71 N. E. Rep. 622; *Ames v. Ames*, 160 Ill. 599, 43 N. E. Rep. 592; *Hughes v. Devlin*, 23 Cal. 502; *White Mines & Min. Rem.*, Sec. 589, *et sub.*

⁶ *Smith v. Brown*, 66 Tex. 543; 1 Washburn on Real Prop. 679; *Bigelow v. Littlefield*, 52 Me. 24; *Clark v. Parker*, 106 Mass. 554; *Colton v. Smith*, 11 Pick. 511; *Arms v. Lyman*, 5 Pick. 210; *Duncan v. Sylvester*, 16 Me. 388.

⁷ *Barnes v. Lynch* (Mass.), 24 N. E. Rep. 783.

⁸ *Hagar v. Wiswall*, 10 Pick. 152; *Story's Eq. Jur.* 654; 1 Washburn on Real Prop. 678; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466; *Dobbin v. Rex*, 106 N. C. 444; *Stannard v. Sperry*, 56 Conn. 541; *Haines*

the consent of the tenant, to whom the larger portion is allotted, to that mode of settlement must be obtained, in order to bind him. He cannot be forced to pay the owelty of partition against his will.⁹ And where both parties want the allotment of the larger share, a sale should be ordered of the entire property.¹⁰ When a bond for owelty is given, it constitutes a lien upon the share of land which is allotted in partition to the obligor.¹¹ A court of equity may so direct partition that the tenant, who has made improvements upon the land, may get the benefit of them even where the partition is made by a sale of the premises and a distribution of the proceeds of sale.¹² If the estate in question is not susceptible of a partition without destroying the value of the property, as where it is a mill, a wharf, and the like, the property will either be ordered to be sold, and the proceeds of sale divided among the tenants according to their equities, or the entire estate will be vested in one, who will then be required to pay to the others their share in money. But an actual partition is more favored, and will be ordered, whenever practicable.

v. Hewitt, 129 Ill. 347; *Koehler v. Klins*, 128 Ill. 323; *Houston v. Blythe*, 71 Tex. 716. See, also, *Bank v. Stansberry* (La. 1903), 34 So. Rep. 452.

⁹ *Whitney v. Parker*, 63 N. H. 416.

¹⁰ *Corrothers v. Jolliffe*, 32 W. Va. 562.

¹¹ *Sniveley's Appeal* (Pa.), 18 Atl. Rep. 124, 129 Pa. St. 250; *Burnside v. Watkins*, 30 S. C. 459.

¹² *Alleman v. Hawley*, 117 Ind. 552; *Green v. Putnam*, 1 Barb. 500; *Wood v. Fleet*, 36 N. Y. 501; *Crafts v. Crafts*, 13 Gray, 360; *Borah v. Archers*, 7 Dana, 177; *Buck v. Martin*, 21 S. C. 590; 53 Am. Rep. 702; *Lynch v. Lynch*, 18 Neb. 586. But see, *contra*, *Gourley v. Woodbury*, 43 Vt. 89. In partition between co-tenants, a lien for rents or improvements will generally be decreed, in the settlement of the respective interests of the co-owners. *Bennett v. Bennett* (Miss. 1904), 36 So. Rep. 452; *Walker v. Williams* (Miss. 1904), 36 So. Rep. 450; *Willis v. Loomis* (1904), 87 N. Y. S. 1086, 94 App. Div. 67; *Porter v. Osman* (Mich. 1904), 98 N. W. Rep. 859; *Ward v. Ward*, 40 W. Va. 611, 21 S. E. Rep. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911; *Donnor v. Quartermas*, 90 Ala. 164, 8 So. Rep. 715, 24 Am. St. Rep. 778; *Collett v. Henderson*, 80 N. C. 337.

If partition is made by sale between tenants, one of whom is only a tenant for life, such co-tenant becomes entitled only to the income during his life from the sum of money allotted to him as his share in the proceeds of sale.¹³

§ 198. *Relief incidental to partition.*—In decrees in partition, where the petition is so framed as to permit the adjustment of the several interests and claims of the parties to the suit, the court, as an incidental right of the party entitled thereto, will take into consideration the reasonable rents and profits that have been received by the party or parties in possession; will make a proper and just allowance for improvements and repairs made upon the common property and such charges for incumbrances placed upon the property or for payments and advancements made upon incumbrances, as will equalize the rights of the different parties to the suit and

¹³ *Exp. Winstead*, 92 N. C. 703; *Miller v. Miller*, 13 Pick. 237; *Adams v. Briggs Iron Co.*, 7 Cush. 361; *King v. Reed*, 11 Gray, 490; *Wood v. Little*, 35 Me. 107; *Crowell v. Woodbury*, 52 N. H. 613; *Conant v. Smith*, 1 Aik. (Vt.) 67; *Hills v. Dey*, 14 Wend. 204; *Belknap v. Trimble*, 3 Paige Ch. 577; *Royston v. Royston*, 13 Ga. 425; *David v. David*, 9 N. Y. S. 256; *Smith v. Upton* (Ky.), 13 S. W. Rep. 721; *Foster v. Roche*, 117 N. Y. 462; *Allard v. Carledon*, 64 N. H. 24; *Wrenn v. Gibson* (Ky.), 13 S. W. Rep. 766; *Bruhn v. Fireman's Bldg. Assn.* (La.), 7 So. Rep. 556; *Durruty v. Musacchia* (La.), 7 So. Rep. 555; *Vail v. Vail*, 52 Hun, 520; *Corrothers v. Jolliffe*, 32 W. Va. 562; *Tyler v. Jewell* (Ky.), 11 S. W. Rep. 25; *Rohn v. Harris*, 130 Ill. 525. The law favors partition in kind, rather than a sale and it is only when the land cannot be divided in kind that a sale will be ordered. *Kloss v. Wylezalek*, 207 Ill. 328, 69 N. W. Rep. 863; *Black v. Black*, 206 Pa. St. 116, 55 Atl. Rep. 847; *Waldron v. Harvey* (W. Va. 1904), 46 S. E. Rep. 603. Where a petition for partition only asks for a partition in kind, a sale thereunder is void and confers no title. *Waldron v. Harvey* (W. Va. 1904), 46 S. E. Rep. 603. Where the land is not of a uniform value or character it is proper to order a sale. *Carpenter v. Coats*, 183 Mo. 52, 81 S. W. Rep. 1089: In the partition of mines and mineral property, on account of the uncertainty of the value of such property, a sale is usually preferable to a division in kind. *White, Mines & Min. Rem.*, Sec. 589, *et sub.*

adjust their equities, according to their respective interests.¹⁴ The interest of a co-tenant who has incumbered the property for his individual benefit, will be charged with such incumbrance;¹⁵ if one co-tenant has received more than his just share of the rents and profits his interest in the estate may be charged with the excess so received, apportioned among the interests of the other co-tenants;¹⁶ one co-tenant placing betterments upon the property is entitled to have the interests of the other tenants charged therewith before a division in kind between himself and the other tenants,¹⁷ and if the parties to the suit are not tenants in common but partners in the land, it is proper to order an accounting between them of the value of the rents and profits received by each and the value of the use and occupation that each has had of the common property.¹⁸ ?

§ 199. Effect of partition.—Partition, when completed, vests in each tenant an estate in severalty in the part or parcel allotted to him by agreement of the parties, or by the decree of the court; and the parties cease to be co-tenants. But if the partition is made by the decree of a court, there is a sufficient privity of estate remaining between them, as to make the loss by one tenant, of the part allotted to him, through the enforcement of a superior title, a burden upon all. In compulsory partition, each tenant becomes a warrantor of the titles of the others to the extent of his share. And if one is ousted of his share by the claim of a superior title, he may enter upon the share of the others, and ask for a new par-

¹⁴ *Shipman v. Shipman* (N. J. Ch. 1904), 56 Atl. Rep. 694; *Simpson v. Scroggins*, 182 Mo. 560, 81 S. W. Rep. 1129; *McConnell v. Pierce*, 210 Ill. 627, 71 N. E. Rep. 622; *Walker v. Williams* (Miss. 1904), 36 So. Rep. 450; *Bennett v. Bennett* (Miss. 1904), 36 So. Rep. 452; *Willis v. Loomis*, 87 N. Y. S. 1086, 94 App. Div. 67.

¹⁵ *Hanson v. Hanson* (Neb. 1904), 97 N. W. Rep. 23.

¹⁶ *Thomas v. Hammill*, 106 Ill. App. 524.

¹⁷ *Legg v. Legg* (Wash. 1904), 75 Pac. Rep. 130.

¹⁸ *Hanson v. Hanson* (Neb. 1904), 97 N. W. Rep. 23.

tition of what remains of the original joint estate.¹⁹ But if the partition is by mutual deeds of release, there will be no claim for compensation, unless the partition was tainted with fraud.²⁰ For this reason, and perhaps for others, it is impossible for one, who has been a co-tenant, to acquire, by purchase after partition, a superior title to the joint estate which he may enforce against his former co-tenants. They may claim the benefit of such purchase by contributing their share of the price or consideration, in the same manner as before partition; and it would seem that this would be the case, whether the partition was voluntary or involuntary.²¹

¹⁹ 1 Washburn on Real Prop. 689; Co. Lit. 173 b. See *Campan v. Bernard*, 25 Mich. 382; *Huntley v. Cline*, 93 N. C. 458. But the purchaser from the tenant cannot make the same claim for re-partition. *Ketchin v. Patrick* (S. C.), 11 S. E. Rep. 301.

²⁰ *Weiser v. Weiser*, 5 Watts, 279; *Beardslee v. Knight*, 10 Vt. 185. But where it is necessary that all should join in an action on the covenant of warranty in the conveyance to them, the one who has lost his estate may call upon the others to join him in the action against their common warrantor. *Sawyers v. Cater*, 8 Humph. 256; *Dugan v. Hollins*, 4 Md. Ch. 139; 4 Kent's Com. 470. But now, a tenant in common may sue alone on the general covenant of warranty where the breach affects him alone. *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426.

²¹ *Venable v. Beuchamp*, 3 Dana 326; Co. Lit. 174 a; 1 Washburn on Real Prop. 688. Where the decree in partition establishes the interest of the parties it is final and binding on them, as to such interest, and in a subsequent action for trespass against the defendant in such suit, he is estopped to deny that his interest was limited as specified in the decree. *Carter v. White* (1904), 134 N. C. 466, 46 S. E. Rep. 983. See, also, as to estoppel by decree in partition, *Brush v. Coomer* (Ky. 1902), 69 S. W. Rep. 793. *In re Sampson's Est.*, 22 Pa. Sup. Ct. 93.

CHAPTER X.

ESTATES UPON CONDITION AND LIMITATION, AND CONDITIONAL LIMITATIONS.

SECTION 200. Definition of estates upon condition.

201. Words necessary to create an estate upon condition.

202. Conditions precedent and subsequent distinguished.

203. Invalid conditions — Impossibility of performance.

204. Invalid condition — Because of Illegality.

205. Building restrictions in deeds.

206. The time of performance.

207. The effect of breach of the condition.

208. Waiver of performance.

209. Equitable relief against forfeiture.

210. Estates upon condition, distinguished from trusts.

211. Same — From estates upon limitation and conditional limitations.

§ 200. Definition of an estate upon condition.— This estate is one which is made to vest, to be modified or defeated, upon the happening or not happening of some event.¹ If the estate is to be created or enlarged² upon the performance of the condition, and not before, it is called a condition *precedent*; if the condition is to defeat or limit an estate already vested, it is a condition *subsequent*. Conditions are also divided into *express* and *implied*. An express condition is, as its name implies, one which is expressly created in the instrument, which limits the estate to which the condition is annexed, and is otherwise called a condition *in deed*; while an implied condition is not expressly declared, but arises by implication of law, and is generally annexed to certain estates as an invari-

¹ 2 Washburn on Real Prop. 2; Co. Lit. 201 a. *Frank v. Frank* (Pa.), 17 Atl. Rep. 11.

² See *Thayer v. Spear*, 53 Vt. 327.

able incident.³ The annexation of a condition to an estate does not affect the grantee's power of enjoyment of the land,⁴ or prevent its alienation or disposition by devise. The only effect is, that the alienee or devisee takes the estate subject to the possibility of forfeiture by a failure to perform the condition.⁵ Nor does the presence of the condition alter the character of the estate, that is, determine whether it is a freehold, or not. Thus an estate to A. for fifty years, provided he lives so long, is a leasehold, and an estate to A. for life, provided he does not live longer than fifty years is a life estate, notwithstanding the first is to terminate with his life, even though the fifty years have not expired, and the second is to terminate with the expiration of the fifty years, although he is still alive.⁶

§ 201. Words necessary to create an estate upon condition.—

No particular words or forms of expression are really necessary for the creation of such an estate. Any words, particularly in wills, which show the intention to annex a condition to the estate granted, will be sufficient. Such phrases, however, as "on condition," "provided," "if it shall so happen," etc., are found in constant use, and if resorted to, will ordinarily remove any doubt as to the grant being an estate upon condition.⁷ As intimated, it is more difficult in devises,

³ 2 Washburn on Real Prop. 3; Co. Lit. 201 a; Vanhorne's Lessee v. Dorrance, 3 Dall. 317.

⁴ N. J. Zinc and Iron Co. v. Morris, etc., Co. (N. J.), 15 Atl. Rep. 227.

⁵ 2 Washburn on Real Prop. 23; Wilson v. Wilson, 38 Me. 18; Underhill v. Saratoga and Washington R. R. Co., 20 Barb. 45; Taylor v. Sutton, 15 Ga. 103; Munroe v. Hall, 97 N. C. 206.

⁶ 2 Washburn on Real Prop. 23; Co. Lit. 42 a; Ludlow v. New York, etc., R. R. Co., 12 Barb. 440.

⁷ 2 Washburn on Real Prop. 3; Vander's Est., 7 Pa. Co. Ct. 482; Miller v. Board of Supervisors (Miss.), 7 So. Rep. 429; Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222; Wilkesbarre v. Wyoming, etc., Soc. (Pa.), 19 Atl. Rep. 809; Goodpaster v. Leathers (Ind.), 23 N. E. Rep. 1090. But it must be expressed in the deed; it cannot be created by parol. Mar-

than in grants, to determine whether they are conditional, and even such phrases, as those above mentioned, in the case of devises do not necessarily create an estate upon condition, if from the context the testator appears to have had a contrary intention.⁸ It has also been held lately that, where a tract of land was conveyed to the county, in consideration of the permanent removal of the county seat to the town in which the land conveyed was situated, there is no condition subsequent, which becomes broken by a removal of the county seat many years afterwards.⁹ The same conclusion is reached in other cases, where the special consideration of the conveyance has failed.¹⁰

shall, etc., *School v. Iowa*, etc., *School*, 28 Iowa, 360. *Hall v. Horton* (Iowa), 44 N. W. Rep. 569. If the right of entry is reserved for the breach of a covenant in the deed, it gives to the covenant the character of a condition and converts the estate into an estate upon condition. *Moore v. Pitts*, 53 N. Y. 85; *Ayer v. Emery*, 14 Allen, 69; *Rawson v. Uxbridge*, 7 Allen, 125; *Waters v. Breden*, 70 Pa. St. 235; *Wheeler v. Walker*, 2 Conn. 201; *Supervisors, etc., v. Patterson*, 50 Ill. 119; *Berryman v. Schumacher*, 67 Tex. 312. But see *Raley v. County of Umantilla* (Oreg.), 13 Pac. Rep. 890. See *post*, Sec. 627. In cases of doubt a clause creating an equitable restriction on land is construed most strongly against the grantor and in favor of the free use of the land by the grantee. *American Unitarian Ass'n v. Minot*, 185 Mass. 589, 71 N. E. Rep. 551; *McCucker v. Goode*, 185 Mass. 607, 71 N. E. Rep. 76. Unless there is a condition of reverter, as a penalty for the breach of the condition, the estate of a grantee upon condition is not terminated, in Arkansas. *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. Rep. 554.

⁸ 2 Washburn on Real Prop. 4. See *Wheeler v. Walker*, 2 Com. 201; *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Stuyvesant v. Mayor of N. Y.*, 11 Paige Ch. 427; *Lindsey v. Lindsey*, 45 Ind. 552.

⁹ *Summer v. Darnell* (Ind.), 27 N. E. Rep. 162.

¹⁰ *Ruggles v. Clare* (Kan.), 26 Pac. Rep. 25. A clause in a deed, for a nominal consideration, to a city, conditioned that the land conveyed should always be used as a burying ground and a neat fence forever maintained around it, without any provision for a reverter, is not such a condition as will work a termination of the title of the grantee. *Thornton v. Natchez*, 129 Fed. Rep. 84, 63 C. C. A. 526. A deed, in Pennsylvania, to a church corporation, providing that the land should

§ 203. Conditions precedent and subsequent distinguished.—

It is not always an easy matter to determine in a given case whether a condition is precedent or subsequent. It is clear that in a grant to A. upon his marriage, or in a lease for ten years, and if he pays a certain sum of money, then to him and his heirs forever, the conditions are precedent; or that in a grant to A. for life, provided she remains a widow, or a grant in fee with a rent reserved, with right of entry upon failure to pay, they are conditions subsequent. But in wills, particularly, great difficulty is sometimes experienced in reaching a definite conclusion on this point. The construction is, of course, governed by the intention of the grantor or deviser, as obtained from the instrument of conveyance. Perhaps the rule for the determination of the character of a condition is best expressed in the words of the court in the case cited below, viz.: "If the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after, as before the vesting of the estate; or if, from the nature of the act to be performed, and the time required for its performance, it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act, after taking possession, then the condition is subsequent."¹¹ But

be used "for mission purposes only," without any limitation over, in case of non-user, the grantee was held to take a good, marketable title, in fee simple. *Rankin Baptist Church v. Edwards*, 204 Pa. St. 216, 53 Atl. Rep. 770. A clause following the nominal consideration mentioned in a deed, "and for the further consideration of the support, during the life of the grantor," is not a condition subsequent, working a forfeiture, but a mere matter of consideration, or, at most a covenant. *Helms v. Helms*, 135 N. C. 164, 47 S. E. Rep. 415.

¹¹ *Underhill v. Saratoga and Washington R. R. Co.*, 20 Barb. 455. See also *Finlay v. King's Lessee*, 3 Pet. 340; *Taylor v. Maxon*, 9 Wheat. 325; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Barruss v. Madan*, 2 Johns. 145; *Horsev v. Horsev*, 4 Harr. 517; *Waters v. Bieden*, 70 Pa. St. 235; *Farabow v. Green*, 108 N. C. 339, where condition enlarged a life estate into a fee; *Stanton v. Allen* (S. C.), 10 S. E. Rep. 878; *Blanchard v. Morey*, 56 Vt. 170, a case of condition precedent; *Morse v. Hayden*, 82 Me. 227; *Wahl's Estate*, 8 Pa. Co. C. 309; *John-*

while the courts are inclined, in any case of doubt, to treat the condition as subsequent, yet a stricter rule of construction is applied than if the condition is precedent. It must be created by express limitation, or arise by necessary implication, in order to work a forfeiture of an estate already vested.¹² And if the performance of the condition is not expressly imposed upon the heirs and assigns, its breach will not work a forfeiture, if the estate has previously descended to the heirs, or has been conveyed away. In such a case, the estate cannot be forfeited for any breach of the condition, occurring after the grantee has parted with the estate.¹³

§ 203. Invalid conditions — Impossibility of performance.—

If the condition is impossible from the beginning, and is for that reason manifestly absurd, or becomes impossible through

son v. Warren, 74 Mich. 491; *Robertson v. Mowell*, 66 Ind. 565, condition precedent; *Burleyson v. Whitley*, 97 N. C. 295, condition precedent; *Barnet v. Barnet*, 43 N. J. Eq. 297, precedent; *Reuff v. Coleman's Heirs*, 30 W. Va. 171; *Hoard v. Wheatley*, 15 Lea 607; *Weinreich v. Weinreich*, 18 Mo. App. 364; *Chute v. Washburn*, 44 Minn. 312.

¹² *Laberee v. Carleton*, 53 Me. 213; *Merrifield v. Cobleigh*, 4 Cush. 178; *Bradstreet v. Clark*, 21 Pick. 389; *Hoyt v. Kimball*, 49 N. H. 327; *Ludlow v. N. Y. and Harlem R. R. Co.*, 12 Barb. 440; *Martin v. Ballou*, 13 Barb. 119; *McWilliams v. Nisley*, 2 Serg. & R. 523; *McKelway v. Seymour*, 29 N. J. L. 322; *Gadberry v. Sheppard*, 27 Miss. 203; *Voris v. Renshaw*, 49 Ill. 432; *Board etc., v. Trustees, etc.*, 63 Ill. 204. A deed, made upon condition that the grantee therein was to negotiate a loan, is a condition precedent to the vesting of the title and if no loan is made, the estate terminates. *Carloss v. Oxford* (Ark. 1904), 80 S. W. Rep. 144. A condition subsequent that the life estate shall terminate if the life tenant does not occupy the land, is valid. *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. Rep. 735. A provision in the nature of a condition subsequent, providing for the grantor's support was enforced, in Michigan, in *Cornell v. Whitney* (1903), 93 N. W. Rep. 614. See, also, *Wanner v. Wanner* (Wis. 1902), 115 Wis. 196, 91 N. W. Rep. 671. A deed made upon the condition that the land at the grantor's death shall be subject to his debts, is a valid condition, for the breach of which, the land can be sold to pay his debts. *Matheny v. Ferguson* (W. Va. 1904), 47 S. E. Rep. 886.

¹³ 2 *Washburn on Real Prop.* 7, 8; *Emerson v. Simpson*, 43 N. H. 475; *Page v. Palmer*, 48 N. H. 385.

the act of the grantor, or by the act of God or inevitable accident, the performance will be excused, and the condition held void. Its invalidity, however, would have a different effect upon the estate, according as it is a condition precedent or subsequent. If the condition is precedent, the estate will fail, just as if the condition was valid and had been broken.¹⁴ But if it is a condition subsequent, its invalidity would destroy the right of entry and forfeiture in the grantor, and leave the estate in the grantee absolute and free from the condition.¹⁵

§ 204. Invalid conditions — Because of illegality. — Similar effects would be produced, if the condition is invalid, because of its illegality. A condition is illegal, whenever it involves the performance of an act prohibited by law. Thus a condition, that the grantee shall commit a murder or any other crime, would be void; and, if it is a condition subsequent, the grantee would take an absolute estate. The illegal conditions, most commonly met with, are those restricting marriage and the alienation of a fee simple estate by the grantee. An absolute restriction of that kind would be just as invalid as the condition to commit a crime.¹⁶ But where an estate is

¹⁴ Co. Lit. 206; *Harvey v. Aston*, 1 Atk. 374; *Taylor v. Mason*, 9 Wheat. 325; *Martin v. Ballou*, 13 Barb. 119; *Vanhorne's Lessee v. Dorrance*, 2 Dall. 317; *Mizell v. Burnett*, 4 Jones L. 249.

¹⁵ Co. Lit. 206 a; *Brandon v. Robinson*, 18 Ves. 429; *Hughes v. Edwards*, 9 Wheat. 489; *Blackstone Bank v. Davis*, 12 Pick. 42; *Badlam v. Tucker*, 1 Pick. 284; *Merrill v. Emery*, 10 Pick. 507; *Gadberry v. Sheppard*, 27 Miss. 203. As to just how far the impossibility of performance will relieve a party from an absolute condition of his contract, where no exception as to the impossibility of performance is entered in the contract, is differently decided by different courts. One who agreed to perform the impossible without qualification, was held to his contract in Missouri, in *Brinkenhoff v. Elliott*, 43 Mo. App. 193. See also, *Hall v. School Dist.* 24 Mo. App. 218; *Harrison v. R. R.*, 74 Mo. 371.

¹⁶ *Brandon v. Robinson*, 18 Ves. 429; *Mumoe v. Hall*, 97 N. C. 206; *Phillips v. Ferguson (Va.)*, 8 S. E. Rep. 241; *Myers v. Bentz*, 127 Pa. St. 222; *McIntyre v. McIntyre*, 123 Pa. St. 323; *Hartman v. Herbine*, 7

granted to a widow during widowhood, it being an estate upon limitation and not an estate upon condition, it is a good limitation, and the estate will terminate upon her marriage.¹⁷ But if the devise is for life, *or* during widowhood, having first given her an estate for life, the subsequent limitation *during widowhood* operates as a condition; it must be construed to be a condition and for that reason has been sometimes held to be void, but not always.¹⁸ The general rule is that if the restriction against alienation or marriage is only for a limited period, as during minority or coverture, or if it is directed only against certain persons, as that the grantee shall not alien to, or marry, a certain named person or class of persons, it is a good condition and can be enforced.¹⁹ So, also,

Pa. C. C. 630; Lloyd v. Mitchell, 130 Pa. St. 205; Halladay v. Stickler, 78 Iowa, 388; Farris v. Rogers (Ky.), 7 S. W. Rep. 543; Pepper's Appeal, 120 Pa. St. 235; Anglesea v. Church Wardens, 6 Q. B. 114; Willis v. Hiscox, 4 Mylne & Cr. 197; Hall v. Tuffts, 18 Pick. 455; Blackstone Bank v. Davis, 21 Pick. 42; Schermerhorn v. Meyers, 1 Denio, 448; Allen v. Craft, 109 Ind. 476; Greene v. Greene, 125 N. Y. 506; Stansbury v. Hubner, 73 Md. 228. But for condition against sale, by a life tenant, see Lewis v. Lewis, 76 Conn. 586, 57 Atl. Rep. 735.

¹⁷ Co. Lit. 42 a; *ante*, Sec. 60; Harmon v. Brown, 58 Ind. 207; Coppage v. Alexander's Heirs, 2 B. Mon. 113; Boylan v. Deinzer, 45 N. J. Eq. 485; Little v. Giles, 25 Neb. 313; Schreiner v. Smith, 38 Fed. Rep. 897; Traphagen v. Levy, 45 N. J. Eq. 448; Best v. Best (Ky.), 11 S. W. Rep. 600; Long v. Paul, 127 Pa. St. 456; Levengood v. Hopple (Ind.), 24 N. E. Rep. 373; Brotzman's App. (Pa.), 19 Atl. Rep. 564; Siddons v. Cockrell (Ill.), 23 N. E. Rep. 586; Harmon v. Dyer (Ky.), 12 S. W. Rep. 774; Myers v. Adler, 6 Mackey, 515; Rowland v. Rowland (S. C.), 6 S. E. Rep. 902; Squier v. Harvey (R. I.), 14 Atl. Rep. 862; Beshore v. Lytle, 114 Ind. 8; Summit v. Yount, 109 Ind. 506; King v. Grant, 55 Conn. 166; McGuire's Appeal (Pa.), 11 Atl. Rep. 72; Knight v. Mahoney *et al.*, 152 Mass. 523.

¹⁸ Lloyd v. Lloyd, 2 Sim. (N. S.), 255; Coon v. Bean, 69 Ind. 474; Stillwell v. Knapper, 69 Ind. 558, 35 Am. Rep. 240; *contra*, Dumey v. Schaeffer, 24 Mo. 170; see Martin v. Seigler (S. C.), 10 S. E. Rep. 1073; Greenhalgh v. Marggraf, 7 N. Y. S. Rep. 728. Any illegal condition in deed renders it void. Watkins v. Nugent, 118 Ga. 372, 45 S. E. Rep. 260; Wakefield v. Van Tossee, 202 Ill. 41, 66 N. E. Rep. 830.

¹⁹ Co. Lit. 223 a; 2 Washburn on Real Prop. 9; Hunt v. Wright, 47 N. H. 396; Plumb v. Tobbs, 41 N. Y. 442; McWilliams v. Nisly, 2 Serg.

is a general restriction of alienation valid, where the land is conveyed to charitable uses.²⁰ A condition, restraining the alienation of a life estate or one for years, is valid, even though it is absolute both as to the persons and time.²¹ The statute *quia emptores*, which made conditions in restraint of alienation void, only applied to estates in fee.²² So also will a condition be void, which defeats the estate if it is appropriated to the payment of the grantee's debts.²³ But an estate may be limited to determine upon the insolvency or bankruptcy of the grantee; in such a case, however, the estate would be one upon limitation and not upon condition.²⁴ It may be added finally, that a condition is never illegal because the prohibited act or deed is itself lawful. Thus a condition

& R. 513; *Attwater*, 18 Beav. 330; *Large's Case*, 2 Leon. 82; *Stewart v. Brady*, 3 Bush. 623; *Reuff v. Coleman's Heirs*, 30 W. Va. 171. But see *Greene v. Greene*, 125 N. Y. 506; *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. Rep. 735.

²⁰ *Butterfield v. Wilton Academy* (Iowa), 38 N. W. Rep. 390; *Bennett v. Washington Cemetery*, 26 Abb. N. C. 450. But the restriction will not be presumed from the declaration of the trusts. *Fewbold v. Glenn* (Md.), 10 Atl. Rep. 242; *Gage v. School District No. 7* (N. H.), 9 Atl. Rep. 387.

²¹ 1 Washburn on Real Prop. 118, 207; 1 Cruise Dig. 108; see *ante*, Secs. 51, 140; *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. Rep. 735.

²² *Crisswell v. Grumbling*, 107 Pa. St. 408; *Hayes v. Davis*, 105 N. C. 482; *Reynolds v. Crispin* (Pa.), 11 Atl. Rep. 236; *Chautauqua Assembly v. Alling*, 46 Hun, 582. A condition against alienation of land, in a deed, during the life of the grantor and providing for monthly payments to her, is a condition running with the land, and is a continuing charge upon it, which equity will enforce. *Polzin v. Polzin*, 110 Ill. App. 187. Where the estates of two life tenants are upon the condition that neither should alien the estate, a purchase of the first life tenant's interest by the reversioner is not a waiver of the condition as to the second life tenant. *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. Rep. 735.

²³ *Brandon v. Robinson*, 18 Ves. 429; *Blackstone Bank v. Davis*, 21 Pick. 42; *Wellington v. Janvrin*, 60 N. H. 174; *McCormick, etc., Machine Co. v. Gates* (Iowa), 39 N. W. Rep. 657.

²⁴ See *post*, Sec. 370. As to condition that on death of the grantor the land shall be liable for his debts, see, *Matheny v. Ferguson* (W. Va. 1904), 47 S. E. Rep. 886.

against the sale of intoxicating liquor on the premises sold and granted, is legal even though the sale of liquor is not generally prohibited by law in the State in which the question arises.²⁵ It is also permissible to convey an estate upon condition, that the grantor does not revoke the conveyance during her life.²⁶ But this would more properly be described as a power of revocation.²⁷

§ 205. Building restrictions in deeds.—Analogous to conditions effecting the use or enjoyment of property by the grantee, are the modern building restrictions in deeds to city property, which may or may not be construed by the courts as conditions limiting the use or method of building upon the land granted, according to the language employed in the deed, or other instrument of conveyance. A restriction in deeds to several lots that but "one building is to be used as a dwelling house, upon each lot," is held to be violated by a double dwelling house, with separate entrances and exits, which is occupied by two families;²⁸ a restriction in a deed to several lots fronting upon a public street, that no buildings shall be constructed nearer than a certain distance of the street, if part of a general scheme or plan, in the conveyance or dedication of such property, is a condition which the courts will enforce,²⁹ and a condition that no building shall be used for a

²⁵ *Smith v. Barrie*, 56 Mich. 314. A condition against the sale of intoxicating liquor on the land granted, is a condition working a forfeiture, in Nebraska, for the breach of which the grantee can be ejected. *Jetter v. Lyon* (1904), 97 N. W. Rep. 596. See, also, *Granite Bldg. Co. v. Green*, 25 R. I. 586, 57 Atl. Rep. 649; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *Brown v. Bragg*, 22 Ind. 122; *Burns v. McCubbin*, 3 Kan. 221, 87 Amer. Dec. 468, Sec. 149 *ante*.

²⁶ *Recketts v. Louisville, etc., Ry. Co. (Ky.)*, 15 S. W. Rep. 182.

²⁷ See *post*, Sec. 404.

²⁸ *Harris v. Roraback* (Mich. 1904), 100 N. W. Rep. 391; *McMurray v. Investment Company*, 103 Ky. 308, 45 S. W. Rep. 96, 40 L. R. A. 489; *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. Rep. 854.

²⁹ *Helmsley v. Marlborough Hotel Co. (N. J. Ch. 1903)*, 55 Atl. Rep. 994; *Schubert v. Eastman Realty Co.*, 25 Ohio Cir. Ct. 336; *Ewersten v. Gerstenberg*, 186 Ill. 344, 57 N. E. Rep. 1051, 51 L. R. A. 310.

saloon, by the grantee, or any one claiming under him, and that such use shall cause a reverter of the lot so used, to the grantor or his heirs, is a valid condition subsequent, running with the land.³⁰ But in cases of any doubt, such clauses creating restrictions upon the grantee's land are construed most strongly against the grantor and in favor of the free use of his land, by the grantee.³¹ And unless part of a general plan, in the sale of contiguous properties, a clause limiting the buildings to certain portions of the land sold, will not be enforced; ³² annexations or porches, not a portion of the building proper, are not held to violate restrictions against buildings erected nearer than a certain distance of the street; ³³ a grantee who has violated such a restriction cannot ask to have it enforced as against another grantee of the property,³⁴ and no language will be held to imply such a condition on the enjoyment or use of property, that is not clear and explicit, as a condition, instead of a covenant or other "understanding" between the parties.³⁵

³⁰ *Jetter v. Lyon* (Neb. 1903), 97 N. W. Rep. 596.

³¹ *Amer. Unitarian Ass'n v. Minot*, 185 Mass. 589, 71 N. E. Rep. 551.

³² *Schubert v. Eastman Realty Co.*, 25 Ohio Cir. Ct. 336; *Ewersten v. Gerstenberg*, 186 Ill. 344, 57 N. E. Rep. 1051, 51 L. R. A. 310.

³³ *Olcott v. Shepard*, 89 N. Y. S. 201, 96 App. Div. 281; *Hawes v. Favor*, 161 Ill. 440, 43 N. E. Rep. 1076; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

³⁴ *Schubert v. Eastman Realty Co.*, 25 Ohio Cir. Ct. 336; *Ewersten v. Gerstenberg*, 186 Ill. 344, 57 N. E. Rep. 1051, 51 L. R. A. 310.

³⁵ *Huron v. Wilcox* (S. D. 1904), 98 N. W. Rep. 88. A clause in a deed to a city, for a fair valuable consideration, that it is the "understanding" that the premises are to be used for City Hall purposes only, is void, as a condition, limiting the use of such property and the grantee can use it for any purpose it desires. *Huron v. Wilcox*, *supra*. See also, *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. Rep. 98; *Packard v. Ames*, 16 Gray, 327; *Green v. O'Connor* (R. I.), 25 Atl. Rep. 692, 19 L. R. A. 262; *Soukup v. Topka* (Minn.), 55 N. W. Rep. 824; *Faith v. Bowles* (Md.), 37 Atl. Rep. 711, 63 Am. St. Rep. 489; *Farnham v. Thompson*, 34 Minn. 330; *Weir v. Simmons* (Wis.), 13 N. W. Rep. 873; *Portland v. Terwillier* (Or.), 19 Pac. Rep. 90; *Eckroyd v. Coggeshell*, 21 R. I. 1, 41 Atl. Rep. 260, 79 Am. St. Rep. 741; *Kalpatrick v. Mayor* (Md.), 31 Atl. Rep. 807, 27 L. R. A. 643, 48 Am. St.

§ 206. **The time of performance.**—If there is a time specified, within which the condition is to be performed, it cannot be performed afterwards. Where there is no express specification of time, it must be determined from the apparent intention of the grantor or testator, as gathered from the context and the nature of the condition. Generally, if the time of performance is not limited, the grantee has his whole life in which to perform. But if a prompt performance appears to have been intended from the use of words in the present tense, or if any other way an immediate performance is indicated; or if an early performance is necessary, in order that the grantor may obtain the expected benefit, the grantee has only a reasonable time in which to perform. Thus, where an estate was conveyed upon condition, that the grantee should pay a certain mortgage upon the estate, a prompt compliance with the condition was held necessary.³⁰

Rep. 509; *Carroll Co. Academy v. Trustees* (Ky), 47 S. W. Rep. 617; *Ashland v. Griener* (Ohio), 50 N. E. Rep. 99; *Hand v. St. Louis* (Mo.), 59 S. W. Rep. 92. But where a deed to a city, provides for the erection of a building, within a fixed period and also for a reverter, in case of a breach of the condition, a failure to build, as provided, works a forfeiture of the estate. *Trustees Union College v. New York*, 173 N. Y. 38, 65 N. E. Rep. 853; *Best v. Nagle*, 182 Mass. 495. 65 N. E. Rep. 842.

³⁰ Co. Lit. 208 b; *Finlay v. King's Lessee*, 3 Pet. 374; *Hayden v. Stoughton*, 5 Pick. 528; *Ross v. Tremain*, 2 Metc. 495; *Allen v. Howe*, 105 Mass. 241; *Williams v. Angell*, 7 R. I. 152; *Stuyvesant v. Mayor of N. Y.*, 11 Paige Ch. 425; *Hamilton v. Elliot*, 5 Serg. & R. 375. A condition against incumbrances is held to apply to voluntary incumbrances only and a sale for taxes does not work a forfeiture of such a condition. *Fouts v. Miliken* (Ind. 1903), 65 N. E. Rep. 1050. A condition against incumbrances and providing for a forfeiture for breach thereof, was held limited to the mortgaged portion of the granted premises, in Indiana, in *Fouts v. Milliken* (1903), 65 N. E. Rep. 1050. A beneficiary holding property, by virtue of a condition entered into by its committee, cannot repudiate the condition and also hold the property, but will hold it as a trustee for the grantor, after breach of the condition. *Med. College of New York v. N. Y. University*, 78 N. Y. S. 673, 76 App. Div. 48. One taking land with knowledge of the breach of a condition subsequent is bound by such condition and the

§ 207. The effect of a breach of the condition.—If it is a condition precedent, the failure to perform will prevent the estate from taking effect.³⁷ But if it is a condition subsequent, the estate is defeated only at the election of the parties who can take advantage of the breach.³⁸ But where the condition is a double contingency, the breach of which cannot be claimed unless both contingencies occur, the happening of one of them will not have any effect upon the estate to which the condition is attached.³⁹ At common law it was necessary for such a party to enter upon the estate, in order to work a forfeiture. It could not be effected by bringing an action for the recovery of the possession. This rule has been somewhat changed, so that at the present time the ordinary action of ejectment would have the same effect as the common-law entry.⁴⁰ Where the grantor is already in possession, the for-

feiture can be enforced against him, by the grantor's heirs. *Brown v. Tilley*, 25 R. I. 579, 57 Atl. Rep. 380.

³⁷ *Corless v. Oxford* (Ark. 1904), 80 S. W. Rep. 144.

³⁸ The breach of the condition does not alone defeat the estate. *Webster v. Cooper*, 14 How. 501; *Talman v. Snow*, 35 Me. 342; *Hubbard v. Hubbard*, 97 Mass. 192; *Warner v. Bennett*, 31 Conn. 477; *Ludlow v. N. Y. & Harlem R. R.*, 12 Barb. 440; *Canal Co. v. Railroad Co.*, 4 Gill & J. 121; *Phelps v. Chesson*, 12 Ired. 194; *Vail v. Long Island R. Co.*, 106 N. Y. 283; *Berryman v. Schumacher*, 67 Tex. 312. A condition that the deed is to be void, if the grantee fails to support the grantor, can be taken advantage of only by the grantor himself and not by third parties. *Helms v. Helms*, 135 N. C. 164, 47 S. E. Rep. 415.

³⁹ *Forsyth v. Forsyth* (N. Y.), 19 Atl. Rep. 119; *Morse v. Church*, 15 R. I. 336.

⁴⁰ See 1 Prest. Est. 46, 48, 50; Co. Lit. 201 a; 2 Washburn on Real Prop. 13; 1 Smith Ld. Cas. 89; *Doe v. Masters*, 2 B. & C. 490; *Osgood v. Abbott*, 58 Me. 73; *Sperry v. Sperry*, 8 N. H. 77; *McKelway v. Seymour*, 29 N. J. L. 329; *Jackson v. Crysler*, 1 Johns. 125; *Fonde v. Sage*, 46 Barb. 123; *Green v. Pettingill*, 47 N. H. 375; *Austin v. Cambridgeport Parish*, 21 Peck. 224; *Stearns v. Harris*, 8 Allen, 598; *Phelps v. Chesson*, 12 Ired. L. 194; *Chalker v. Chalker*, 1 Conn. 79. On breach of a condition subsequent in a deed, the grantor or his heirs, can enforce the forfeiture, by ejectment, in Nebraska. *Jetter v. Lyon* (1904), 97 N. W. Rep. 596.

feiture is effected without any overt act.⁴¹ This right of entry need not be expressly reserved where the condition is express. It follows as a necessary incident to the condition and passes with the land, into whosoever hands it may come.⁴² The enforcement of the forfeiture does not depend upon any previous demand for the performance of the condition. The grantee should perform without any demand or notice.⁴³ Conditions are reserved only to the grantor and his heirs. They cannot be reserved for the benefit of third persons. As a general rule, therefore, only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights if they should convey away the reversion in them. The right of entry is not an estate, not even a possibility of reverter; it is simply a chose in action.⁴⁴ And although it has been held that an express condition can be devised with the reversion, and the devisee and his heirs enter for the breach,⁴⁵

⁴¹ *Guffey v. Hukill* (W. Va.), 11 S. E. Rep. 750; *Witte v. Quinn*, 38 Mo. App. 681.

⁴² *Osgood v. Abbott*, 58 Me. 73; *Gray v. Blanchard*, 8 Pick. 284; *Jackson v. Aller*, 3 Cow. 220; *Jackson v. Topping*, 1 Wend. 388; *Bowen v. Bowen*, 18 Conn. 535. A clause in a deed that "this deed is upon the following condition upon the breach of which the grantor, or his wife, or heirs shall have the right to re-enter and thereupon the title conveyed hereunder shall cease," creates a condition subsequent, for a breach of which the estate can be determined. *Brown v. Tilley*, 25 R. I. 579, 57 Atl. Rep. 380.

⁴³ *Royal v. Aultman-Taylor Co.*, 116 Ind. 424.

⁴⁴ *Shulenberg v. Harriman*, 21 Wall. 346; *Hooper v. Cummings*, 45 Me. 359; *Gray v. Blanchard*, 8 Pick. 284; *Merritt v. Harris*, 102 Mass. 328; *Fonda v. Sage*, 46 Barb. 122; *Cross v. Carson*, 8 Blackf. 138; Co. Lit. 201 a. Butler's note, 84; 2 Washburn on Real Prop. 13-15; *Hayward v. Kinney*, 84 Mich. 501; *Helms v. Helms*, 135 N. C. 164, 47 S. E. Rep. 415; *Brown v. Tilley*, 25 R. I. 579, 57 Atl. Rep. 380.

⁴⁵ This appears to be a local rule in Massachusetts. *Hayden v. Stoughton*, 5 Pick. 528; *Clapp v. Stoughton*, 10 Pick. 463; *Austin v. Cambridgeport Parish*, 21 Pick. 215. See *contra*, *Avelyn v. Ward*, 1 Ves. Sr. 422; *Southard v. Central R. R.*, 26 N. J. L. 21; *Cornelius v. Ivins*, 25 N. J. L. 386. See also *Webster v. Cooper*, 14 How (U. S.) 501; *Nicoll v. N. Y. & Erie R. R.*, 12 N. Y. 121; *Henderson v. Hunter*, 59 Pa. St. 341; *Jones v. Roe*, 3 T. R. 88.

yet such a condition cannot be aliened or assigned, and does not pass with a grant of the reversion.⁴⁶ This rule against assignment of the right of entry was restricted by the statute, 32 Hen. VIII, ch. 34, to freehold estates upon condition, thus enabling the assignees of the reversion to enforce the forfeiture of leasehold estates for the breach of the condition.⁴⁷ But if it be a condition in law, or an implied condition; the right of entry was always assignable, it being considered more in the nature of an incident to the right of property, than a separate and independent *chose in action*.⁴⁸ But the condition cannot be apportioned between two or more assignees of separate portions of the reversion, and it will be destroyed by such dissection of the reversion.⁴⁹ If the grantor is in possession of the property at the time of the breach, no act of entry is required of him, in order to defeat the estate. But if he is out of possession, he must enter or do acts equivalent to entry, with the express intention of thereby working a forfeiture. Entry without such an intention would have no effect.⁵⁰ The right of entry may be exercised, even though the breach of the condition has worked no material injury to the grantor.

⁴⁶ Co. Lit. 214 a; Hooper v. Cummings, 45 Me. 359; Gray v. Blanchard, 8 Pick. 284; Guild v. Richards, 16 Gray, 309; Gilbert v. Peteler, 38 N. Y. 165; Nicholl v. N. Y. & Erie R. R., 12 Barb. 461; s. c. 12 N. Y. 132; Warner v. Bennett, 31 Conn. 478; Cross v. Carson, 8 Blachf. 138; Smith v. Brannan, 13 Cal. 107; Hayward v. Kinney, 84 Mich. 591.

⁴⁷ Co. Lit. 215 a; 1 Washburn on Real Prop. 476; Fenn v. Smart, 12 East. 444; Lewes v. Ridge, Cro. Eliz. 863; Burden v. Thayer, 3 Mete. 76; Trask v. Wheeler, 7 Allen, 111; Plumleigh v. Cook, 13 Ill. 669.

⁴⁸ 2 Washburn on Real Prop. 13; Co. Lit. 214.

⁴⁹ Co. Lit. 215 a; Taylor's L. & T., Sec. 296; Wright v. Burroughs, 3 Mann. Gr. & S. 700; Doe v. Lewis, 5 Ad. & El. 277; s. c. Eng. C. L. 277; Cruger v. McLaury, 41 N. Y. 225.

⁵⁰ Andrews v. Senter, 32 Me. 394; Willard v. Henry, 2 N. H. 120; Rollins v. Riley, 44 N. H. 13; Bowen v. Bowen, 18 Conn. 535; Hamilton v. Elliott, 5 Serg. & R. 375; Richter v. Richter, 111 Ind. 456. And where he is in possession, his retention of possession after the breach will not necessarily work a forfeiture. He may, even under such circumstances, waive the breach, and thus prevent a forfeiture. Guild v. Richards, 16 Gray, 317; Hubbard v. Hubbard, 97 Mass. 192.

And he can exercise it, notwithstanding he may have other equally effective remedies.⁵¹

§ 208. **Waiver of performance.**— If a party, who is entitled to the right of entry, waives the performance by an actual release of the condition or by an express license, the condition is gone, and he cannot take advantage of any subsequent breach. But a mere acquiescence, without actual license, would only constitute a waiver of the present breach, and the right of entry for subsequent breaches would survive.⁵² This waiver may result from acts, as well as from agreements. Thus if there is a condition attached to a lease against its assignment, the subsequent acceptance of rent from the assignee, or the beginning of an action for rent accruing after the breach, will constitute a waiver of the breach.⁵³ But mere delay in making the entry will not have the effect of a waiver, unless such apparent acquiescence is sufficient to induce the

⁵¹ *Gray v. Blanchard*, 8 Pick. 284; *Stuyvesant v. Mayor of N. Y.*, 11 Paige Ch. 414; 2 Washburn on Real Prop. 17, 18. But where the grantee is ready and willing to comply with a condition for the grantor's support and the grantor has voluntarily left the premises, to which the condition was attached, a forfeiture will not be enforced for breach of this condition. *Wolcott v. Wolcott* (Mich. 1903), 95 N. W. Rep. 740.

⁵² 2 Washburn on Real Prop. 19; Co. Lit. 211 b; *Andrews v. Senter*, 32 Me. 397; *Gray v. Blanchard*, 8 Pick. 284; *Hubbard v. Hubbard*, 97 Mass. 192; *Doe v. Gladwin*, 6 Q. B. (51 Eng. C. L.) 953; *Guild v. Richards*, 16 Gray, 326; *Doe v. Jones*, 5 Exch. 498; *Doe v. Peck*, 1 B. & Ad. (20 Eng. C. L.) 428; *Jackson v. Crysler*, 1 Johns. 126; *Gluck v. Elkan*, 36 Minn. 80.

⁵³ *Hubbard v. Hubbard*, 97 Mass. 192; *Coon v. Brecket*, 2 N. H. 153; *Jackson v. Crysler*, 1 Johns. 126; *Crouch v. Wabash*, etc., R. R. Co., 22 Mo. App. 315. But it has been held, and perhaps it is the better opinion, that in order that the acceptance of rent may constitute a waiver of forfeiture for non-payment of rent, it must be rent accruing after the breach. *Jackson v. Allen*, 3 Cow. 220; *Hunter v. Osterhout*, 11 Barb. 33; *Price v. Worwood*, 4 H. & N. 512; *Green's Case*, Cro. Eliz. 1; s. c. 1 Leon. 262. See *Downes v. Turner*, 2 Salk. 597; *Dumpor's Case*, 4 Rep. 119; s. c. 1 Smith's Ld. Cas. note; *Horn v. Peterer*, 16 Mo. App. 438; *Silva v. Campbell*, 84 Cal. 420.

grantee to incur expenses, and the subsequent exercise of the right of entry would in consequence work a legal fraud upon him. Thus, where in a grant to a railroad the condition was, that the road should be finished within a certain time, the grantor stood by and acquiesced in the continuance of the work after the expiration of the time stipulated, the right of entry was held to be waived under the doctrine of estoppel. But, except in special cases like this, only affirmative acts and express agreements by the grantor will have the effect of a waiver.⁵⁴ But the waiver of a condition precedent cannot have the effect of passing to the grantee the title of the land. The grantee can under the same deed only acquire the title by the performance of the condition precedent; its performance is not a conveyance.⁵⁵ However effective a waiver of entry for forfeiture may have upon the condition, it would have no effect upon the right of action for the breach of a covenant, which is caused by the same act which constituted a breach of the condition.⁵⁶

§ 209. Equitable relief against forfeiture.—As a general proposition, equity will neither relieve against, nor enforce a forfeiture. It simply leaves the parties to their remedies at law. Where the breach is the result of an unlooked-for accident, and where the damages resulting therefrom can be accurately estimated by the court, as where the condition calls for the payment of a sum of money at a particular time, it may be a mortgage, or a rent reserved, equity will prevent a

⁵⁴ *Dudlow v. N. Y. & Harlem R. R.*, 12 Barb. 440. See *Williams v. Dakin*, 22 Wend. 209; *Jackson v. Chrysler*, 1 Johns. 126; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 349; *Gray v. Blanchard*, 8 Pick. 284; *Doe v. Galdwin*, 6 Q. B. (51 Eng. C. L.) 953; *Doe v. Beck*, 1 B. & Ad. (20 Eng. C. L.) 428; *Doe v. Jones*, 5 Exch. 498; *Duffield v. Hue*, 129 Pa. St. 94; *Young v. Gay*, 41 La. An. 758. A purchase by the remainderman, from one of two life tenants, where both hold upon conditions against alienation, is not a waiver of the condition as to the other life tenant. *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. Rep. 735.

⁵⁵ *Johnson v. Warren* (Mich.), 42 N. W. Rep. 74.

⁵⁶ *Spencer v. Dougherty*, 23 Ill. App. 399.

forfeiture and decree, instead thereof, as compensation in damages, the payment of the sum of money, together with interest for the time which has elapsed.⁵⁷ But if the condition be some act, collateral to the grant, and one which cannot be estimated in damages, as where the condition is to repair, or against the acquisition of rights of easement by third parties; or where the breach is not the result of inevitable accident, but is willfully or negligently committed, equity will not interfere.⁵⁸

§ 210. *Estate upon condition distinguished from trusts.*— It is sometimes difficult in devises, to ascertain whether the testator intended to create an estate upon condition, or one upon trust. If he intended the former, there can be no relief against forfeiture, except as already explained, nor can performance of the condition be enforced. But if an estate upon trust was intended, and what appeared to be conditions were directions to trustees, explanatory of what they should do with the estate, a failure to perform would not result in an

⁵⁷ *Goodtitle v. Holdfast*, 2 Strange, 900; *Hill v. Barclay*, 18 Ves. 56; *Stone v. Ellis*, 9 Cush. 95; *Atkins v. Chilson*, 11 Metc. 112; *Hancock v. Carlton*, 6 Gray, 39; *Bethlehem v. Annis*, 40 N. H. 34; *City Bank v. Smith*, 3 Gill & J. 265; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Warner v. Bennett*, 31 Conn. 478; *Williams v. Angell*, 7 R. I. 152; *Beaty v. Harkey*, 2 Smed. & M. 563.

⁵⁸ *Hill v. Barclay*, 18 Ves. 56; *Descarlett v. Dennett*, 9 Mod. 22; *Elliott v. Turner*, 13 Sim. Ch. 485; *Wafer v. Mocato*, 9 Mod. 112; *Reynolds v. Pitt*, 2 Price, 212; *Hancock v. Carlton*, 6 Gray, 39; *Henry v. Tupper*, 29 Vt. 56; *Skinner v. Dayton*, 2 Johns. Ch. 526; *Livingston v. Thompkins*, 4 Johns. Ch. 431; *Baxter v. Lansing*, 7 Paige Ch. 350; *City Bank v. Smith*, 3 Gill & J. 265. Even when equity will not relieve against it, it will not enforce a forfeiture, *Bishop. Pr. Eq. Sec. 181*; *Atlas Bank v. Nahant Bank*, 3 Metc. (Mass.), 582; *Livingston v. Thompkins*, 4 Johns. Ch. 415; *Meigs App.* 62 Pa. St. 28; 1 Pom. Eq. Jur. 459; *Toledo R. R. v. St. L. & C. R. R.*, 208 Ill. 623, 70 N. E. Rep. 715; *Moberly v. Trenton*, 181 Mo. 637, 81 S. W. Rep. 169. A suit for relief from forfeiture, estops the plaintiff from denying there was a forfeiture at law. *Gordon v. Richardson*, 185 Mass. 492, 70 N. E. Rep. 1027.

absolute forfeiture, but a court of equity would interpose in behalf of the *cestui que trust* and enforce a performance of those acts, which were intended for his benefit. The conclusion in every case depends upon the ascertained intention of the testator, and the devise will in proper cases be declared upon trust, instead of upon condition, though the words, "provided," "on condition," etc., are used in that connection.⁵⁹

§ 211. Same — From estates upon limitation and conditional limitations.— An estate upon limitation is one which is made to determinè absolutely upon the happening of some future event as an estate to A., so long as she remains a widow. The technical words generally used to create a limitation, are conjunctions relating to time, such as *during, while, so long as, until*, etc. But these words are not absolutely necessary; for where it is necessary, in order to carry out the intent of the grantor, to construe an estate to be a limitation, it will be done, even though words, ordinarily used in the creation of an estate upon condition, appear in their stead.⁶⁰ An estate upon limitation *differs* from one upon condition in this, that the estate is determined *ipso facto* by the happening of the contingency, and does not require any entry by the grantor in order to defeat it.⁶¹ A

⁵⁹ *Stanly v. Colt*, 5 Wall (U. S.) 165. See *Linsee v. Mixer*, 101 Mass. 512; *Dorr v. Hallaran*, *Id.* 534; *Smith v. Brown*, 66 Tex. 543; 1 S. W. 573; *Miller v. Board of Supervisors* (Miss.), 7 So. Rep. 429; *Curtis v. Board of Education*, 43 Kan. 138, 23 Pac. Rep. 98; *Watterson v. Ury*, 5 Ohio C. C. 347. For a condition held to be enforceable against a beneficiary, who took with knowledge thereof, see *Medical Est. of N. Y. v. N. Y. University*, 78 N. Y. S. 673, 76 App. Div. 48.

⁶⁰ 1 Prest. Est. 129; Co. Lit. 203 b; *Mary Portington's Case*, 10 Rep. 42; *Chapin v. Harris*, 8 Allen, 594; *Ashley v. Warner*, 11 Gray, 43; *Owen v. Fields*, 102 Mass. 105; *Miller v. Levi*, 44 N. Y. 489; *Henderson v. Hunter*, 59 Pa. St. 340; *Herrick's Estate*, 59 Hun, 616.

⁶¹ 2 Bla. Com. 155; 1 Prest. Est. 456; 2 Washburn on Real Prop 23, 26; *Fifty Associates v. Howland*, 11 Metc. 102; *Proprietors, etc., v. Grant*, 3 Gray, 142; *Attorney-General v. Merrimack Co.*, 14 Gray, 612;

conditional limitation is an estate limited to take effect upon the happening of the contingency, and which takes the place of the estate which is determined by such contingency. Some authors, among others, Mr. Washburn, have used the terms conditional limitations and limitations interchangeably, referring in both instances to the estate which is determined by the happening of the event.⁶² But it appears to be the better method to apply the term *conditional limitation* to the estate which takes effect, and *limitation* to the estate which is determined.⁶³ A conditional limitation is an estate limited to take effect after the determination of an estate, which in the absence of a limitation over would have been an estate upon condition. Strictly speaking, a conditional limitation cannot be limited after an estate upon limitation, except where the contingency which constitutes the limitation, is not sure to happen and the estate is a fee upon limitation. Thus in a grant to A. during widowhood, and upon her marriage to B., A.'s estate would be an estate upon limitation, and consequently B.'s estate would be a good common-law remainder.⁶⁴ Using the term *conditional limitation* as indicating a future estate which is to take effect in derogation of a preceding limitation, it may be stated here in general terms, to be more clearly explained in subsequent pages, that

Owen v. Field, 102 Mass. 105; Miller v. Levi, 44 N. Y. 489; Wheeler v. Walker, 2 Conn. 196; Henderson v. Huntington, 59 Pa. St. 340.

⁶² 2 Washburn on Real Prop. 23, 26.

⁶³ Mr. Washburn quotes from Watkins on Conveyancing, to this effect: "Between a condition and a conditional limitation there is this difference: a condition respects a destruction and determination of an estate; a conditional limitation relates to the commencement of a new one. A condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger." Watkins, Convey. 204. There can be no limitation of a fee, after a fee, in North Carolina, and where such a provision is attempted the grantee of the estate, takes a fee-simple estate. Gray v. Hawkins, 133 N. C. 1, 45 S. E. Rep. 363.

⁶⁴ 2 Washburn on Real Prop. 563; Fearn Cont. Rem. 5, 10. See post, Sec. 307.

it was unknown to the common law. The only common-law future estate, which can be created by the same deed with a prior limitation, is a remainder, and as a remainder cannot be limited, which takes effect in derogation of the preceding estate, conditional limitations are not recognized by the common law. They can only be created as a shifting use, or an executory devise.⁶⁵

⁶⁵ 2 Washburn on Real Prop. 26, 28; 4 Kent's Com. 128; 1 Prest. Est. 50. See *post*, Secs. 298, 313, 391, 392. The common law rule that a conveyance vesting title in one person on the death of another, "without issue of his body," at his death, under most statutes is changed so that the words of limitation are held to mean, "issue living at his death" and instead of a fee tail, at common law, the grantee takes a fee-simple, and the limitation over is conditional on the death of the first taker without living heirs. *Middlesex Bank v. Field* (Miss. 1904), 37 So. Rep. 139; *Yocum v. Siler*, 160 Mo. 297; *Black v. Webb* (Ark. 1904), 80 S. W. Rep. 367.

CHAPTER XI.

MORTGAGES.

- SECTION I. *Nature and Classification of Mortgages.*
II. *The Rights and Liabilities of Mortgagors and Mortgagees.*
III. *Remedies and Remedial Rights incident to a Mortgage.*

SECTION I.

NATURE AND CLASSIFICATION OF MORTGAGES.

- SECTION 212. Definition.
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236. The mortgage debt.

237. Mortgages for the support of the mortgagee.

238. What may be mortgaged.

§ 212. Definition.—A mortgage is an interest in lands, given to secure the payment of a sum of money or money's equivalent. It incumbers the title of the land and enables the creditor or obligee to satisfy his claim by a sale of the land, or by a forfeiture of the land to the mortgagee. Before explaining the character and incidents of the common-law mortgage, which will constitute the principal subject of the present chapter, reference will be made to several kinds of incumbrances upon land, which, although generally called mortgages, are not strictly such. The first of these is the—

§ 213. Mortgage by deposit of title deeds.—This is an ancient security for debt, which at one time was in general use in England, and even now is employed there to some extent. The deposit of the title deeds of a tract of land with the creditor secured to him in equity a lien upon the land for the amount of the debt. It was looked upon in equity as an agreement to execute a mortgage which would be enforced against the depositor and all other persons claiming under him, except subsequent purchasers and incumbrancers for value and without notice.¹ Although it has been strongly objected to, as violating the Statute of Frauds, it is now definitely settled in England that the mortgage by deposit of title deeds does not come within the operation of the statute.²

¹ Story's Eq. Jur., Sec. 1020; 2 Washburn on Real Prop. 83; 4 Kent's Com. 150, 115; Russell v. Russell, 1 Bro. C. C. 269; *Ex parte* Langstone, 17 Ves. 230; Pain v. Smith, 2 Myl. & K. 417; Mandeville v. Welch, 5 Wheat. 277; Roberts v. Craft, 24 Beav. 223; Edge v. Worthington, Cox, 211; *Ex parte* Corning, 9 Ves. Jr. 115; Carey v. Rawson, 8 Mass. 159; Jarvis v. Dutcher, 16 Wis. 307.

² Whitebread, *ex parte*, 19 Ves. 209; Haigh, *ex parte*, 11 Ves. 403; *Ex parte* Hooper, 19 Ves. 477; Norris v. Wilkinson, 19 Ves. 192; Russell v. Russell, 1 Bro. C. C. 269. In Pennsylvania, a written agreement must accompany the deposit of the title deeds, in order that the transaction may create a mortgage. Luch's Appeal, 44 Pa. St. 519;

The mere possession by the creditor of the debtor's muniments of title will not raise for the former a lien upon the land. They must have been deposited with him with the express intention of providing a lien, in order that the possession may have that effect.³ But it is not necessary that all the title deeds in the chain of title should be deposited. A single title deed would be sufficient as against the depositor, and it would only be invalid as to those, who were fairly misled by the fact that the mortgagor or depositor was in possession of the other deed.⁴ And as against the mortgagor and all others claiming under him with notice, the mere agreement to deposit the title-deeds as security would suffice to make the debt an equitable charge upon the estate, if it be evidenced by some writing.⁵

Edwards v. Trumbull, 50 Pa. St. 509. "The plaintiffs brought suit on an agreement reciting that defendants had assigned to them a mortgage and certain policies of insurance to secure a loan, with the agreement on plaintiff's part to reassign, if the loan was paid within a year. Defendants authorized plaintiffs, if the loan was not so paid, to realize a surrender value of the policies, and sell the mortgage, the proceeds to be applied on the debt; and, if the sum realized was insufficient to pay the debt in full; defendants agreed to pay any deficiency. It was held that plaintiffs could not sue to recover the full amount without first attempting to realize on the collateral." *Klee v. Trumbull* (Pa.), 60 Atl. Rep. 157.

³ *Norris v. Wilkinson*, 12 Ves. 162; *Bozon v. Williams*, 3 Y. & J. 150; *James v. Rice*, 23 Eng. L. & E. 567; *Chapman v. Chapman*, 3 Eng. L. & E. 70; *s. c.* 13 Beav. 308; *Ex parte Bruce*, 1 Rose, 374; *Ex parte Wright*, 19 Ves. 258; *Ex parte Langston*, 17 Ves. 227; *Lucas v. Darren*, 7 Taunt. 278; *Mandeville v. Welch*, 5 Wheat. 277; *Story's Eq. Jur.*, Sec. 1020. If the intention is declared by a memorandum in writing, it cannot be controlled by parol evidence. *Ex parte Coombe*, 17 Ves. 369; *Baynard v. Woolley*, 20 Beav. 583.

⁴ *Ex parte Chippendale*, 2 Mont. & A. 299; *Ex parte Wetherall*, 11 Ves. 398; *Lacon v. Allen*, 3 Drew, 582; *Roberts v. Crofty*, 24 Beav. 253; *s. c.* De G. & J. 1.

⁵ *Edwards, ex parte*, 1 Deac. 611, 4 Kent's Com. 151. An assignment of a lease, to secure a debt, is held to be a mortgage, in *Massachusetts*. *Providence Steamboat Co. v. Fall River I. Co.*, 187 Mass. 45, 72 N. E. Rep. 338.

§ 214. Continued — Notice to subsequent purchasers.— If the subsequent purchaser for value has received no notice of the existence of this equitable mortgage, it cannot be enforced against him and the land in his hands. What will be sufficient notice to such a purchaser would depend upon the circumstances of each particular case. In England, where there is no registration law, and the purchaser is accustomed to depend upon the original title deeds in investigating the title to lands, the absence of these deeds or of any of them would constitute sufficient notice to put the purchaser on his inquiry. But the burden of proof is on the equitable mortgagee to show that the purchaser has received notice of the mortgage.⁶ In this country, however, where all deeds of conveyance are required to be recorded, in order to give constructive notice to subsequent purchasers, actual notice of the deposit of the deeds must be brought to such purchasers, in order to bind the land in their hands. The purchaser in this country is not required to look beyond the record for the evidences of title.⁷

§ 215. Continued — Their recognition in this country.— The equitable mortgage by deposit of title deeds is recognized in some of the States of this country, but in view of the general prevalence of the recording law, it is at best a very inefficacious kind of security. It can never be relied upon; and is rarely, if ever at the present day, met with in practice. Its value as a security is destroyed, as soon as the land has been sold or mortgaged to one having no actual

⁶ *Herrick v. Atwood*, 25 Beav. 212; *Coyler v. Finch*, 5 H. L. Cas. 924; *Ex parte Hardy*, 2 Deac. & C. 363; *Hiern v. Mill*, 13 Ves. 114; *Hewitt v. Loosemore*, 9 Eng. L. & E. 35; *Story's Eq. Jur.*, Sec. 1020; *Jones, Mortg.*, Sec. 179; *Ex parte Whitebread*, 19 Ves. 209; *Ex parte Wright*, 19 Ves. 255.

⁷ *Story's Eq. Jur.*, Sec. 1020; *Jones, Mortg.*, Sec. 179; *Hall v. McDuff*, 24 Me. 311; *Whitworth v. Gangain*, 3 Hare 416; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. 604; *Luch's Appeal*, 44 Pa. St. 522; *Edwards v. Trumbull*, 50 Pa. St. 612; *Probasco v. Johnson*, 2 Disney 96.

notice of the deposit. And it being a purely equitable interest, not even an equitable estate, the mortgagee cannot have any instrument of notice recorded for the purpose of giving constructive notice of its existence. The mortgage is, however, recognized in Maine, Rhode Island, New York, New Jersey, South Carolina, Georgia, Wisconsin, and in the United States Courts.* While in Pennsylvania, Vermont, Kentucky, Missouri, Ohio and Tennessee, the doctrine has been repudiated.†

§ 216. Continued — Foreclosure.— Since the mortgage by deposit of title deeds is only an equitable lien, it can be enforced only in a court of equity, and it is a matter of doubt in the English courts, whether the decree should be for foreclosure, or simply direct a sale of the premises, and the ap-

* Hall v. McDuff, 24 Me. 311; Hackett v. Reynolds, 4 R. I. 512; Rockwell v. Hobby, 2 Sandf. Ch. 9; Stoddard v. Hart, 23 N. Y. 561; Mounce v. Byars, 16 Ga. 469; Williams v. Stratton, 10 Smed. & M. 418; Welsh v. Usher, 2 Hill (S. C.) 166-170; Mandeville v. Welch, 5 Wheat. 277; Rockwell v. Hobby, 2 Sandf. Ch. 9; Griffin v. Griffin, 18 N. J. Eq. 104; Welsh v. Usher, 2 Hill Ch. 167, 170, per Harper J.; Williams v. Stratton, 10 Sm. & Mar. 418, 426; First Nat. Bk. v. Caldwell, 4 Dillon, 314.

† Shitz v. Dieffenbach, 3 Pa. St. 233; Strauss' Appeal, 49 Pa. St. 258; Van Meter v. McFaddin, 8 B. Mon. 438; Meador v. Meador, 3 Heisk. 562; Gothard v. Flynn, 25 Miss. 58. But compare *contra*, Williams v. Stratton, 10 Sm. & Mar. 418; Thomas' Appeal, 30 Pa. St. 378; Edwards' Exrs. v. Trumbull, 50 Pa. St. 509; Bowers v. Oyster, 3 P. & W. 239. But in Pennsylvania, if the deposit is accompanied by an instrument, declaring the purpose of the deposit it will be a good, equitable mortgage. Luch's Appeal, 44 Pa. St. 522; Edwards v. Trumbull, 56 Pa. St. 512. For validity of assignment of equitable mortgage from deposit of school-land certificates, see Mowrey v. Wood, 12 Wis. 413. And generally, on this subject, see 10 Am. & Eng. Dec. in Equity, p. 665. The doctrine that a deposit of title deeds constitutes a mortgage is equity, is repudiated, in Missouri, as it is asserted that such a doctrine would be in conflict with the universally recognized system of public registration and the statute of frauds. Hackett v. Watts, 138 Mo. 502. See also, Meador v. Meador, 3 Heisk. (Tenn.) 562; Gothard v. Flynn, 25 Miss. 58; Shitz v. Diefenbach, 3 Pa. St. 233; Van Meter v. McFaddin, 8 B. Mon. (Ky.) 438. For recognition of equitable mortgage in New York, see, Matthew v. Dernonnell, 89 N. Y. S. 493.

plication of the proceeds to the liquidation of the debt. But the later English cases hold that the mortgagee of such a mortgage has the same rights of foreclosure as any other mortgagee.¹⁰

§ 217. **Vendor's lien.**— This is also an equitable lien recognized in favor of the vendor as a security for the purchase-money. It is founded on the equitable theory that, until the payment of the purchase-money, the vendee holds the land as trustee of the vendor for the purpose of a security. No agreement is necessary for its creation; it is presumed to exist until the contrary is shown.¹¹ This lien has been generally recognized in the States of this country,¹² but it has

¹⁰ *Backhouse v. Charlton*, L. R. 8 Ch. D. 444; *Carter v. Wake*, L. R. 4 Ch. D. 605; *James v. James*, L. R. 16 Eq. 153; *Pryce v. Bury*, L. R. 16 Eq. 153 n.; *Adams Eq.* 125; *Pain v. Smith*, 2 M. & K. 417; *Brocklehurst v. Jessop*, 7 Sim. 438; *Price v. Carver*, 3 M. & C. 157; *Lister v. Turner*, 5 Hare 281; *Tuckley v. Thompson*, 1 Johns. & H. 126; *James v. James*, L. R. 16 Eq. 153; *Redmagne v. Forster*, L. R. 4 Eq. 467. In *Jarvis v. Dutcher*, 16 Wis. 307, it was held that the decree should be for a sale of the premises. See to the same effect, *Hackett v. Reynolds*, 4 R. I. 512; *Mowry v. Wood*, 12 Wis. 413.

¹¹ *Walker Am. Law*, 366; *Mackreth v. Symmons*, 15 Ves. 339; *Chapman v. Tanner*, 1 Vern. 267; *Blackburn v. Gregson*, 1 Bro. C. C. 420; *Payne v. Atterbury*, Harr. (Mich.) 414; *Warren v. Fenn*, 28 Barb. 334; *Wilson v. Lyon*, 51 Ill. 166; *Truebody v. Jacobson*, 2 Cal. 269; *Dodge v. Evans*, 43 Miss. 570; *Schnebley v. Ragan*, 7 Gill & J. 120; *Ahrend v. Odiorne*, 118 Mass. 266; *Cowfelt v. Bower*, 7 Serg. & R. 64; *Story's Eq. Jr.*, Sec. 1217; *Moreton v. Harrison*, 1 Bland. Ch. 491; *Iglehart v. Armiger*, 1 Bland. Ch. 519, 524, 525, 2 *Story's Eq. Jur.*, Secs. 1218 et seq. 1217; *Snell's Eq.* 136 (5 ed.); *Perry on Trusts*, Secs. 231, 232; *Ringgold v. Bryan*, 3 Md. Ch. 488.

See in Alabama, Arkansas, California, Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Tennessee, Texas, Wisconsin. *Haley v. Bennett*, 5 Port. 452; *Pylant v. Reeves*, 53 Ala. 132; *Thames v. Caldwell*, 60 *Id.* 644; *Blankhead v. Owen*, 60 *Id.* 457; *Bizzell v. Nix*, 60 *Id.* 281; *Roper v. McCook*, 7 Ala. 318; *Thurman v. Stoddard*, 63 *Id.* 336; *Chapman v. Lee*, 64 *Id.* 483; *Carver v. Eads*, 65 *Id.* 190; *Shall v. Ciscoe*, 18 Ark. 142; *Harris v. Hanie*, 37 *Id.* 348; *Salmon v. Hoffman*, 2 Cal. 138; *Gallagher v. Mars*, 50 *Id.* 23; *Wells*

been denied or left in doubt in some.¹³ The decisions differ

v. Harter, 56 *Id.* 342; *Francis v. Wells*, 2 *Col.* 660; *Ford v. Smith*, 1 *McArthur* 592; *Bradford v. Marvin*, 2 *Flor.* 463; *Woods v. Bailey*, 3 *Id.* 41; *Keith v. Horner*, 42 *Ill.* 524; *Henson v. Westcott*, 82 *Id.* 224; *Small v. Stagg*, 95 *Id.* 39; *Manning v. Frazier*, 96 *Id.* 279; *Yayan v. Shriner*, 26 *Ind.* 364; *Anderson v. Donnell*, 66 *Id.* 150; *Higgins v. Kendall*, 73 *Id.* 522; *Richards v. McPherson*, 74 *Id.* 158; *Lagow v. Badollet*, 1 *Blackf.* 416; *Deibler v. Barwick*, 4 *Id.* 339; *Tinsley v. Tinsley*, 52 *Iowa* 14; *Stuart v. Harrison*, 52 *Id.* 511; *Tiernan v. Thurman*, 14 *B. Mon.* 277, 284; *Gritton v. McDonald*, 3 *Metc.* 252; *Burrus v. Roulhac's Admx.*, 2 *Bush* 39; *Phillips v. Skinner*, 6 *Bush* 662; *Fowler v. Heirs of Rust*, 2 *A. K. Marsh* 284; *Thornton v. Knox's Exr.*, 6 *B. Mon.* 74; *Muir v. Cross*, 10 *Id.* 277; *Magruder v. Peter*, 11 *Gill & J.* 217; *Repp v. Repp*, 12 *Id.* 341; *Carr v. Hobbs*, 11 *Md.* 285; *Hummer v. Schott*, 21 *Id.* 307; *Moreton v. Harrison*, 1 *Bland Ch.* 491; *White v. Casenave's Heirs*, 1 *Har. & J.* 106; *Ghiselin v. Fergusson*, 4 *Id.* 522; *Pratt v. Vanwyck's Exrs.*, 6 *Gill & J.* 495; *Payne v. Avery*, 21 *Mich.* 524; *Palmer v. Sterling*, 41 *Id.* 218; *Hiscock v. Norton*, 42 *Id.* 320; *Daughaday v. Paine*, 6 *Minn.* 306; *Dawson v. Girard L. Ins. Co.*, 27 *Minn.* 411; *Dodge v. Evans*, 43 *Miss.* 570; *Perkins v. Gibson*, 51 *Miss.* 699; *Tucker v. Hadley*, 52 *Id.* 414; *McLain v. Thompson*, 52 *Id.* 418; *Walton v. Hargroves*, 42 *Id.* 18; *Stewart v. Ives*, 1 *Sm. & Mar.* 197; *March v. Turner*, 4 *Mo.* 253; *Stevens v. Rainwater*, 4 *Mo. App.* 292; *Davenport v. Murray*, 68 *Mo.* 198; *Pearl v. Hervey*, 70 *Id.* 160; *Armstrong v. Ross*, 20 *N. J. Eq.* 109; *Warren v. Fenn*, 28 *Barb.* 333; *Dubois v. Hull*, 43 *Id.* 26; *Smith v. Smith*, 9 *Abb. Pr. (N. S.)* 420; *Chase v. Peck*, 21 *N. Y.* 581; *Hazeltine v. Moore*, 21 *Hun* 355; *Stafford v. Van Rensselaer*, 9 *Cow.* 316; *White v. Williams*, 1 *Paige* 502; *Mayham v. Coombs*, 14 *Ohio* 428; *Niel v. Kinney*, 11 *Ohio St.* 58; *Pease v. Kelly*, 3 *Oreg.* 417; *Brown v. Vanlier*, 7 *Humph.* 239; *Ellis v. Temple*, 4 *Coldw.* 315; *Choate v. Tighe*, 10 *Heisk.* 621; *Eskridge v. McClure*, 2 *Yerg.* 84; *Burgess v. Millican*, 50 *Tex.* 397; *Waldrom v. Zacharie*, 54 *Id.* 503; *Robinson v. McWhirter*, 52 *Id.* 201; *Willard v. Reas*, 26 *Wis.* 540; *Madden v. Barnes*, 45 *Id.* 135; *Lavender v. Abbott*, 30 *Ark.* 172; *Neal v. Speigle*, 33 *Id.* 63; *Mayes v. Hendry*, 33 *Id.* 240; *English v. Russell*, *Hempst.* 35; *Kent v. Gerhard*, 12 *R. I.* 92. The vendor's lien for purchase money has been recognized in the following late cases: *Borrer v. Carrier* (*Ind.* 1905), 73 *N. E. Rep.* 123; *Acree v. Stone* (*Ala.* 1904), 37 *So. Rep.* 934; *Dickenson v. Duckworth* (*Ark.* 1905), 85 *S. W. Rep.* 82; *Zieschang v. Helmke* (*Tex.* 1904), 84 *S. W. Rep.* 436; *McNeill v. Cage*, 85 *S. W. Rep.* 57; *Wilson v. Moore* (*Tex.* 1904), 85 *S. W. Rep.* 25; *Ford v. Azill* (*Ky.* 1905), 85 *S. W. Rep.* 217; *Bryson v. Collmer* (*Ind.* 1904), 71 *N. E. Rep.* 229.

¹³ Denied and repudiated in *Kansas*, *Maine*, *Massachusetts*, *North*

as to details, but agree in respect to the general features of such a lien. The vendor's lien is binding upon the vendee, and all persons claiming under him who had notice of the lien or who are not purchasers for value. A volunteer to whom the land is conveyed without consideration, a widow with her dower, and the heirs and devisees, cannot plead the

Carolina, Pennsylvania and South Carolina. *Simpson v. Munde*, 3 Kan. 172; *Greene v. Barbard*, 18 *Id.* 518; *Gilman v. Brown*, 1 Mason 191, 192, 270; *Philbrook v. Delano*, 29 Me. 410, 415; *Ahrend v. Odiorne*, 118 Mass. 216; *Wright v. Dame*, 5 Metc. 603. See, *Mast v. Raper*, 81 N. C. 330; *McKay v. Gillman*, 65 *Id.* 130; *Zentmeyer v. Mittower*, 5 Pa. St. 403; *Kauffelt v. Bower*, 7 S. & R. 64; *Semple v. Burd*, 7 *Id.* 286; *Megargel v. Saul*, 3 Whart. 19; *Bear v. Whistler*, 7 Watts. 144, 147; *Cook v. Trimble*, 9 *Id.* 15; *Hepburn v. Snyder*, 3 Barr 72; *Sprigner v. Walters*, 34 Pa. St. 328; *Heist v. Baker*, 49 *Id.* 99; *Strauss' Appeal*, 49 *Id.* 353; *Wragg v. Comptroller-Gen.*, 2 Desaus 509, 520. Left in doubt in Connecticut, New Hampshire and Rhode Island. *Watson v. Wells*, 5 Conn. 468; *Chapman v. Beardsley*, 31 Conn. 115; *Buntin v. French*, 16 N. H. 592; *Arlin v. Brown*, 44 *Id.* 102; *Perry v. Grant*, 10 R. I. 334; *Kent v. Gerhart*, 12 R. I. 92. While in Georgia, Vermont, Virginia and West Virginia, although upheld judicially, it is now abolished by statute, except that in the last two States, it may be reserved on the face of the deed of conveyance. Ga. Code 1873, Sec. 1997; *Jones v. Jones*, 56 Ga. 325; but see *Drinkwater v. Moreman*, 61 *Id.* 395; *Still v. Mayor*, etc., 27 *Id.* 502, 504; Stat. Laws of 1851, Ch. 47, Gen. Stat. (1862), Ch. 65, Sec. 33; *Manly v. Slason*, 21 Vt. 271, per Redfield, C. J., Code Va. 1873, Ch. 115, Sec. 1; *Wade v. Greenwood*, 2 Robt. 475; *Yancey v. Mauck*, 15 Gratt. 300; *Cole v. Scot*, 2 Wash. 141; *Tompkins v. Mitchell*, 2 Rand. 428; *Redford v. Gibson*, 12 Leigh 338; *Kyles v. Tait's Admr.*, 6 Gratt. 44, W. Va. Code 1870, Ch. 75, Sec. 1; *Hempfield R. R. v. Thornburg*, 1 W. Va. 261. See also, *Bailey v. Greenleaf*, 7 Wheat. 46; *Chilton v. Briaden*, 2 Black 458; *McLean v. McLean*, 10 Pet. 625; *Gilman v. Brown*, 4 Wheat. 254; *s. c.* 1 Mason 191; *McLearn v. Wallace*, 10 Pet. 625, 640; *Galloway v. Finley*, 12 *Id.* 264; *Bush v. Marshall*, 6 How. (U. S.) 284; *Chilton v. Braiden's Admx.*, 2 Black 458; *Cordova v. Hood*, 17 Wall. 1, 5. A vendee in possession of land holds it charged with an equitable lien for the unpaid purchase price, in Indiana. *Borrer v. Carrier* (1905), 73 N. E. Rep. 123. The existence of the vendor's lien does not depend upon the transfer of a perfect legal title, but any conveyance which is affected is sufficient to create a lien for the unpaid purchase price. *Mully v. Karroll* (Ind. 1903), 68 N. E. Rep. 689; *Halvorsen v. Halvorsen*, 97 N. W. Rep. 494.

want of notice as a defense.¹⁴ The decisions, however, are not uniform in determining to what extent the vendor's lien will be enforced against creditors of the purchaser, who are not charged with notice. It is certain that it will prevail against an assignment for the benefit of creditors, if the vendor enforces his lien by filing a bill in equity, before the assignee executes the trust.¹⁵ But where the conveyance is direct to the creditor, or the land is attached under levy of execution issued upon a judgment against the vendee, the courts generally hold that the lien will not prevail.¹⁶ It is

¹⁴ *Pintard v. Goodloe*, 1 Hempst. 527; *Webb v. Robinson*, 14 Ga. 16; *Garson v. Green*, 1 Johns. Ch. 308; *Upshaw v. Hargrove*, 8 Smed. & M. 286; *Crane v. Palmer*, 8 Blackf. 12; *Williams v. Wood*, 1 Humph. 408; *Besland v. Hewitt*, 11 Smed. & M. 164; *Ellicott v. Welch*, 2 Bland 242; *Warner v. Van Alstyne*, 3 Paige Ch. 513; *Newton v. McLean*, 41 Barb. 285; *Cole v. Scott*, 2 Wash. (Va.) 141; *Bayley v. Greenleaf*, 7 Wheat. 46; *Duval v. Bibb*, 4 Hen. & M. 113; *Shirley v. Sugar Refin. Co.*, 2 Edw. Ch. 505, 1 Eq. Lead. Cas. 477-481; *Graves v. Coutant*, 31 N. J. Eq. 763; *Simpson v. McAllister*, 56 Ala. 228; *Stafford v. Van Rensselaer*, 9 Cow. 316; *Magruder v. Peter*, 11 Gill & J. 217; *Tucker v. Hadley*, 52 Miss. 414; *McLain v. Thompson*, 52 *Id.* 418; *Pylant v. Reeves*, 53 Ala. 132; *Carver v. Eads*, 65 *Id.* 190; *Higgins v. Kendall*, 73 Ind. 522; *Mast v. Raper*, 81 N. C. 330; *Whetsel v. Roberts*, 31 Ohio St. 503; *Swan v. Benson*, 31 Ark. 728; *Dagger v. Taylor*, 60 Ala. 504; *Burgess v. Green*, 64 *Id.* 509; *Thurman v. Stoddard*, 63 *Id.* 336; *Russell v. Dodson*, 6 Baxt. 16; *Robinson v. McWhirter*, 52 Tex. 201; *Dugger v. Taylor*, 60 Ala. 504; *Fisk v. Potter*, 2 Abb. App. Dec. 138. The vendor's lien is generally good against a married woman's dower interest (*Bryson v. Collmer* (Ind. 1904), 71 N. E. Rep. 229), and all others, except bona fide purchasers. *Bryson v. Collmer*, *supra*; *Flanagan Est. v. Land Co.* (Ore. 1904), 77 Pac. Rep. 485.

¹⁵ *Brown v. Vanlier*, 7 Humph. 239; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 505; *Repp v. Repp*, 12 Gill & J. 341; *Truebody v. Jacobson*, 2 Cal. 269; *Pearce v. Foreman*, 29 Ark. 563; *Green v. Demoss*, 10 Humph. 371; *Walton v. Hargroves*, 42 Miss. 18; *Warren v. Fenn*, 28 Barb. 333; *Corlies v. Howland*, 26 N. J. Eq. 311; *Bowles v. Rogers*, 6 Ves. 95.

¹⁶ *Bayley v. Greenleaf*, 7 Wheat. 46; *Aldridge v. Dunn*, 7 Blackf. 249; *Taylor v. Baldwin*, 10 Barb. 626; *Gaun v. Chester*, 5 Yerg. 205; *Roberts v. Rose*, 2 Humph. 145; *Roberts v. Salisbury*, 3 Gill & J. 425; *Cook v. Banker*, 50 N. Y. 655; *Johnson v. Cawthorne*, 1 Dev. & B. Eq. 32;

also very doubtful whether a subsequent judgment creditor of the grantee can claim priority for his lien over the purchased land, or whether the grantor's lien can be enforced against such judgment creditor. The courts differ on this question, some holding that the judgment-lien has priority,¹⁷ while other courts give priority to the grantor's lien.¹⁸ In respect to what constitutes notice of the vendor's lien, it may be stated that any notice, which is sufficient to put a reasonable man upon his inquiry will charge the purchaser with knowledge of the existence of the lien. Thus the vendor's possession, or a recital in the deed that the consideration has not been paid, would be sufficient notice to bind the land in the purchaser's hands.¹⁹

Adams v. Buchanan, 49 Mo. 64; *Allen v. Loring*, 34 Iowa 499; *Porter v. City of Dubuque*, 20 Iowa 440.

¹⁷ *Hulett v. Whipple*, 58 Barb. 224; *Cook v. Kraft*, 3 Lans. 512; *Johnson v. Cawthorne*, 1 Dev. & Bat. Eq. 32; *Roberts v. Rose*, 2 Humph. 145, 147; *Gann v. Chester*, 5 Yerg. 205; *Allen v. Loring*, 34 Iowa 499; *Dawson v. Girard L. Ins. Co.*, 27 Minn. 411; *Bayley v. Greenleaf*, 7 Wheat. 46; *Cook v. Banker*, 50 N. Y. 655; *Robinson v. Williams*, 22 *Id.* 380. When the existence of the lien appears from the recorded deed of the vendee, a subsequent purchaser is bound by it, the same as the original purchaser. *North v. Rogers* (Ky. 1904), 78 S. W. Rep. 165. But see, *Fellows v. King*, 78 S. W. Rep. 468.

¹⁸ *Parker v. Kelley*, 10 Sm. & Mar. 184; *Thompson v. McGill*, Freem. Ch. (Miss.) 401; *Lewis v. Caperton's Exr.*, 8 Gratt. 148; *Aldridge v. Dunn*, 7 Blackf. 249; *Lamberton v. Van Voorhis*, 15 Hun. 336; *Tucker v. Hadley*, 52 Miss. 444; *Walton v. Hargroves*, 42 *Id.* 18. A subsequent mortgagee, who knows that part of the purchase price of land is unpaid, takes subject thereto in New Jersey. *Harter v. Brewing Co.*, 64 N. J. Eq. 155, 53 Atl. Rep. 560.

¹⁹ *McSimmons v. Martin*, 14 Texas 318; *Tiernan v. Thurman*, 14 B. Mon. 277; *Honore v. Bakewell*, 6 B. Mon. 67; *Daughady v. Paine*, 6 Minn. 452; *Hopkins v. Garrard*, 6 B. Mon. 66; *Thorpe v. Dunlap*, 4 Heisk. 674; *Frail v. Ellis*, 17 Eng. L. & Eq. 457; *Manly v. Glason*, 21 Vt. 271; *Wilson v. Lyon*, 51 Ill. 166; *Thornton v. Knox*, 6 B. Mon. 74; *Woodward v. Woodward*, 7 B. Mon. 116; *Kilpatrick v. Kilpatrick*, 23 Miss. 124; *Parker v. Foy*, 43 Miss. 260; *McAlpine v. Burnett*, 23 Texas 649; *Cordova v. Hood*, 17 Wall. 1; *Masich v. Shearer*, 49 Ala. 226. See, *King v. Quincy Bank* (Tex. 1902), 69 S. W. Rep. 978; *Edwards v. Anderson*, 71 S. W. Rep. 555; *Worth v. Rogers* (Ky. 1904), 78 S. W. Rep. 165.

§ 218. Continued—Discharge or waiver of the lien.—Since this lien is raised in favor of the vendor on the theory that he is without remedy in a court of law, and the lien is necessary to prevent his incurring the loss of both the land and the purchase-money; if the vendor shows by any act that he does not rely upon the vendor's lien for protection, the land will vest in the vendee, discharged of the lien. The reservation of the lien depends upon the intention of the parties. In the absence of any evidence to the contrary, the law presumes that it was their intention to reserve the lien. This presumption may, however, be rebutted. An express agreement, that the lien shall not be reserved, will, of course, have that effect; and the general rule in all other cases is, that nothing less than the acceptance of some other security will constitute a waiver of the lien.²⁰ Such would be a mortgage or pledge of the same²¹ or other property, or a note with surety or indorser.²² The execution of an invalid mortgage on the same land would not discharge the lien.²³ Nor would a mere change in the form of the vendee's indebtedness, such as the acceptance of the vendee's bond,

²⁰ *Anderson v. Donnell*, 66 Ind. 150; *Clark v. Stilson*, 36 Mich. 482; *Perry v. Grant*, 10 R. I. 334; *Walker v. Carroll*, 65 Ala. 61; *Brown v. Gilman*, 4 Wheat. 255, 290; *Fish v. Howland*, 1 Paige 20, 30.

²¹ *Burgess v. Millican*, 50 Texas 397; *Escher v. Simmons*, 54 *Id.* 269; *Neal v. Speigle*, 33 Ark. 63; *Gaylord v. Knapp*, 15 Hun 87; *Wells v. Harter*, 56 Cal. 342; *Richards v. McPherson*, 74 Ind. 158; *Little v. Brown*, 2 Leigh 353; *Young v. Wood*, 11 B. Mon. 123; *Johnson v. Sugg*, 13 Sm. & Mar. 346. See *contra*, *Armstrong v. Ross*, 20 N. J. Eq. 109; *DeForest v. Holum*, 38 Wis. 516; *Anketel v. Converse*, 17 Ohio St. 11; *Linville v. Savage*, 58 Mo. 248; *Morris v. Pate*, 31 *Id.* 315.

²² *Carrico v. Farmers', etc., Bk.*, 33 Md. 235; *McGonigal v. Plummer*, 30 *Id.* 422; *Campbell v. Henry*, 45 Miss. 326; *Sanders v. McAfee*, 41 Ga. 684; *Baum v. Grisby*, 21 Cal. 172; *Hazeltine v. Moore*, 21 Hun, 355; *Durette v. Briggs*, 47 Md. 356; *Durham v. Heirs of Daugherty*, 30 La. Ann. pt. 2, 1255; *Haskell v. Scott*, 56 Ind. 564. The acceptance of the note from the father of a minor grantee, is not a waiver of the vendor's lien, in Alabama. *Acree v. Stone* (1904), 37 So. Rep. 934.

²³ *Fouch v. Wilson*, 60 Ind. 64; *Camden v. Vail*, 23 Cal. 633; *Kent v. Gerhard*, 12 R. I. 92; *Martin v. Cauble*, 72 Ind. 67. A conveyance

note, or check,²⁴ unless the parties expressly agree or it is provided by law that such change in the form of indebtedness will operate as an actual payment of the consideration.²⁵ And, on the other hand, if the parties expressly agree or intend that the vendor's lien shall be retained notwithstanding additional security is given, the lien will not be discharged by the receipt of such security.²⁶

§ 219. Continued—In whose favor raised.—It is doubtful if any one but the vendor and his heirs can claim the benefit of this lien. It certainly does not inure to a third person, who pays the consideration at the request of the purchaser.²⁷ And whether it is assignable with the vendor's

from a vendee to the vendor, in satisfaction of the lien, will generally discharge the lien and the debt for which it is given. *Austin v. Lauderdale* (Tex. 1904), 83 S. W. Rep. 413. See also, *McCord v. Hames*, 85 S. W. Rep. 504.

²⁴ *Brinkerhoff v. Vansciven*, 3 Green Ch. 251; *Thornton v. Knox's Exr.*, 6 B. Mon. 74; *Aldridge v. Dunn*, 7 Blackf. 249; *Baum v. Grigsby*, 21 Cal. 172; *White v. Williams*, 1 Paige, 502; *Garson v. Green*, 1 Johns. Ch. 308; *Warren v. Fenn*, 28 Barb. 333; *Vandoren v. Todd*, 2 Green Ch. 397; *Flinn v. Barber*, 61 Ala. 530; *Bizzell v. Nix*, 60 *Id.* 281; *Chapman v. Lee*, 64 *Id.* 483; *Shorter v. Frazer*, 64 *Id.* 74.

²⁵ *Keith v. Wolf*, 5 Bush, 646; *Thames v. Caldwell*, 60 Ala. 644; *Moshier v. Meek*, 80 Ill. 79; *Ogden v. Thornton*, 30 N. J. Eq. 569; *Simpson v. McAllister*, 56 Ala. 228; *Shorter v. Frazer*, 64 *Id.* 74; *Lavender v. Abbott*, 30 Ark. 172; *Corlies v. Howland*, 26 N. J. Eq. 311; *Nichols v. Glover*, 41 Ind. 24; *Walton v. Hargroves*, 42 Miss. 18; *Dodge v. Evans*, 43 *Id.* 570; *Kent v. Gerhard*, 12 R. I. 92; *Dibrell v. Smith*, 49 Tex. 474; *Irvin v. Garner*, 50 *Id.* 48; *Madden v. Barnes*, 45 Wis. 135; *Moore v. Worthy*, 56 Ala. 163; *Graves v. Coutant*, 31 N. J. Eq. 763; *Ball v. Hill*, 48 Tex. 634; *Waldrom v. Zacharie*, 54 *Id.* 503.

²⁶ *Mayes v. Hendry*, 33 Ark. 240; *Stroud v. Pace*, 35 *Id.* 100; *De Forest v. Holum*, 38 Wis. 516; *Fonda v. Jones*, 42 Miss. 792; *Sanders v. McAfee*, 41 Ga., 684; *Irvine v. Muse*, 10 Heisk. 477; *Durett v. Briggs*, 47 Mo. 356.

²⁷ *Stansell v. Roberts*, 3 Ohio 148; *Skaggs v. Nelson*, 25 Miss. 88; *Nolte's Appeal*, 45 Pa. St. 361; *Brown v. Budd*, 2 Ind. 442. But see *contra*, where this is done by agreement of all the parties, and a note is given by the grantee to a third person who pays the purchase-money to the grantor. *Campbell v. Roach*, 45 Ala. 667; *Hamilton*

claim for the purchase-money is a matter of great doubt. There are decisions in support of both positions, but the better opinion is, that the lien is personal to the vendor and cannot be assigned, unless the right is expressly reserved by the parties, when it will have all the characteristics of an express lien, and will pass with the assignment.²⁸

v. Gilbert, 2 Heisk. 680; *Mitchell v. Butt*, 45, 162; *Francis v. Wells*, 2 Col. 660; *Perkins v. Gibson*, 51 Miss. 699; *Nichol v. Glover*, 41 Ind. 24; *Latham v. Staples*, 46 Ala. 462. One claiming that his conveyance was voluntary and without any consideration by the grantee, has no equitable lien. *Ostenson v. Severson* (Iowa 1904), 101 N. W. Rep. 789. A third party who loans money to pay for land, has no lien therefor in Arkansas. *Hardin v. Hooks* (1904), 81 S. W. Rep. 386. But see, *Williams v. Rice*, 60 Mich. 102, 26 N. W. Rep. 846; *Charter Oak Co. v. Gisborne*, 5 Utah 319, 15 Pac. Rep. 253; *Carey v. Boyle*, 53 Wis. 574, 11 N. W. Rep. 47. A vendor's lien is not waived, in Missouri, by the execution of a mortgage to secure the purchase money notes. *Hannah v. Davis*, 112 Mo. 599.

²⁸ It is held to be non-assignable in California, Illinois, Iowa, Maryland, Mississippi, Missouri, New York, North Carolina, Ohio, Tennessee. *Carlton v. Buckner*, 28 Ark. 66; *Hutton v. Moore*, 26 Ark. 396; *Ross v. Heintzen*, 36 Cal. 313; *Keith v. Horner*, 32 Ill. 524; *Dickenson v. Chase*, 1 Morris 492; *Moshier v. Meek*, 30 Ill. 79; *Inglehart v. Armiger*, 1 Bland 519; *Pitts v. Parker*, 44 Miss. 247; *Walker v. Williams*, 30 Miss. 165; *White v. Williams*, 1 Paige 502; *Smith v. Smith*, 9 Abb. (N. S.) 420; *Green v. Crockett*, 2 Dev. & B. Eq. 390; *Thorpe v. Dunlap*, 4 Heisk. 674; *Green v. DeMoss*, 10 Humph. 371; *Stratton v. Gold*, 40 Miss. 780; *Norvell v. Johnson*, 5 Humph. 489; *Gann v. Chester*, 5 Yerg. 205; *Sheratz v. Nicodemus*, 7 Yerg. 9; *Briggs v. Hill*, 6 How. (Miss.) 362; *Horton v. Horner*, 14 Ohio 437; *Durant v. Davis*, 10 Heisk. 522; *Tharpe v. Dunlap*, 4 Heisk. 674; *Williams v. Christian*, 23 Ark. 255; *Blevins v. Rogers*, 32 *Id.* 258; *Williams v. Young*, 21 Cal. 227; *Shall v. Stagg*, 95 Ill. 39; *Wing v. Goodman*, 75 *Id.* 159; *Rutland v. Brister*, 53 Miss. 683; *Pearl v. Hervey*, 70 Mo. 160; *White v. Williams*, 1 Paige 502. While in Alabama, Indiana, Kentucky, and Texas the lien is held to be assignable. *Wells v. Morrow*, 38 Ala. 125; *Griggsby v. Hair*, 25 Ala. 327; *Nichols v. Glover*, 41 Ind. 24; *Honore v. Bakewell*, 6 B. Mon. 67; *Ripperdon v. Cozine*, 8 B. Mon. 465; *White v. Downs*, 40 Texas 225; *DeBruhl v. Mass*, 54 *Id.* 464; *Broadwell v. King*, 3 B. Mon. 449. And in some of the States, where it is generally held that the lien is not assignable with the debt, a distinction is made between a transfer by sale of the debt, and a deposit of the debt as security for the vendor's indebtedness. In the latter case it is held that

§ 220. **Vendee's lien.**—Where the vendee has paid any part of the purchase-money on the faith of the contract of sale before a conveyance has been made to him, equity gives him a lien upon the title of the vendor for the amount so advanced, which has all the characteristics of the vendor's lien, and is enforceable in the same way against the vendor and all his privies who have notice.²⁹

the pledgee may assert the vendor's lien in his own behalf. *Carlton v. Buckner*, 28 Ark. 66; *Hallock v. Smith*, 3 Barb. 272; *Crowley v. Riggs*, 24 Ark. 563. The assignment of the note or other instrument of indebtedness of the vendee does not discharge the lien although the lien does not pass to the assignee, as long as the vendor is liable as indorser or guarantor. He may enforce it for his own benefit. *Kelly v. Payne*, 18 Ala. 371; *White v. Williams*, 1 Paige 502; *Lindsey v. Bates*, 42 Miss. 397; *Turner v. Horner*, 29 Ark. 440; *Smith v. Smith*, 9 Abb. Pr. (N. S.) 420. In Missouri, it is held that the assignment of note for purchase money will pass the vendor's lien to the assignee, where the vendor retains the legal title, and has only conditioned for the execution of a deed upon payment of the purchase money. *Adams v. Cowherd*, 30 Mo. 458. A vendor's lien is assignable, like a mortgage, with the debt, in Arkansas and Georgia. *Smith v. Butler* (1904), 80 S. W. Rep. 580; *Ray v. Anderson*, 119 Ga. 926, 47 S. E. Rep. 205. See also, *Dickason v. Fisher*, 137 Mo. 342; *Sloan v. Campbell*, 71 Mo. 387, 3 Pom. Eq. Jur. 1254.

²⁹ *Burgess v. Wheate*, 1 W. Bl. 150; *Mackreth v. Symmons*, 15 Ves. 352; *Payne v. Atterbury*, Harr. Ch. 414; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Lowell v. Middlesex Ins. Co.*, 8 Cush. 127; *Shirley v. Shirley*, 7 Blackf. 452; *Cooper v. Merritt*, 30 Ark. 686; *Stewart v. Wood*, 63 Mo. 252; *Lane v. Ludlow*, 6 Paige 316, note, 2 Story Eq. Jur. Sec. 1216; *Anderson v. Spencer*, 51 Miss. 869; *Hughes v. Hatchett*, 55 Ala. 539; *Lane v. Ludlow*, 2 Paine 591; *Clark v. Jacobs*, 56 How. Pr. 519; *Wright v. Dufield*, 2 Baxt. 218; *Flinn v. Barber*, 64 Ala. 193; *Stewart v. Wood*, 63 Mo. 252; *Cooper v. Merritt*, 30 Ark. 86; *Shirley v. Shirley*, 7 Blackf. 452; *Brown v. East*, 5 Mon. 405, 407. Upon the purchaser's lien and enforcement thereof, see, *Combs Admr. v. Krish* (Ky. 1905), 84 S. W. Rep. 562; *Durham v. Wick*, 210 Pa. 128, 59 Atl. Rep. 824; *Seibel v. Purchase*, 134 Fed. Rep. 484; *Corrough v. Hamill*, 110 Mo. App. 53, 84 S. W. Rep. 96; *Smith v. Lamb*, 26 Ill. 396, 79 Am. Dec. 381; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Fuller v. Hubbard*, 6 Cow. 13, 16 Am. Dec. 439.

§ 221. Enforcement of grantor's, vendor's and vendee's liens.

— Both the vendor's and the vendee's liens are enforced by a bill in equity; and if the debt cannot be liquidated in any other way, the court will order the property to be sold, or so much of it as is necessary, and the proceeds of sale applied to the satisfaction of the debt. But in order that the property might be subjected to the lien, the action must be brought directly for that purpose. It cannot be enforced in any collateral suit.³⁰

§ 222. Mortgage at common law.— A common-law mortgage is a conveyance of an estate in lands upon condition that it will be defeated by the payment of the debt or the performance of the obligation, to secure which the conveyance was made. The conveyance is a security and for that purpose the mortgagee is given a defeasible estate, which is to become absolute upon the failure of the mortgagor to perform the condition. It is a species of estate upon condition subsequent, and

³⁰ *Wilson v. Davisson*, 2 Robt. 384; *Mullikin v. Mullikin*, 1 Bland 538; *Eskridge v. McClure*, 2 Yerg. 84; *Clark v. Bell*, 2 B. Mon. 1; *Payne v. Harrell*, 40 Miss. 498; *Clark v. Hunt*, 3 J. J. Marsh. 558; *Jones v. Conde*, 6 Johns. Ch. 77; *Ely v. Ely*, 6 Gray 439; *Codwise v. Taylor*, 4 Sneed 346; *Burger v. Potter*, 32 Ill. 66; *Milner v. Ramsey*, 48 Ala. 287; *Emison v. Risque*, 9 Bush 24; *Elwards v. Edwards*, 5 Heisk. 123. In some of the States, the lien-holder must exhaust his remedy at law before he can file a suit in equity to enforce his lien. *Roper v. McCook*, 7 Ala. 318; *Battorf v. Conner*, 1 Blackf. 287; *Ford v. Smith*, 1 McArthur 592; *Pratt v. Van Wyck*, 5 Gill & J. 495. In Maryland it has now been changed by statute. Gen. Laws Md. (1860) p. 99. And in other States, the vendor or vendee may enforce his lien although he may have a complete remedy at law. *Bradley v. Bosley*, 1 Barb. Ch. 125; *Duquois v. Hull*, 43 Barb. 26; *Stewart v. Caldwell*, 54 Mo. 536; *Pratt v. Clark*, 57 Mo. 189; *Campbell v. Roach*, 45 Ala. 667; *Richardson v. Baker*, 5 J. J. Marsh. 323; *McCaslin v. The State*, 44 Ind. 151; *Sehorn v. McWhirter*, 6 Baxt. 311, 313; *Church v. Smith*, 39 Wis. 492. See, *Seat v. Knight*, 3 Tenn. Ch. 262; *Bruce v. Tilson*, 25 N. Y. 194. For the necessary parties and for form of decree enforcing lien, see, *Acree v. Strong* (Ala. 1904), 37 So. Rep. 934; *Wilson v. Moore* (Texas 1904), 85 S. W. Rep. 25; *Ford v. Azbell* (Ky. 1905), 85 S. W. Rep. 217; *Brixen v. Jorgensen* (Utah 1904), 78 Pac. Rep. 674.

grew out of the doctrine of those estates.³¹ The common-law mortgage is to be distinguished from two kinds of securities, which once were used quite extensively in Great Britain, viz., *vivum vadium* and the Welsh mortgage.

§ 223. *Vivum vadium*.— This was also an estate granted to the creditor for the purpose of securing the payment of a debt. But it is to be distinguished from the mortgage or *vadium mortuum*, in that the debt was to be satisfied out of the rents and profits of the estate. The grantee in the *vadium vivum* invariably took possession of the premises. Transfer of possession was a necessary incident, whereas, as we shall presently have occasion to observe, the common-law mortgage does not require a change of possession, although it may take place. In the mortgage, also, if the mortgagor fails to discharge his obligation, the title becomes absolute in the mortgagee, while in the *vadium vivum* it never does, but reverts to the grantor, as soon as the grantee shall have paid himself out of the rents and profits of the estate.³²

§ 224. *Welsh mortgage*.— This mortgage was one, in which the distinguishing feature was, that the mortgagee always entered into possession and appropriated the rents and profits of the estate in payment of interest on the debt. The mortgagee could neither compel the mortgagor to pay the principal, nor foreclose the mortgage and acquire the absolute estate. The mortgagor could pay or not as he chose, but until payment of the principal, he could not exercise any of the rights of an owner over the land.³³ Both the *vadium vivum*

³¹ 2 Washburn on Real Prop. 34; 4 Kent's Com. 136; Jones on Mortg., Sec. 4; Williams on Real Prop. 422; Erskine v. Townsend, 2 Mass. 493; Mitchell v. Burnham, 44 Me. 299; Wing v. Cooper, 37 Vt. 179; Lund v. Lund, 1 N. H. 39.

³² Jones on Mortg., Sec. 2; 4 Kent's Com. 137; 2 Bla. Com. 157; Co. Lit. 520.

³³ 4 Kent's Com. 137; Jones on Mortg., Sec. 3; Howell v. Price, 1 P. Wms. 291; Lonquet v. Scawen, 1 Ves. Sr. 402; 2 Washburn on Real Prop. 37. See, O'Neill v. Grab, 39 Hun 566.

and the Welsh mortgage have fallen into disuse, and they are mentioned only as curiosities in legal literature.

§ 225. *Equity of redemption.*— If the mortgagor in a common law mortgage failed to perform the condition at the time stipulated, the estate became absolute in the mortgagee, even though the estate may have been worth much more than the mortgage debt.³⁴ There was no remedy by which the mortgagor could enforce the acceptance of payment after the breach of the condition, even where his failure arose from some accident or unavoidable delay, or where the payment of the debt with interest to date of the tender of payment would do no injury to the mortgagee. This rigorous rule of the common law did not fail to be productive of great injustice in many instances, and like all cases of hardships resulting from the technicality of the common law, it attracted the attention of the Court of Chancery. A long contest ensued between these courts from the time of the *Magna Charta* until the reign of James I, when Chancery acquired jurisdiction over questions arising out of mortgages, and decreed that the mortgagor may become entitled to redeem his estate from the mortgagee, after condition broken, by the payment of the debt and interest; and in the reign of Charles I the law of mortgages was firmly established as a branch of equity jurisprudence.³⁵ This right of the mortgagor to redeem the es-

³⁴ 2 Washburn on Real Prop. 35; 4 Kent's Com. 140; *Fay v. Cheney*, 14 Pick. 399; *Brigham v. Winchester*, 1 Metc. 390; *Goodall's Case*, 5 Rep. 96; *Wade's Case*, 5 Rep. 115; *Jones on Mortg.*, Sec. 11.

³⁵ 1 Spence Eq. Jur. 603; *Jones on Mortg.*, Sec. 6; *How v. Vigures*, 1 Rep. in Ch. 32; *Emanuel College v. Evans*, *Id.* 18; 2 Washb. on Real Prop. 39; *Roscarriek v. Barton*, 1 Ca. in Ch. 217; *Casborne v. Scarfe*, 1 Atk. 603; *Willett v. Winnelly*, 1 Vern. 488; *Price v. Perrie*, 2 Freem. 258. A statute giving a right of redemption, does not apply to a mortgage executed before it went into effect. *Bremen M. & M. Co. v. Bremen* (N. M. 1905), 79 Pac. Rep. 806; *Barnitz v. Beverly*, 169 U. S. 118, 41 L. Ed. 93. Whenever the mortgagee uses his mortgage to acquire the equity of redemption at less than its value, a court of equity will compel a redemption. *Noble v. Graham* (Ala. 1904), 37 So. Rep. 230;

tate after the breach of the condition was recognized only in a court of equity. The legal estate, as viewed from the legal standpoint, was still considered to be absolute in the mortgagee, but discharged of all rights of the mortgagor. The right to redeem was therefore no estate in the land. It was simply an equity, and hence was called the **EQUITY OF REDEMPTION**.

§ 226. **The mortgage in equity.**—As a result of this equitable jurisdiction, mortgages assumed in equity a different character from what they had in law. Equity seized hold of the real intention of the parties, and construed the mortgage to have only the effect of a lien, instead of vesting a defeasible estate in the land. This equitable construction conforms more nearly to the purposes and desired effect of a mortgage. It is given only to secure the payment of a debt, or the performance of some obligation, and its ends are satisfied, if after condition broken means are provided to the mortgagee for satisfying his claim by an appropriation of the land, while in the *interim* his interests are protected against any subsequent conveyance of the land. All this is attained by a lien. Equity, therefore, held the mortgage to be a lien upon the land, and not an estate in it.³⁶

§ 227. **Influence of equity upon the law.**—As soon as equity assumed jurisdiction over mortgages, it began to exert a potent influence over the law in respect to that class of interests, and has in the course of time almost entirely superseded the courts of law in their jurisdiction. This is specially true in

Kakley v. Shelley, 129 Ala. 467, 29 So. Rep. 385; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171.

³⁶ *Headley v. Goundray*, 41 Barb. 282; *Jackson v. Willard*, 4 Johns. 41; *Green v. Hart*, 1 Johns. 580; *Kinna v. Smith*, 2 Green Ch. 14; *Hughes v. Edwards*, 9 Wheat. 500; *Runyan v. Mersereau*, 11 Johns. 534; *Eaton v. Whiting*, 3 Pick. 484; *Whitney v. French*, 25 Vt. 663; *Myers v. White*, 1 Rawle, 353; *Hannah v. Carrington*, 18 Ark. 85; *Matthews v. Wallwyn*, 4 Ves. 118; 4 Kent's Com. 138.

regard to the foreclosure of mortgages. Although in some of the States the common-law foreclosure still prevails in a modified form, yet in most of them, and in England, it has given way to the more practicable and just foreclosure in equity.³⁷ Not only has equity supplanted the jurisdiction of courts of law in respect to foreclosure, but it has everywhere, in England and in this country, produced, through a legislation, judicial and statutory, greater or less influence upon the legal theories in regard to the interests of the mortgagor and the mortgagee. In some of the States the modifications effected by equity are but slight and pertain only to minor details, while the mortgage is still held to be a conveyance of an estate in the land. Such is the law in Maine, Massachusetts, New Hampshire, Connecticut, Rhode Island, Vermont, North Carolina, Mississippi, Alabama, Missouri, Indiana, and Minnesota. In others the mortgage is still considered a conveyance of an interest corresponding to an estate, while the mortgagee possesses in the estate only such rights and remedies as are recognized in a court of equity. The ordinary legal rights of ownership do not attach. Such will be found to be the law in Pennsylvania, South Carolina, Texas, Kentucky, Ohio, Illinois, Iowa, and Wisconsin. This class approximates so nearly to the next class to be mentioned, that in the subsequent discussion of the rights of the mortgagor and mortgagee, they will be treated as constituting one subdivision; so far at least as general rules are concerned. In the last class of States, namely in New York, Georgia and California, the whole common law theory has been repudiated, and the mortgage is construed to be simply a lien upon the land conveying no legal estate, not even after condition broken.³⁸ In South Carolina it has been held that the mort-

³⁷ 2 Washburn on Real Prop. 98; 4 Kent's Com. 181. See *post*, Sec. 272. A mortgagee in possession, in Kansas, can bring a suit to compel the mortgagor to redeem, or to have his mortgage foreclosed. *Henthorn v. Securities Co.*, 79 Pac. Rep. 653.

³⁸ 2 Washburn on Real Prop. 100-108; Jones on Mortg., Secs. 17-60.

gage is so far not an alienation or conveyance of land, as that the word "heirs" is not required to give effect to a mortgage in fee, although words of limitation are still required in that State in conveyances *inter vivos*.³⁹

§ 228. **The form of a mortgage.**—The mortgage consists of a deed, similar in terms to the ordinary deed of conveyance, conveying the estate to the mortgagee, but qualified by a defeasance clause, in which it is provided that the conveyance shall be void, when the condition, usually the payment of money, is performed, and shall become absolute in the mortgagee upon breach of the condition. Generally, any deed which appears upon its face to have been intended as a security for the payment of money, will be construed as a mortgage.⁴⁰ If the instrument does not conform to the legal re-

³⁹ *Bredenburg v. Landrum (s. c.)*, 10 S. E. Rep. 956. There is no conflict between courts of law and equity, in regard to the rights and status of the mortgagor, as courts of law recognize the power of equity, with reference to the mortgagor's rights, and equity follows the law, so far as the rights of the mortgagee are concerned. 3 Pom. Eq. Jur., Sec. 1184; 4 Kent's Com. 160; 2 Tiffany Real Prop., Sec. 507, p. 1168. Mr. Tiffany observes that the recognition of the right of redemption, by the mortgagor, and that the mortgage is but a lien, instead of an estate upon condition, is a distinct advance in legal ideas, and that with time, the crude conception of an estate upon condition will entirely disappear. 2 Tiffany Real Prop., Sec. 507, p. 1169. The trustee, or mortgagee, in Missouri, takes the legal title for the purposes of security for the debt. *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. Rep. 1078.

⁴⁰ Co. Lit. 205 a, *Butler's note* 96; *Hughes v. Edwards*, 9 Wheat. 489; *Morris v. Nixon*, 1 How. 118; *Russell v. Southard*, 12 How. 139; *Bigelow v. Topliff*, 25 Vt. 273; *Steel v. Steel*, 4 Allen 419; *Gilson v. Gilson*, 2 Allen 115; *Parks v. Hall*, 2 Pick. 211; *Nugent v. Riley*, 1 Metc. 117; *Vanderhaize v. Hughes*, 13 N. J. 244; *James v. Morey*, 2 Cow. 246; *Conway v. Alexander*, 7 Cranch 218; *Howe v. Russell*, 36 Me. 115; *Stoever v. Stoever*, 9 Serg. & R. 434; *Mende v. Delaire*, 2 Desau. 564; *Yarborough v. Newell*, 10 Yerg. 376; *Delahay v. McConnell*, 4 Scam. 156; *Flagg v. Mann*, 2 Sumn. 386; *Edington v. Harper*, 3 J. J. Marsh. 353; *Henry v. Davis*, 7 Johns. Ch. 40; *M'Brayer v. Roberts*, 2 Dev. Eq. 75; *Hauser v. Lash*, 2 Dev. & B. Eq. 212; *Clark v. Henry*, 2 Cow. 324; *Cotterell v. Long*, 20 Ohio 464; *Burnside v. Terry*, 45 Ga. 621; *Mason*

quirements for the execution of a deed, as where the seal has been neglected, or the proper number of attesting witnesses is not obtained, the deed will be inoperative as a mortgage at law, and it is believed generally in equity. But in some of the States, such an imperfect mortgage has been treated in equity as imposing a lien upon the land for the benefit of the creditor, which partakes of the same nature as a mortgage by deposit of title deeds.⁴¹ And it has been held that a written agreement for security on certain property will in equity, under the doctrine of equitable conversion, operate as a lien on such property against every one interested therein, who has notice of the agreement.⁴²

v. Moody, 26 Miss. 184; 4 Kent's Com. 461; *Newman v. Samuels*, 17 Iowa 528; *Turner v. Brown*, 82 Mo. App. 30; *Pullis v. Pullis*, 157 Mo. 565, 57 S. W. Rep. 1095. A deed, given to the grantee, as security for his going security, is a mortgage. *Meeker v. Warren* (N. J. Ch. 1904) 57 Atl. Rep. 421. See also, *Morrison v. Jones* (Mont. 1904), 77 Pac. Rep. 507. Any description in a mortgage is generally held to be sufficient if it would put a subsequent purchaser or lien-holder, upon inquiry. *Bray v. Ellison* (Ky. 1904), 83 S. W. Rep. 96; *Fields v. Fish et al.* (Ky. 1904), 82 S. W. Rep. 376; *Scott v. Gordon*, 109 Mo. App. 695, 83 S. W. Rep. 550.

⁴¹ *Coe v. Columbia, etc., R. R. Co.*, 10 Ohio St. 372; *Price v. Cutts*, 29 Ga. 142-148; *McQuie v. Rag*, 58 Mo. 56; *McClurg v. Phillips*, 57 Mo. 214; *Burnside v. Wayman*, 48 Mo. 356; *Harrington v. Fortner*, 58 Mo. 468; *Dunn v. Raley*, 58 Mo. 134; *Lake v. Doud*, 10 Ohio, 515; *Abbott v. Godfroy*, 1 Mann. (Mich.) 198; *Black v. Gregg*, 58 Mo. 565; *Brown v. Brown*, 103 Ind. 23; *Bullock v. Whipp*, 15 R. D. 195; *Watkins v. Vrooman*, 51 Hun 175; *Bell v. Pelt*, 51 Ark. 433; *Westerly Sav. Bank v. Stillman Mfg. Co.* (R. I.), 17 Atl. Rep. 918.

⁴² *Gest v. Packwood*, 39 Fed. Rep. 525; *Watkins v. Vrooman*, 51 Hun 175. Any writing charging a debt on property, although not a formal mortgage, is generally held to be a good mortgage thereon, in equity. *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. Rep. 909; *Feely v. Bryan* (W. Va. 1904), 47 S. E. Rep. 307; *Wenzel v. Weigand* (Minn. 1904), 99 N. W. Rep. 633; *Potter v. Kimball*, 186 Mass. 120, 71 N. E. Rep. 308. The court will decree an agreement to execute a mortgage, long past due, an equitable mortgage, in Indiana. *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. Rep. 535. And after the recording or notice of an equitable mortgage, it imparts notice, the same as any other mortgage, and the rights of the parties are determined accordingly. *Mathew*

§ 229. **Execution of the defeasance.**—The defeasance clause is usually found in the same deed which conveys the estate, but this is not necessary. It may be contained in a separate instrument executed and delivered by the grantee or mortgagee to the grantor or mortgagor. In such a case, however, the instrument must be under seal, in order to have at law the power of converting the apparently absolute deed of conveyance into a mortgage.⁴³ It must either be executed at the same time or subsequently in pursuance of an agreement entered into at the time of conveyance.⁴⁴ And as a general rule, although it is not necessary that the deed and the defeasance should bear the same date or be executed at the same time, they must be delivered at the same time. Delivery of the defeasance is essential to its full legal operation.⁴⁵ In

v. Damainville, 89 N. Y. S. 493. A written assignment of a contract for a deed, is an equitable mortgage, in Missouri. *Hackett v. Watts*, 138 Mo. 502. An agreement by the owner of an equity of redemption, in consideration of the stay of foreclosure proceedings, to execute a bond and mortgage, on certain property is held, in New York, to amount to an equitable mortgage thereon. *Matthew v. Damainville*, 89 N. Y. S. 493.

⁴³ *Bodwell v. Webster*, 13 Pick. 411; *Adams v. Stevens*, 49 Me. 362; *Warren v. Lovis*, 53 Me. 464; *French v. Sturdivant*, 8 Greenl. 246; *Dey v. Dunham*, 2 Johns. Ch. 191; *Baker v. Wind*, 1 Ves. sr. 160; *Perkins v. Dibble*, 10 Ohio 433; *Lane v. Shears*, 1 Wend. 433; *Stoeve v. Stoeve*, 9 Serg. & R. 434; *Houser v. Lamont*, 55 Pa. St. 311; *Sharkey v. Sharkey*, 47 Mo. 543; *Clark v. Lyon*, 46 Ga. 203; *Robinson v. Willoughby*, 65 N. C. 520; *Archambau v. Green*, 21 Minn. 520; *Freeman v. Baldwin*, 13 Ala. 246; *Edington v. Harper*, 3 J. J. Marsh. 353; *Hammonds v. Hopkins*, 3 Yerg. 525; *Clark v. Henry*, 2 Cow. 324.

⁴⁴ *Jeffrey v. Hursh*, 58 Mich. 246; *Waters v. Crabtree*, 105 N. C. 394; *McMillan v. Bissell*, 63 Mich. 66. In *McCauley v. Smith* (132 N. Y. 524, *Finch's Sel. Cas.* 1109), the New York court held that it was competent to consider an agreement, antedating the deed, with a view of determining the character of the conveyance and whether it was a mortgage or an absolute deed.

⁴⁵ *Bennock v. Whipple*, 12 Me. 340; *Bodwell v. Webster*, 13 Pick. 411; *Kelly v. Thompson*, 7 Watts 401; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131; *Hale v. Jewell*, 7 Greenl. 435; *Holmes v. Grant*, 8 Paige Ch. 243; *Newhall v. Bart*, 7 Pick. 187; *Colwell v. Woods*, 3 Watts 188; *Kelley v. Thompson*, 7 Watts 401; *Nugent v. Riley*, 1 Metc. 117; *Crane v. Bonnell*, 1 Green Ch. 264; *Wilson v. Shoenberger*, 31 Pa. St. 295; *McIntier*

some of the States a separate deed of defeasance is required to be recorded, in order to convert an absolute deed into a mortgage, as against every one except the maker.⁴⁶ But where such is not the law, any other notice, actual or constructive, suffices to bind subsequent purchasers. If they have no notice of the defeasance at all, the deed as to them will be an absolute conveyance.⁴⁷ And where they are both recorded they must show for themselves, that they are parts of the same transaction, in order that the record may be constructive notice to purchasers.⁴⁸ Possession by the grantor is not notice of a defeasance deed held by him.⁴⁹

§ 230. *Form of the defeasance.*—No particular form is necessary, provided the deed clearly shows the intention of the parties, that the instrument shall have the effect of a mortgage.⁵⁰ And wherever the condition in a deed is the payment of money, the presumption of law is always in favor of its be-

v. Shaw, 6 Allen 83; *McLaughlin v. Shepherd*, 32 Me. 143; *Brown v. Holyoke*, 53 Me. 9; *Haines v. Thompson*, 70 Pa. St. 434; *Bickford v. Daniels*, 2 N. H. 71.

⁴⁶ *Tomlinson v. Monmouth Ins. Co.*, 47 Me. 232; 1 Minn. Stat. at large (1873) p. 640; *Russell v. Waite*, Walk. 31.

⁴⁷ *Newhall v. Pierce*, 5 Pick. 450; *Parrington v. Pierce*, 38 Me. 447; *Walton v. Crowley*, 14 Wend. 63; *Brown v. Dean*, 3 Wend. 208; *James v. Johnston*, 6 Johns. Ch. 417; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Knight v. Dyer*, 57 Me. 177; *Day v. Dunham*, 2 Johns. Ch. 182; *Wyatt v. Stewart*, 34 Ala. 716; *Halsey v. Martin*, 22 Cal. 645; *Henderson v. Pilgrim*, 22 Texas, 475.

⁴⁸ *Weide v. Gehl*, 21 Minn. 449; *Hill v. Edwards*, 11 Minn. 22; *King v. Little*, 1 Cush. 436.

⁴⁹ *Newhall v. Pierce*, 5 Pick. 450; *Hennessey v. Andrews*, 6 Cush. 170; *Kunkle v. Wolfsberger*, 6 Watts 126. See *contra*, *Daubenspeck v. Platt*, 22 Cal. 330; *Pritchard v. Brown*, 4 N. H. 397. In *Conway's Exec. v. Alexander* (7 Cranch 218), Ch. J. Marshall, says: "The want of a covenant to repay the money, is not complete evidence that the conditional sale was intended, but is a circumstance of no inconsiderable importance." See also, *Flagg v. Mann*, 14 Pick. 467.

⁵⁰ *Pearce v. Wilson*, 111 Pa. St. 14; *Mellon v. Lemmon*, 111 Pa. St. 56; *In re Helfenstein's Estate*, 20 Atl. Rep. 151. See, *McCaul v. Smith*, 132 N. Y. 524; *Finch's Sel. Cas.* 1109.

ing treated as a mortgage. Any agreement under seal, therefore, which provides for the contingent avoidance of a deed of conveyance, or calls for the reconveyance of the estate, upon the payment of a sum of money within the prescribed time, will be a defeasance deed and will make the deed of conveyance a mortgage. And where the relation of debtor and creditor existed, any such agreement would be held to create a mortgage, although the parties did not intend that that should be the effect of the transaction.⁵¹ Such agreements or defeasance deeds or clauses are to be distinguished from

§ 231. *Agreements to repurchase*.—Which very often bear a close resemblance to each other. The difference in the legal effect of the two is very great. If the agreement be merely to repurchase upon certain specified terms, or at the time stipulated, a failure to comply with the terms of the agreement destroys the right to repurchase, and the grantor has no equity of redemption, of which he can afterward avail himself in a court of equity. If it is a defeasance, he has that right, the conveyance being a mortgage. Wherever a doubt exists whether the agreement is one to repurchase or a defeasance, the courts are inclined to the latter construction. And where the relation between the parties is that of debtor and creditor, and the intention of the parties, as shown on the face of the deed, is that the agreement should operate as a security for the debt, the presumption becomes conclusive that the agreement is a defeasance. And generally, under

⁵¹ *Nugent v. Riley*, 1 Metc. 117; *Hebron v. Centre Harbor*, 11 N. H. 571; *Holmes v. Grant*, 8 Paige Ch. 243; *Lanfair v. Lanfair*, 18 Pick. 299; *Austin v. Downer*, 25 Vt. 558; *Stewart v. Hutchings*, 13 Wend. 485; *Hicks v. Hicks*, 5 Gill & J. 75; *Breckinridge v. Auld*, 1 Robt. 148; *Reed v. Gaillard*, 2 Desau. 552; *Harrison v. Lemon*, 3 Blackf. 51; *Carr v. Holbrook*, 1 Mo. 240; *Belton v. Avery*, 2 Root, 279; *Marshall v. Stewart*, 17 Ohio 356; *Pugh v. Holt*, 27 Miss. 461; *Gillis v. Martin*, 2 Dev. Eq. 470; *Coldwell v. Woods*, 3 Watts 188; *Kunkle v. Wolfersberger*, 6 Watts 126; *Watkins v. Gregory*, 6 Blackf. 113; *Peterson v. Clark*, 15 Johns. 205; *Rice v. Rice*, 4 Pick. 349; *Pearce v. Wilson*, 111 Pa. St. 14; *Hannah v. Davis*, 112 Mo. 599.

such circumstances, parol evidence will not be admissible to rebut this presumption, although such evidence is freely admitted to rebut the contrary presumption.⁵² Each case, however, must depend upon its own circumstances, and the question finally becomes one of fact, whether it was intended that the agreement should operate as a defeasance or as a conditional sale.⁵³ Among the circumstances, which tend to establish the presumption that the agreement is a defeasance, are the inadequacy of the consideration, the continued possession of the grantor, the necessities or financial embarrassments of the grantor; while the adequacy of the consideration, the

⁵² 2 Cruise Dig. 74; 4 Kent's Com. 144; *Kelly v. Thompson*, 7 Watts 401; *Wing v. Cooper*, 37 Vt. 179; *Trucks v. Lindsay*, 18 Iowa 505; *Trull v. Skinner*, 17 Pick. 216; *Page v. Foster*, 7 N. H. 392; *Conway v. Alexander*, 7 Cranch 218; *Weathersly v. Weathersly*, 40 Miss. 469; *Pearson v. Seay*, 35 Ala. 612; *DeFrance v. DeFrance*, 34 Pa. St. 385; *Watkins v. Gregory*, 6 Blackf. 113; *Haines v. Thompson*, 70 Pa. St. 438; *Peterson v. Clark*, 15 Johns. 205; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *s. c.* 6 Paige 480; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Sears v. Dixon*, 33 Cal. 326; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Pennington v. Hanby*, 4 Munf. 140; *Henly v. Hotaling*, 41 Cal. 22; *Kearney v. McComb*, 16 N. J. Eq. 189; *Glover v. Payne*, 19 Wend. 518. But if the debt is an old one, and the intention of the parties is to pay the debt by the conveyance, the agreement to repurchase will not convert the deed into a mortgage, as it would if the conveyance was intended as a security for the conveyance. *Glover v. Payne*, 19 Wend. 518; *Murphy v. Parifay*, 52 Ga. 480; *Slowey v. McMurray*, 27 Mo. 113; *O'Neill v. Capelle*, 62 Mo. 202; *Honore v. Hutchings*, 8 Bush 687; *Pitts v. Cable*, 44 Ill. 103; *Magnusson v. Johnson*, 73 Ill. 156; *Hall v. Saville*, 3 Greene (Iowa) 37; *West v. Hendrix*, 28 Ala. 226; *Ruffier v. Womack*, 36 Texas 332; *Kerr v. Hill*, 27 W. Va. 576; *Chicago, B., etc., R. R. Co. v. Watson*, 113 Ill. 195; *Wolfe v. McMillan*, 117 Ind. 587.

⁵³ But in order that a conveyance may be treated as a mortgage, there must be a debt or a loan. If there be no debt, the agreement to reconvey is an agreement to repurchase, or converts the original conveyance into a conditional sale. *Lund v. Lund*, 1 N. H. 39; *Flagg v. Mann*, 14 Pick. 467; *Pearson v. Seay*, 35 Ala. 612; *Henley v. Hotaling*, 41 Cal. 22; *DeFrance v. DeFrance*, 34 Pa. St. 385; *Rich v. Doane*, 35 Vt. 125; *Chandler v. Chandler*, 76 Iowa 574; *Vincent v. Walker*, 86 Ala. 333. See also, opinion of Chief Justice Marshall in *Conway's Exec. v. Alexander*, 7 Cranch 218.

possession of the grantee, the vesting of the right to enforce the agreement in a third person, the existence of other securities in the possession of the grantor for the payment of the consideration of the original conveyance, go to prove that it was a conditional sale, or that the grantor has only the right to repurchase.⁵⁴ Both the defeasance and the contract to repurchase are to be distinguished from a contract to repurchase at a given figure, if the grantee should at any time conclude to sell. This agreement does not give the grantor

⁵⁴ *Williams v. Owen*, 5 Mylne & C. 303; *Perry v. Meddowcraft*, 4 Beav. 197; *Haines v. Thompson*, 70 Pa. St. 442; *Hiester v. Madeira*, 3 Watts & S. 384; *Baker v. Thrasher*, 4 Denio 493; *Conway v. Alexander*, 7 Cranch 218; *Holmes v. Grant*, 8 Paige Ch. 243; *Russell v. Southard*, 12 How. 139; *Waters v. Randall*, 6 Metc. 479; *West v. Hendrix*, 28 Ala. 226; *Sellers v. Stalcup*, 7 Ired. Eq. 13; *Bennett v. Holt*, 2 Yerg. 6; *Flagg v. Mann*, 14 Pick. 467; *Low v. Henry*, 9 Cal. 538; *Warren v. Lovis*, 53 Me. 463; *Ransone v. Frayser*, 10 Leigh 592; *Campbell v. Dearborn*, 109 Mass. 130; *Freeman v. Wilson*, 51 Miss. 329; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Carr v. Rising*, 62 Ill. 14; *Pearson v. Seay*, 35 Ala. 612; *Elliott v. Maxwell*, 7 Ired. Eq. 246; *Trucks v. Lindsey*, 18 Iowa 504; *Gibbs v. Penny*, 43 Texas 560; *Crews v. Threadgill*, 35 Ala. 334; *Wilson v. Patrick*, 34 Iowa 361; *Greig v. Russell*, 115 Ill. 483; *Devore v. Woodruff* (N. D.), 45 N. W. Rep. 701; *Lynch v. Jackson*, 28 Ill. App. 660, s. c. 129 Ill. 72; *Snow v. Pressey*, 82 Me. 552; *Sherrer v. Harris* (Ark.), 13 S. W. Rep. 730; *Clark*, 24 Ill. App. 510; *Becker v. Howard*, 75 Wis. 415; *Greenwood, etc., Co. v. N. Y., etc., R. R. Co.*, 8 N. Y. S. 711; *Eames v. Hardin*, 111 Ill. 634; *Gaines v. Brockerhoff* (Pa.), 19 Atl. Rep. 958; *Fox v. Heffner*, 1 Watts & S. 372; *Jackinan v. Kingland*, 4 Watts & S. 149; *Null v. Fries*, 110 Pa. St. 521; *Lynch v. Jackson*, 28 Ill. App. 160, s. c. 129 Ill. 72; *Stahl v. Dehn*, 72 Mich. 645; *Elston v. Chamberlain*, 41 Kan. 354; *Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34; *Chandler v. Chandler*, 76 Iowa 574; *Jackson v. Lynch*, 129 Ill. 72; *Hall v. Arnott*, 80 Cal. 348; *Wallace v. Johnstone*, 129 U. S. 58; *Hodge v. Weeks*, 31 S. C. 276; *Vincent v. Walker*, 86 Ala. 333. When it is doubtful on all the facts of the case, whether the transaction is a mortgage or a conditional sale, it is always presumed to be a mortgage. *Russell v. Southard*, 12 How. 139; *Eaton v. Green*, 22 Pick. 526; *Crane v. Bonnell*, 1 Green Ch. 264; *Raughter v. Merryman*, 32 Md. 185; *Cottrell v. Long*, 20 Ohio 464; *Gillis v. Martin*, 2 Dev. Eq. 470; *O'Neil v. Capelle*, 62 Mo. 209; *Turner v. Kerr*, 44 Mo. 429; *Heath v. Williams*, 30 Ind. 498; *Scott v. Henry*, 13 Ark. 112; *Ward v. Deering*, 4 Mon. 44; *Jones v. Blake*, 33 Minn. 362.

any right to compel a reconveyance, if the grantee does not want to sell.⁵⁵

§ 232. **The defeasance clause in equity.**— If the instrument containing the defeasance does not fulfill all the legal requirements of a deed, it will not in a court of law have the effect of converting an absolute conveyance into a mortgage. But it will be good in equity, and in that court the conveyance will be treated and enforced as a mortgage against all having actual notice of its real character. Thus, the want of a seal, the absence of the requisite number of witnesses, an improper acknowledgment of the deed, would invalidate the defeasance in law, but it would be enforced in equity.⁵⁶ Courts of equity have not only gone thus far in correcting and supplementing the common law, but they have, also, in cases where the defeasance was not put to writing, sustained

§ 233. **The admissibility of parol evidence.**— To prove that a deed, absolute on its face, was intended to be a mortgage. The authorities are not uniform as to how far, or in what cases, such evidence is admissible. Some have held that in any case parol evidence can be introduced to prove a deed to be a mortgage, thus ignoring completely the application to mortgages of the rule, that parol evidence is inadmissible to vary or control a written instrument,⁵⁷ while others either

⁵⁵ *Garcia v. Callender*, 125 N. Y. 307.

⁵⁶ *Story Eq. Jur.*, Sec. 1018; *Eaton v. Green*, 22 Pick. 526; *Delaire v. Keenan*, 3 Desau. 74; *Flagg v. Mann*, 14 Pick. 467; *Cutter v. Dickinson*, 8 Pick. 386; *Warren v. Louis*, 53 Me. 463; *Murphy v. Calley*, 1 Allen 107; *Gillis v. Martin*, 2 Dev. Eq. 470. See 2 *Washburn*, Sec. 59; *Harri-gan v. Gilchrist*, 121 Wis. 127, 99 N. W. Rep. 909; *Feeley v. Bryon* (W. Va. 1904), 47 S. E. Rep. 307; *Wenzel v. Weigland* (Minn. 1904), 99 N. W. Rep. 633; *Potter v. Kimball*, 186 Mass. 120, 71 N. E. Rep. 308; *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. Rep. 535; *Hackett v. Watts*, 138 Mo. 502; *Matthews v. Damainville*, 89 N. Y. S. 493.

⁵⁷ *Russell v. Southard*, 12 How. 139; *Babcock v. Wyman*, 19 How. 239; *Sprigg v. Bk. of Mt. Pleasant*, 14 Pet. 201; *Anthony v. Anthony*, 23 Ark. 479; *Pierce v. Robinson*, 13 Cal. 116; *Farmer v. Grose*, 42 Cal.

deny the right altogether,⁵⁸ or limit its admissibility to such cases as fall within the ordinary equitable jurisdiction of fraud, accident or mistake, *i. e.*, where the failure to reduce the defeasance to writing arose out of some fraud, accident or mistake.⁵⁹ As a general rule, such evidence will be re-

169; *Kuhn v. Rumpp*, 46 Cal. 299; *Klock v. Walter*, 70 Ill. 416; *Heath v. Williams*, 30 Ind. 495; *Johnson v. Smith*, 39 Iowa 549; *Zuver v. Lyons*, 40 Iowa 570; *Richardson v. Woodbury*, 43 Me. 206; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 371; *Hassam v. Barrett*, 115 Mass. 24; *McDonough v. Squire*, 111 Mass. 256; *Flagg v. Mann*, 14 Pick. 467, 478; *Wadsworth v. Loranger*, Har. (Mich.) 113; *Freeman v. Wilson*, 51 Miss. 329; *Littlewort v. Davis*, 50 Miss. 403; *O'Neill v. Capelle*, 62 Mo. 202; *Sweet v. Parker*, 22 N. J. Eq. 453; *Crane v. Bonnell*, 1 Green Ch. 264; *Strong v. Stewart*, 4 Johns. 167; *Horn v. Keteltas*, 46 N. Y. 605; *Carr v. Carr*, 52 N. Y. 258; *Fielder v. Darien*, 50 N. Y. 437; *Miami Ex. Co. v. U. S. Bank*, *Wright* 249; *Cottrell v. Long*, 20 Ohio 464; *Kerr v. Gilmore*, 6 Watts 405; *Palmer v. Guthrie*, 76 Pa. St. 441; *Nichols v. McCabe*, 3 Head. 93; *Haynes v. Swan*, 6 Heisk. 560; *Ruggles v. Williams*, 1 Head. 141; *Gibbs v. Penny*, 43 Texas 560; *Hills v. Loomis*, 42 Vt. 562; *Bird v. Wilkinson*, 4 Leigh 266; *Cadman v. Peter*, 118 U. S. 731; *Lance's Appeal*, 112 Pa. St. 456; *Matheny v. Sandford*, 26 W. Va. 385; *Workman v. Greening*, 115 Ill. 477; *Bailey v. Bailey*, 115 Ill. 551; *Jones v. Blake*, 33 Minn. 362; *Miller v. Ausenig*, 2 Wash. 22; *McMillon v. Bissell*, 63 Mich. 66; *Murdock v. Clark* (Cal.), 24 Pac. Rep. 272; *Gilchrist v. Boswick*, 33 W. Va. 168; *Broughton v. Vasquez*, 73 Cal. 325; *Ashton v. Shepherd*, 120 Ind. 64; *McPherson v. Hayward*, 81 Me. 329; *Hart v. Epstein*, 71 Tex. 752; *Hanks v. Rhodes*, 128 Ill. 404; *Tower v. Fetz*, 26 Neb. 706; *Hall v. Arnott*, 80 Cal. 348; *Jackson v. Jones*, 74 Tex. 104; *Book v. Bessley*, 138 Mo. 455; *Boob v. Wolff*, 148 Mo. 355; *Chance v. Jennings*, 159 Mo. 544.

⁵⁸ *Bassett v. Bassett*, 10 N. H. 64; *Porter v. Nelson*, 4 N. H. 130; *Boody v. Davis*, 20 N. H. 140. By statute, in Georgia, the admissibility of parol evidence is limited to cases of fraud in the procurement of the absolute deed. Code Ga. (1873), p. 669; *Spence v. Steadman*, 49 Ga. 133; *Broach v. Barfield*, 57 Ga. 601; *Mitchell v. Fullington*, 83 Ga. 301. In Pennsylvania a similar statute has been enacted. *Smolly v. Ulrich* (Pa.), 19 Atl. Rep. 305. In Connecticut it has been held to be a doubtful question. *Osgood v. Thompson Bk.*, 30 Conn. 27.

⁵⁹ *Washburn v. Merrills*, 1 Day, 139; *French v. Burns*, 35 Conn. 359; *Spence v. Steadman*, 49 Ga. 133; *Biggars v. Bird*, 55 Ga. 650; *Skinner v. Miller*, 5 Litt. 86; *Blanchard v. Kenton*, 4 Bibb. 451; *Green v. Sherrod*, 105 N. C. 197; *Coutcher v. Muir's Exr.* (Ky.), 13 S. W. 435. And if the deed is made absolute so as to cover up a usurious contract, it

ceived only in a court of equity, and although perhaps the majority of the courts apply the rule in every case, irrespective of any question of fraud, yet, upon a closer analysis of the cases, it will be found that in no case does the court of equity interfere and permit the introduction of parol evidence, unless the circumstances of the case are such as would make the vendee guilty of at least constructive fraud in insisting upon the deed being treated as an absolute conveyance.⁶⁰ In any case, the evidence must be clear and free from doubt as to the intention to execute a mortgage in order

will be such a ground of fraud in Kentucky as will admit parol evidence. *Murphy v. Trigg*, 1 Mon. 72; *Cook v. Colyer*, 2 B. Mon. 71; *Price v. Grover*, 40 Md. 102; *Kelly v. Bryan*, 6 Ired. Eq. 283; *Brothers v. Harrill*, 2 Jones Eq. 209; *Glisson v. Hill*, *Id.* 256; *Arnold v. Mat-tison*, 3 Rich. Eq. 153.

⁶⁰ In most of the States where the rule is broad, as above stated, it is held, to employ the language of Mr. Jones, that "fraud in the use of the deed is as much a ground for the interposition of equity as fraud in its creation." *Jones on Mortg.*, Sec. 288; *Pierce v. Robinson*, 13 Cal. 116; *Conwall v. Evill*, 4 Ind. 67; *O'Neill v. Capelle*, 62 Mo. 202; *Moreland v. Barnhart*, 44 Texas, 275, 283; *Strong v. Stewart*, 4 Johns. Ch. 167. In *Horn v. Ketelas* (46 N. Y. 605), the New York Court said: "It is too late to controvert the proposition, that a deed, absolute upon its face, may, in equity, be shown, by parol or other extrinsic evidence, to have been intended as a mortgage." *s. c.* *Finch's Sel. Cas.* p. 1106, citing, *Holmes v. Grant*, 8 Paige, 243; *Robinson v. 2 Edw. Chy. R.* 138; *Strong v. Stewart*, 4 J. C. R. 167; *Clark v. Henry*, 2 Cow. 324; *Murray v. Walker*, 31 N. Y. 399. Parol proof, to establish that an absolute deed is, in fact, a mortgage, is held competent in the following cases: *Holmes v. Warren*, 145 Cal. 457, 78 Pac. Rep. 954; *Conkey v. Rex*, 212 Ill. 444, 72 N. E. Rep. 370; *Clark v. Seagreaves*, 186 Mass. 430, 71 N. E. Rep. 370; *Faulkner v. Cody*, 91 N. Y. S. 633; *McGill v. Thorne*, 70 S. C. 65, 48 S. E. Rep. 994; *Hursey v. Hursey* (W. Va. 1904), 49 S. E. Rep. 367; *Schneider v. Reed* (Wis. 1905), 102 N. W. Rep. 571; *N. W. Fire Ins. Co. v. Lough* (N. D. 1904), 102 N. W. Rep. 160; *Foster v. Rice* (Iowa, 1904), 101 N. W. Rep. 771; *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. Rep. 232; *Gerhardt v. Tucker*, 187 Mo. 46, 85 S. W. Rep. 552. The test to determine whether or not a deed is a mortgage is the subsequent existence of a debt. *Holmes v. Warren*, 145 Cal. 457, 78 Pac. Rep. 954; *Conkey v. Rex*, 212 Ill. 444, 72 N. E. Rep. 370.

that a deed absolute on its face may by parol evidence be converted into a mortgage.⁶¹ It is to be understood, however, that the deed cannot be shown to be a mortgage, so as to disturb the title of a purchaser from the grantee, in reliance upon his apparent absolute title.⁶²

§ 234. Contemporaneous agreements.—If the deed be in fact a mortgage, not only will no parol evidence be admitted to show that such was not the intention of the parties, but it is also impossible by any contemporaneous agreement of the most formal character to withdraw from the mortgage the rights which are incident thereto, or to change the obligations of the parties thereunder in any manner whatsoever. The right to redeem after condition broken can never be taken away by such an agreement. The agreement is simply void.⁶³ Neither can the mortgage provide for redemption

⁶¹ *Cadman v. Peters*, 118 Pa. St. 73; *Lance's Appeal*, 112 Pa. St. 456; *Matheney v. Sandford*, 26 W. Va. 386; *Bentley v. O'Bryne*, 111 Ill. 53; *Parmer's Admr. v. Parmer*, 88 Ala. 545; *Fisher's Appeal*, 132 Pa. St. 488; *Langes v. Muserve* (Iowa), 45 N. W. Rep. 732; *Armor v. Spalding* (Colo.), 23 Pac. Rep. 789; *Franklin v. Ayers*, 22 Fla. 645; *McMillan v. Bissell*, 63 Mich. 66; *Jameson v. Emerson*, 82 Me. 359; *Sanborn v. Magee* (Iowa), 44 N. W. Rep. 720; *Sherrer v. Harris* (Ark.), 13 S. W. Rep. 730; *Jones v. Pierce* (Pa.), 19 Atl. Rep. 689; *Winston v. Burrell* (Kan.), 24 Pac. Rep. 477; *Strong v. Strong*, 27 Ill. App. 148; *s. c.* 126 Ill. 301; *Shattuck v. Bascom*, 55 Hun, 14 Null *v. Fries*, 110 Pa. St. 521; *Munger v. Casey* (Pa. St.), 17 Atl. Rep. 36; *Townsend v. Petersen*, 12 Colo. 491; *Jackson v. Jones*, 74 Tex. 104. As a condition to the review of a deed, to ascertain if it will be held to be a mortgage, the plaintiff must generally offer to redeem as to the alleged mortgage. *Gerhart v. Tucker*, 187 Mo. 46, 85 S. W. Rep. 552. But see, *Marvin v. Prentice*, 49 How. Pr. 385.

⁶² *Jackson v. Lawrence*, 117 U. S. 679; *Parrott v. Baker*, 82 Ga. 364.

⁶³ *Wing v. Cooper*, 37 Vt. 181; *Clark v. Henry*, 2 Cow. 324; *Henry v. Davis*, 7 Johns. Ch. 40; *Vanderhaize v. Haques*, 13 N. J. 244; *Oldenbaugh v. Bradford*, 67 Pa. St. 104; *Rankin v. Mortimere*, 7 Watts, 372; *Baxter v. Child*, 39 Me. 110; *Johnston v. Gray*, 16 Serg. & R. 361; *Murphy v. Calley*, 1 Allen, 107; *Clark v. Condit*, 18 N. J. Eq. 358; *Batty v. Snook*, 5 Mich. 231; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Eaton v. Whiting*, 3 Pick. 484; *Wynkoop v. Cowing*, 21 Ill.

within a shorter period than what is allowed by law, nor impose an increased rate of interest after breach of the condition, nor require anything else which would in the slightest degree curtail the right to redeem.⁶⁴

§ 235. **Subsequent agreements.**—But it is possible for the mortgagor by a subsequent agreement, either to deprive himself entirely of the equity of redemption, or to limit its exercise. But in view of the peculiar relation of the parties,

570; *Cherry v. Bowen*, 4 Sneed 415; *Willetts v. Burgess*, 34 Ill. 494. An agreement to turn a mortgage into an absolute deed, is one that finds no favor, in equity, as the maxim is, "once a mortgage always a mortgage." *McCauley v. Smith*, 132 N. Y. 524; *Finch's Sel. Cas.* 1110; *Carr v. Carr*, 52 N. Y. 251; *Morris v. Nixon*, 1 How. (U.S.) 118; *Villa v. Rodrigues*, 12 Wall. 323, 4 Kent's Com. 143; *Seton v. Slade*, 7 Ves. 265; *Newcomb v. Bonham*, 1 Vern. 7; *Co. Lit.* 205 a, n. 96; 1 *Spence Eq. Jur.* 693; *Miami Ex. Co. v. U. S. Bank*, *Wright (Ohio)*, 253; *Youle v. Richards*, 1 N. J. Eq. 534; *McClurkan v. Thompson*, 69 Pa. St. 305.

⁶⁴*Johnston v. Gray*, 16 Serg. & R. 361; *Howard v. Harris*, 1 Vern. 33; *Spurgeon v. Collier*, 1 Eden, 55; *Mayo v. Judah*, 5 Munf. 495; *Price v. Perrie*, *Freem. Ch.* 257; *Hallifax v. Higgins*, 2 Vern. 134; *McClurkan v. Thompson*, 69 Pa. St. 305; *Tooms v. Couset*, 3 Atk. 261; *Waters v. Randall*, 6 Metc. 479; *Chambers v. Goldwin*, 9 Ves. 271; *Jenning v. Ward*, 2 Vern. 520; *Chambers v. Goldwin*, 9 Ves. 71; *Leith v. Irvine*, 1 My. & K. 277; *Blackburn v. Warwick*, 2 Younge & C. 92. But it has been held that the right to redeem may be postponed for a reasonable time by the agreement of the parties. *Talbot v. Braddill*, 1 Vern. 183; *Cowdry v. Day*, 1 Gif. 316. And an agreement that, upon the failure to pay interest or an installment of the principal when due, the entire debt will fall due, is good, and does not curtail the right to redeem. *Ferris v. Ferris*, 28 Barb. 29; *People v. Supreme Court*, 19 Wend. 104; *Noyes v. Clark*, 7 Page, 179; *James v. Thomas*, 5 B. & Ad. 40; *Basset v. Gallagher*, 7 Wis. 442; *Ottawa Plank Road v. Murray*, 15 Ill. 336. *Contra*, *Tiernan v. Hinman*, 16 Ill. 400. A failure to pay the interest payments due on the mortgaged debt, is generally sufficient ground to foreclose. *Long Island Loan Co. v. Long Island R. R. Co.*, 178 N. Y. 588, 70 N. E. Rep. 1102. But see, as to waiver of interest payments, *Lawrence v. Ward (Utah, 1904)*, 77 Pac. Rep. 229. Where there is a default as to part of the mortgage debt, the mortgagee is entitled to foreclose as to the debt in default. *Land v. May*, 84 S. W. Rep. 489.

and the possibility of duress and undue influence through the perhaps impecunious condition of the mortgagor, courts of equity look with suspicion upon all such agreements; and if there is any improper advantage taken of his financial embarrassment, or the transaction is in the slightest degree a hard bargain, the agreement will be annulled, and the mortgagor permitted to redeem. For that reason the purchase by the mortgagee of the mortgagor's equity of redemption must be conducted with the most scrupulous care, in order to remove from the transaction all suspicion of fraud.⁶⁵

§ 236. **The mortgage debt.**—There can be no mortgage without a mortgage debt. The debt may be either antecedent or contemporary, or it may be incurred in the future, the last being known as future advances.⁶⁶ All that is re-

⁶⁵ *Russel v. Southard*, 12 How. (U. S.) 139; *Trull v. Skinner*, 17 Pick. 213; *Falis v. Conway Ins. Co.*, 7 Allen, 49; *Rice v. Bird*, 4 Pick. 350; *Patterson v. Yeaton*, 47 Me. 308; *Villa v. Rodriguez*, 12 Wall. 323; *Lawrence v. Stratton*, 6 Cush. 163; *Holdridge v. Gillespie*, 2 Johns. Ch. 30; *Carpenter v. Carpenter*, 70 Ill. 457; *Baughner v. Merryman*, 32 Md. 185; *Locke v. Palmer*, 26 Ala. 312; *Shubert v. Standley*, 52 Ind. 46; *Waters v. Randall*, 6 Metc. 479; *Greene v. Butler*, 26 Cal. 602; *Henry v. Davis*, 7 Johns. Ch. 40; *Mills v. Mills*, 26 Conn. 213; *Wright v. Bates*, 13 Vt. 341. A contract for the purchase by the grantee in a deed absolute in form, but in fact a mortgage, of the equity of redemption, will not be sustained unless it is in all respects fair, and for an adequate consideration. *Faulkner v. Cody*, 91 N. Y. Sup. 633, 45 Misc. Rep. 64; *Oliver v. Cunningham*, 7 Fed. Rep. 689; *Locke v. Palmer*, 26 Ala. 312; *Sheckell v. Hopkins*, 2 Md. Ch. 89; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Amer. Dec. 171. Where a mortgagee has obtained from the mortgagor a release of his equity of redemption, the burden is on him to show that he paid for the property what it was worth. *Liskey v. Snyder*, 49 S. E. Rep. (W. Va.), 515. After the execution of a mortgage, the right of the mortgagee, or beneficiary, in a deed of trust, cannot be prejudiced by any subsequent agreement or conveyance of the mortgagor. *N. Y. Merc. Co. v. Thurmond*, 186 Mo. 410, 85 S. W. Rep. 333; *Bloomer v. Burk* (Minn. 1904), 101 N. W. Rep. 974; *Leech v. Karthaus* (Ala. 1904), 37 So. Rep. 696.

⁶⁶ See *Newkirk v. Newkirk*, 56 Mich. 525; *Shores v. Doherty*, 65 Wis. 153; *Louisville Bkg. Co. v. Leonard* (Ky.), 13 S. W. Rep. 521; *Hyland v. Habich*, 150 Mass. 112; *Fessenden v. Taft* (N. H.), 17 Atl. Rep. 713.

quired is that the debt is sufficiently described and limited in the mortgage, so that it may be recognized and distinguished from other obligations.⁶⁷ Ordinarily, parol evidence is inadmissible to show that the parties intended to include in the operation of the mortgage a debt which is not covered by the description.⁶⁸ But where the description is not sufficiently particular to make the identification of the debt sure, parol evidence is admissible to connect the debt with the mortgage, and supply the deficiencies of the description.⁶⁹ It has also been held that a mortgage, given apparently for a fixed debt already incurred, may be shown to have been intended to secure future advances.⁷⁰ It is not necessary that the amount of the debt be stated in the mortgage, whether the sum be certain or uncertain.⁷¹ But although the amount need not perhaps be stated in the mortgage, means must be provided in it, by way of reference to other papers or records, for ascertaining the amount. Thus mortgages have been held good, where they were intended to secure a general indebtedness, such as,

⁶⁷ *Robertson v. Stark*, 15 N. H. 112; *Partridge v. Swazey*, 46 Me. 414; *Hough v. Bailey*, 32 Conn. 288; *Johns v. Church*, 12 Pick. 557; *Warner v. Brooks*, 14 Gray, 107; *Kellogg v. Frazier*, 40 Iowa, 502; *Paine v. Benton*, 32 Wis. 491; *Boyd v. Baker*, 43 Md. 182; *Hughes v. Edwards*, 9 Wheat. 489; *Aull v. Lee*, 61 Mo. 160; *Gilman v. Moody*, 43 N. H. 329; *Ray v. Hallenbeck*, 42 Fed. Rep. 381; *King v. Kilbride*, 58 Conn. 109; *Williams v. Silliman*, 74 Tex. 626; *Walker v. Rand* (Ill.), 22 N. E. Rep. 1006; *Bank of Buffalo v. Thompson* (N. Y.), 24 N. E. Rep. 473; *Moran v. Gardemeyer*, 82 Cal. 96.

⁶⁸ *Union Nat. Bank v. International Bank*, 22 Ill. App. 652; *s. c.* 123 Ill. 510.

⁶⁹ *Jackson v. Bowen*, 7 Cow. 13; *Johns v. Church*, 12 Pick. 557; *Hall v. Tufts*, 18 Pick. 455; *Bell v. Fleming*, 1 Beas. 13; *Baxter v. McIntire*, 13 Gray, 166; *Babcock v. Lisk*, 57 Ill. 327; *Aull v. Lee*, 61 Mo. 160; *Crafts v. Crafts*, 13 Gray, 168; *Shoemaker v. Smith* (Iowa), 45 N. W. Rep. 744; *McAleer v. McAleer*, 31 S. C. 313; *Blair v. Harris*, 75 Mich. 167; *Mosson v. Creditors*, 41 La. An. 296.

⁷⁰ *Huckaba v. Abbott*, 87 Ala. 409.

⁷¹ *Pike v. Collins*, 33 Me. 38; *Somersworth Sav. Bk. v. Roberts*, 38 N. H. 22; *Curtis v. Flinn*, 46 Ark. 70. *Contra*, *Hart v. Chalker*, 14 Conn. 77; *Pearce v. Hall*, 12 Bush, 209; which hold that where the debt is a certain fixed sum, the amount should be stated.

“ what I may owe on book,” “ all the notes or agreements I now owe,” “ all sums that the mortgagee may become liable to pay,” an open book account, and the like.⁷² But a debt must, to at least a reasonable degree, conform to the particulars of the description, in order to be covered by the mortgage.⁷³ Generally the amount of the advances need not be stated, provided it can be otherwise ascertained by the description.⁷⁴ And where the amount is stated, it is taken to be the limit of the principal of the mortgage debt, so that the mortgage would also cover the interest accrued to date of settlement, although the addition of such interest to the principal debt would make the mortgage debt exceed the stipulated amount.⁷⁵ But the principal cannot exceed the stipulated amount in any event except as against the mortgagor.⁷⁶ The debt creates a personal obligation, which runs parallel with, but is independent of, the mortgage. The for-

⁷² *Merrills v. Swift*, 18 Conn. 257; *Shirras v. Craig*, 7 Cranch 34; *Seymour v. Darrow*, 31 Vt. 142; *Vanmeter v. Vanmeter*, 3 Gratt. 148; *Fisher v. Otis*, 3 Chand. 83; *DeMott v. Benson*, 4 Edw. Ch. 297; *U. S. v. Sturges*, 1 Paine, 525; *Esterly v. Purdy*, 50 How. Pr. 350; *Emery v. Owings*, 7 Gill, 488; *Barker v. Barker*, 62 N. H. 366; *Farr v. Duxtater*, 9 N. Y. S. 141.

⁷³ *Doyle v. White*, 26 Me. 341; *Storms v. Storms*, 3 Bush, 77; *Walker v. Paine*, 31 Barb. 213; *Hall v. Tufts*, 18 Pick. 455; *Balcock v. Lisk*, 57 Ill. 327; *Walker v. Rand* (Ill.), 22 N. E. Rep. 1064; *Bank of Buffalo v. Thompson* (N. Y.), 24 N. E. Rep. 473; *Moran v. Gardemeyer*, 82 Cal. 96. But see *Baxter v. McIntire*, 13 Gray, 168. In Maryland and New Hampshire, there are statutes requiring the amount of the debt intended to be secured, to be stated in the mortgage. *Pub. Lien Laws* (Md. 1860), art. 64, Sec. 2; *Gen. Stats.* N. H. 253; and where the mortgage is for future advances, the amount must be limited. *Wilson v. Russell*, 13 Md. 494; *Leeds v. Cameron*, 3 Sumn. 488; *Bank of Willard*, 10 N. H. 210.

⁷⁴ *Allen v. Lathrop*, 46 Ga. 133; *Crane v. Deming*, 7 Conn. 387; *U. S. v. Hooe*, 3 Cranch, 73; *Shirras v. Craig*, 7 Cranch, 34; *Hughes v. Woley*, 1 Bibb, 200; *Farr v. Duxtater*, 9 N. Y. S. 141, and other cases cited *supra*.

⁷⁵ *Stafford v. Jones*, 91 N. C. 189.

⁷⁶ *Louisville Bkg. Co. v. Leonard* (Ky.), 13 S. W. Rep. 521; *Wagner v. Breed* (Neb.), 46 N. W. Rep. 286.

mer obligation depends upon the privity of contract, and binds only the mortgagor and his personal representatives. The latter is an obligation *in rem*, resting upon the privity of estate in the mortgaged land, and binds the land into whosoever hands it may come. But for the support of the mortgage, the personal obligation need not exist; that is, the debt need not, independently of the mortgage, be enforceable at law. Thus a mortgage by husband and wife of the wife's lands, to secure the note of the wife, would be good, even though the wife's contracts are held to be otherwise absolutely void.⁷⁷ And so, likewise, is a mortgage valid, although the debt can no longer be enforced, because after the death of the mortgagor, it was not probated under the call of the mortgagor's personal representatives.⁷⁸ So also is the mortgage good if the Statute of Limitations has run against the debt.⁷⁹ And it may be stated generally, that the personal liability of the mortgagor for the mortgage debt is not essential to the validity of the mortgage, although its absence may constitute a circumstance from which it might be inferred that the transaction was intended to be a conditional sale,

⁷⁷ *Bucklin v. Bucklin*, 1 Abb. Pr. 242; see *contra*, *Heburn v. Warner*, 112 Mass. 271; 17 Am. Rep. 86; *Taylor v. Page*, 6 Allen, 86; *Crooker v. Holmes*, 55 Me. 195; 20 Am. Rep. 687; *Wyman v. Brown*, 50 Me. 150; *Hoffey v. Carey*, 73 P. St. 433; *Neimcewitz v. Sohn*, 3 Paige, 643; *Story's Eq. Jur.*, Sec. 1399; *Brigham v. Potter*, 14 Gray, 522.

⁷⁸ *Hodger v. Taylor* (Ark), 13 S. W. Rep. 129.

⁷⁹ *Thayer v. Mann*, 19 Pick. 537; *Hughes v. Edwards*, 9 Wheat. 489; *Wood v. Augustine*, 61 Mo. 46; *Kellar v. Sinton*, 14 B. Mon. 307; *Hough v. Bailey*, 32 Conn. 288; *Birnie v. Main*, 29 Ark. 591; *Nevitt v. Bacon*, 32 Miss. 212; *Waltermire v. Westover*, 14 N. Y. 20; *Heyer v. Pruyn*, 7 Paige, 465; *Crooker v. Holmes*, 65 Me. 105; *Capehart v. Dettrich*, 91 N. C. 344; *Rodriguez v. Hayes*, 96 Tex. 225; *Benton Co. v. Czarlinski* (Mo.), 14 S. W. Rep. 114. *Contra*, *Lord v. Morris*, 18 Cal. 482; *Duty v. Graham*, 12 Texas, 427; *Gower v. Winchester*, 33 Iowa, 303; *Chick v. Willetts*, 3 Kan. 384; *Hagan v. Parsons*, 67 Ill. 170. This rule has been changed, in Missouri, by statute and in that State, after the debt is barred, by limitation, no action will lie to foreclose the mortgage. R. S. Mo. 1899, Sec. 4276.

instead of a mortgage.⁸⁰ It is usual for the debt to be contained in a separate writing as a bond or note; but that is not necessary, since the acknowledgment of the debt in the mortgage will be a sufficient compliance with the provisions of the Statute of Frauds.⁸¹ Nor is it necessary that the recital of the debt in the mortgage should correspond in every respect with the instrument of indebtedness. Any immaterial variation would not affect its validity, and if the variance was material, as where the amount was misstated, the mortgage would be good, at least for the amount stated.⁸²

⁸⁰ *Glagg v. Mann*, 2 Sumn. 534; *Rich v. Doane*, 35 Vt. 129; *Haines v. Thompson*, 70 Pa. St. 442; *Ball v. Wyeth*, 8 Allen, 278; *Glover v. Payn*, 19 Wend. 518; *Holmes v. Grant*, 8 Paige Ch. 243; *Mills v. Darling*, 43 Me. 565; *Murphy v. Calley*, 1 Allen, 108; *Dougherty v. McColgan*, 6 Gill & J. 285; *Ferris v. Crawford*, 2 Denio, 595; *Weed v. Coville*, 14 Barb. 242; *Salisbury v. Philips*, 10 Johns. 57; *Elder v. Rouse*, 15 Wend. 218; *Conway v. Alexander*, 7 Cranch, 218; *Scott v. Fields*, 7 Watts, 360; *Miami Ex. Co. v. U. S. Bank, Wright (Ohio)*, 252; *Drummond v. Richards*, 2 Munf. 337; *Floyer v. Lavington*, 1 P. Wms. 268; *King v. King*, 3 P. Wms. 258; *Mitchell v. Burnham*, 44 Me. 286.

⁸¹ Where there is no separate obligation to pay the debt, in order that there may be a personal liability upon the mortgagor, the mortgage must contain a covenant for payment, or at least an acknowledgment of the existence of the debt. *Brown v. Cascaden*, 43 Iowa, 103; *Elder v. Rouse*, 15 Wend. 218; *Yates v. Aston*, 4 Q. B. 182; *Smith v. Rice*, 12 Daly, 307; *Frank v. Pickle*, 2 Wash. 55; *Baum v. Tompkin*, 110 Pa. St. 569.

⁸² *Russell v. Southard*, 12 How. (U. S.) 139; *Mitchell v. Barnham*, 44 Me. 246; *Brookings v. White*, 49 Me. 483; *Brown v. Dewey*, 1 Sandf. Ch. 56; *Jaques v. Weeks*, 7 Watts, 268; *Wharf v. Howell*, 5 Bing. 499; *Rice v. Rice*, 4 Pick. 349; *Whitney v. Buckman*, 43 Cal. 536. As to variations, see *Cushman v. Luther*, 53 N. H. 562; *Hough v. Bailey*, 32 Conn. 289; *Kimball v. Myers*, 21 Mich. 276; *Stoddart v. Hart*, 23 N. Y. 556; *Large v. Doren*, 14 N. J. Eq. 203, and cases cited *supra*, preceding note. The acceptance of a new mortgage and note, in renewal of an older note and mortgage, is held to be a complete discharge of the older debt, in *Missouri. Benton Land Co. v. Zeitner*, 182 Mo. 251, 81 S. W. Rep. 193. But see, *White v. Stevenson*, 144 Cal. 104, 77 Pac. Rep. 828. When a note, secured by a mortgage, is declared void, the mortgage is also void. *Ft. Wayne Co. v. Sihler* (Ind. 1904), 72 N. E. Rep. 494. A mortgagor who still retain-

§ 237. *Mortgages for the support of the mortgagee.*— There is a class of mortgages which, instead of being given as security for the payment of a debt, are conditioned to provide and secure the support of the mortgagee or some other person. The obligation to support, unless it is imposed upon all claiming under the mortgagor, is a personal one, and will prevent his alienation of the mortgaged premises, or their sale under execution, except by the consent of the mortgagee.⁸³ Neither is the mortgagee's interest assignable, for the benefit derived from the mortgage is of a personal nature.⁸⁴ If the mortgagor fails to perform the condition through his inability to furnish the support, he may redeem the land by the payment of a sum of money, which would be equivalent to the support to be rendered.⁸⁵ Usually the mort-

his ownership of the mortgaged property may make a valid contract of extension of the original mortgage, which will be binding upon a subsequent grantee, whether he takes with or without notice of such extension. *White v. McMillan*, 79 Pac. Rep. 495; *George v. Butler*, 26 Wash. 456, 67 Pac. Rep. 263, 57 L. R. A. 396, 90 Am. St. Rep. 756; *Denny v. Palmer*, 26 Wash. 469, 67 Pac. Rep. 268, 90 Am. St. Rep. 766; *Raymond v. Bales*, 26 Wash. 493, 67 Pac. Rep. 269; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. Rep. 271.

⁸³ *Bryant v. Erskine*, 55 Me. 156; *Mitchell v. Burnham*, 57 Me. 322; *Bethlehem v. Annis*, 40 N. H. 34; *Brown v. Leach*, 35 Me. 41; *Eastman v. Batchelder*, 36 N. H. 141; *Marsh v. Austin*, 1 Allen, 235; *Wales v. Mellen*, 1 Gray, 512; *Soper v. Guernsey*, 71 Pa. St. 224. But see *contra*, *Ottawaquechee Sav. Bank v. Holt*, 58 Vt. 166. Until condition is broken, the mortgagor is entitled to possession. *Flanders v. Parker*, 9 N. H. 201; *Soper v. Guernsey*, *supra*, and other cases *supra*. Sometimes the condition is in the alternative, to support the mortgagee or to pay a stipulated sum. In that case, the mortgagor has the right to elect within a reasonable time, and both parties are bound by his election. *Bryant v. Erskine*, *supra*; *Soper v. Guernsey*, *supra*; *Furbish v. Sears*, 2 Cliff. 454.

⁸⁴ *Bethlehem v. Annis*, 40 N. H. 34; *Bryant v. Erskine*, 55 Me. 153.

⁸⁵ *Bryant v. Erskine*, 55 Me. 153; *Austin v. Austin*, 9 Vt. 42; *Bethlehem v. Annis*, 40 N. H. 44; *Wilder v. Whittemore*, 15 Mass. 262; *Fiske v. Fiske*, 20 Pick. 499; *Hoyt v. Bradley*, 27 Me. 242. But it has been held that no such right of redemption exists; that where the condition calls for the support of the mortgagee or some other person, the land cannot be redeemed by the payment of a sum of money. *Soper v.*

gage specifies the place where the support is to be furnished; but where it is silent on that subject, the law requires that it should be tendered in some place convenient to both mortgagor and mortgagee. But if they are residing in the same locality, or on the same land, the mortgagor cannot insist upon supplying it at his own table, or in his own house.⁸⁶ These mortgages are seldom found in actual practice, and by a reference to the cases cited below it will be observed, that they have obtained a greater prevalence in the New England States than elsewhere.⁸⁷

§ 238. What may be mortgaged.—Any vested interest or estate in lands, legal or equitable,⁸⁸ is capable of being mortgaged. An estate for years or for life can be mortgaged as well as the fee. So also can a vendee in possession under a parol or written contract of sale mortgage his interest in the land.⁸⁹ And the fact that the land is in the adverse pos-

Guernsey, 71 Pa. St. 219. See, also, *Evans v. Norris*, 6 Mich. 369; *Hawkins v. Clermont*, 15 Mich. 513; and it is said to rest in the discretion of the court, whether such relief shall be granted. *Henry v. Tupper*, 29 Vt. 358; *Dunklee v. Adams*, 20 Vt. 415. Upon the breach of the condition, the mortgagee may enter into possession, until the mortgage is redeemed or foreclosed. *Flanders v. Lamphear*, 9 N. H. 201; *Eastman v. Batchelder*, 36 N. H. 141. The mortgage may be foreclosed in the same manner as other mortgages. *Marsh v. Austin*, 1 Allen, 235; *Daniels v. Eisenlord*, 10 Mich. 454.

⁸⁶ *Holmes v. Fisher*, 13 N. H. 9; *Flanders v. Lamphear*, *supra*; *Thayer v. Richards*, 19 Pick. 398; *Hubbard v. Hubbard*, 12 Allen, 586; *Fiske v. Fiske*, 20 Pick. 499; *Powers v. Martin* (Vt.), 20 Atl. Rep. 105.

⁸⁷ See cases cited in notes 1 and 2, *supra*.

⁸⁸ *Morgan v. Field*, 35 Kan. 162.

⁸⁹ *Lanfair v. Lanfair*, 18 Pick. 304; *Attorney-General v. Parmort*, 5 Paige, 620; *Hogan v. Brainard*, 45 Vt. 294; *Phila., etc., R. R. v. Woelpper*, 64 Pa. St. 371; 2 Am. Rep. 596; *John v. Nut*, 19 Wend. 559; *Wilson v. Wilson*, 32 Barb. 328; *Neligh v. Mechenor*, 11 N. J. Eq. 539; *Sinclair v. Armitage*, 1 Beasl. 174; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Hosmer v. Carter*, 68 Ill. 98; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Kidd v. Teeple*, 22 Cal. 255; *Hutchins v. King*, 1 Wall. 53; *Miller v. Tipton*, Blackf. 238; *Edwards v. McKernan*, 55 Mich. 520; *Adams v. Smith*, 19 Nev. 259 (estate for years), *Balen v. Mercier*, 75

session of a third person, does not prevent its being mortgaged as between the parties to it, at least in equity.⁹⁰ If the mortgagor is a devisee, who mortgages the land before the claims against the estate of his deviser have been settled, the mortgage is valid, but the mortgagee takes his title subject to these claims.⁹¹ And likewise are the interests of the mortgagor and mortgagee, in whatever light they may be held, possible subjects of a mortgage. Where the mortgagee conveys the estate by way of a mortgage, his mortgagee takes it subject to the mortgagor's right to redeem; but in such a case notice to the mortgagor of the second mortgage by the mortgagee would require the mortgagor to make payment to the sub-mortgagee, so that he might protect his interests against the mortgage.⁹² And where the mortgagor mortgages his equity of redemption, the second mortgagee has

Mich. 42; *Gordon v. Avery*, 102 N. C. 532. And the mortgage of a vendee's equity under an executory contract of sale, when duly recorded, can be enforced both against the vendor and his subsequent vendee, notwithstanding the subsequent surrender of the contract to the vendor. *Davis v. Davis*, 88 Ala. 523. But not when the vendee has never had possession. See *Bright v. Buckman*, 39 Fed. Rep. 243; *Gordon v. Avery*, 102 N. C. 532. But a mere possibility, not coupled with an interest, or a personal right, such as the right of pre-emption, cannot be made the subject of a mortgage. *Skipper v. Stokes*, 42 Ala. 255; *Bayler v. Commonwealth*, 40 Pa. St. 37. Generally, "whatever can be sold, can also be mortgaged." *Talman v. Casualty Co.*, 90 Mo. App. 274; *Low v. Pew*, 108 Mass. 347; *Purcell v. Mather*, 35 Ala. 570; *Penn. v. Ott*, 12 La. An. 233; *Gilbert v. Penn.*, 12 La. An. 235. The right of a beneficiary of sharing in the proceeds of sale of the land cannot be mortgaged. *Wood v. Reeves*, 23 S. C. 382. But land held by right of pre-emption may be mortgaged in California. *Whitney v. Buckman*, 13 Cal. 536; *Henderson v. Grammar*, 66 Cal. 232.

⁹⁰ *Hall v. Westcott*, 15 R. I. 373.

⁹¹ *Shaw v. Barksdale*, 25 S. C. 204.

⁹² *Henry v. Davis*, 7 Johns. Ch. 40; *Johnson v. Blydenburgh*, 31 N. Y. 432; *Murdock v. Chapman*, 9 Gray, 156; *Coffin v. Loring*, 9 Allen, 154; *Slee v. Manhattan Co.*, 1 Paige, 48; *Solomon v. Wilson*, 1 Whart. 241; *Brown v. Tyler*, 8 Gray, 135; *Harrison v. Burlingame*, 48 Hun, 212; *Hidden v. Kretschmar*, 37 Fed. Rep. 465; *Murray v. Porter*, 26 Neb. 288.

all the rights of the first mortgagee, except that he can only satisfy his debt out of the mortgaged property after the prior mortgagee has received payment in full.⁹³ The franchise of a railroad corporation can be mortgaged, and the mortgage will cover whatever real property may be acquired by the corporation after the execution of the mortgage, and used in the exercise of the franchise. Whether the rolling stock of a railroad will pass with a mortgage of its franchise depends upon the further question, whether such property is held to be real or personal; in regard to which the courts have rendered contrary decisions. If the rolling stock is considered to be realty, it will pass with the mortgage, otherwise it will not.⁹⁴

⁹³ *Garza v. Howell* (Tex. 1904), 85 S. W. Rep. 461; *Dickinson v. Duckworth* (Ark. 1905), 85 S. W. Rep. 82.

⁹⁴ *Pierce v. Emery*, 32 N. H. 484; *Hoyle v. Plattsburg, etc.*, R. R., 54 N. Y. 314; *Willink v. Morris Canal*, 3 Green Ch. 377; *Galveston R. R. v. Cowdrey*, 11 Wall. 481; *Dunham v. Railway Co.*, 1 Wall. 254; *Rennock v. Coe*, 23 How. (U. S.) 117; *Benjamin v. Elmira, etc.*, R. R. Co., 54 N. Y. 675; *Howe v. Freeman*, 14 Gray, 566; *Morrill v. Noyes*, 56 Me. 458; *Emerson v. European, etc.*, R. R., 67 Me. 387; 24 Am. Rep. 39; *Sillers v. Lester*, 48 Miss. 513; *Phillips v. Winslow*, 18 B. Mon. 431; *Brown v. Sharpe's Rifle Co.*, 29 Conn. 282; *Phila., R. R. v. Woelpper*, 64 Pa. St. 366; 3 Am. Rep. 596; *Chew v. Barret*, 11 Serg. & R. 389; *Parkhurst v. Northern, etc.*, R. Co., 19 Md. 472. But only so much of the franchise will pass to the mortgagee, as is necessary to make the grant beneficial to him. *Eldridge v. Smith*, 34 Vt. 484. As to whether rolling-stock is real or personal property, see *ante*, Sec. 2. For equitable right of mortgagee to enforce his lien upon property not in *esse*, as ungrown corn, see, *Swinney v. Gontz*, 83 Mo. App. 549.

SECTION II.

THE RIGHTS AND LIABILITIES OF MORTGAGORS AND MORTGAGEES.

- SECTION 239. The mortgagor's interest.
240. The mortgagee's interest.
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248. Insurance of the mortgaged premises.
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250. Common-law assignment.
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261. Registry of assignments of mortgages and equities of redemption.
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263. Priority in mortgages for future advances.
264. Satisfaction of the mortgage on the records.

§ 239. The mortgagor's interest.— Whatever may be the view taken in any particular State of the character of a mortgage, whether it is construed as a conveyance of an estate in lands, or only the grant of a lien, the mortgagor's interest *before condition broken* is a legal estate, the only difference being, that under the common-law theory of the mortgage, it

is an estate in reversion, or more strictly a possibility of reverter, while under the lien theory it is a present vested estate, only liable to be destroyed by the enforcement of the lien. It is subject to the same rules of conveyance and descends to the heirs as any other kind of real estate.⁹⁵ And it may be stated as a general proposition that, except as against the mortgagee, he is clothed with all the rights and liabilities which are usually incident to an estate in lands.⁹⁶ Upon the

⁹⁵ Co. Lit. 205 a, Butler's note, 96; Thorne v. Thorne, 1 Vern. 141; Casborne v. Scarfe, 1 Atk. 606; Ledyard v. Butler, 9 Paige Ch. 132; Baxter v. Dyer, 5 Ves. 656; Huckins v. Straw, 34 Me. 166; Orr v. Hadley, 36 N. H. 575; White v. Rittenmyer, 30 Iowa, 272; Wright v. Rose, 2 Sim. & S. 323; Bourne v. Bourne, 2 Hare, 35; Bigelow v. Wilson, 1 Pick. 485.

⁹⁶ Willington v. Gale, 7 Mass. 138; Blaney v. Pearce, 2 Greenl. 132; Felch v. Taylor, 13 Pick. 133; Bird v. Decker, 64 Me. 550; Collins v. Torry, 7 Johns. 278; Schuykill Co. v. Thoburn, 7 Serg. & R. 411; Hitchcock v. Harrington, 6 Johns. 290; Clark v. Reyburn, 1 Kan. 281. Trustees of Donations v. Streeter, 64 N. H. 106; Tilden v. Greenwood, 149 Mass. 567. Except as against the mortgagee and his privies, the mortgagor may maintain actions to recover possession or to recover damages for waste. Huckins v. Straw, 34 Me. 166; Stinson v. Ross, 51 Me. 556; Den v. Dimon, 5 Halst. 156; Bird v. Decker, 64 Me. 550; Woods v. Hildebrand, 46 Mo. 284; 2 Am. Rep. 513; Pueblo, etc., Valley R. R. Co. v. Beshoar, 8 Col. 32. In Meyer v. Campbell, 12 Mo. 603, it was held that ejectment will not lie by the mortgagor after the breach of the condition. And where the mortgagee has taken possession, an action for waste cannot be maintained by the mortgagor, unless the inheritance has been injured by the trespass. Sparhawk v. Bagg, 16 Gray, 583. And an action by the mortgagee for trespass is a bar to a similar action for the same offense by the mortgagor. James v. Worcester, 141 Mass. 361. The mortgagor's widow has dower in the equity, if she has not released her dower in the land, and may redeem the land from the mortgagee. Titus v. Neilson, 5 Johns. Ch. 452; Van Duyne v. Thayre, 14 Wend. 233; Hawley v. Bradford, 9 Paige Ch. 200; Snow v. Stevens, 15 Mass. 278; Eaton v. Simonds, 14 Pick. 98; McCabe v. Bellows, 7 Gray, 148; see *post*, Sec. 255. The mortgagee, or trustee, in Missouri, is held to take the legal title, for purposes of security, in all cases where the deed or mortgage purports to convey the estate. Markwell v. Markwell, 157 Mo. 326, 57 S. W. Rep. 1078; Mathews v. Mo. Pac. Co., 142 Mo. 645, 44 S. W. Rep. 802. But see, Dickerson v. Bridges, 147 Mo. 235, 48 S. W. Rep. 825; Pence v. Gabbert, 70 Mo. App. 201.

breach of the condition, under the common-law theory that the mortgage conveyed a defeasible estate, the estate became absolute in the mortgagee, leaving nothing in the mortgagor but the equitable right to redeem the estate. This was called the *equity of redemption*. It was no estate in the land, simply an equitable right to regain the legal estate. At common law, therefore, the interest of the mortgagor after condition broken, although still considered real estate and descendible to the heirs of the mortgagor, and capable of alienation by the usual methods, could not be levied upon by creditors. But in this country at the present day the equity of redemption is generally held to have all the characteristics and qualities of a legal estate, and this too in those States whose courts still cling to the common-law theory of mortgages. The equity is now generally subject to levy and sale under execution.⁹⁷

⁹⁷ It is liable for debts. *Cushing v. Hurd*, 4 Pick. 253; *Febeiger v. Craighead*, 4 Dall. 151; *Perrin v. Read*, 35 Vt. 2; *Grace v. Mercer*, 10 B. Mon. 157; *Crow v. Tinsley*, 16 Dana, 402; *Waters v. Stewart*, 1 Caines' Cas. 47; *Fernald v. Linscott*, 6 Greenl. 234; *Huntington v. Cotton*, 31 Miss. 253; *Wiggin v. Heyward*, 118 Mass. 514; *Hall v. Tunnell*, 1 Houst. 320; *Van Ness v. Hyatt*, 13 Pet. 294; *Jackson v. Willard*, 4 Johns. 41; *Bosse v. Johnson*, 73 Tex. 608. At common law, it was not subject to levy and sale under execution, although perhaps always liable in equity. *Plunkett v. Penon*, 2 Atk. 290; *Forth v. Norfolk*, 5 Madd. 504; *Van Ness v. Hyatt*, 13 Pet. 294; *Hill v. Smith*, 2 McLean, 446. But in most of the States the courts have either by their adjudications assumed that it was a common-law right, or the right has been expressly given by statute. Statutes have been passed in Alabama, Connecticut, Florida, Illinois, Massachusetts, Mississippi, Maine, North Carolina, South Carolina and several other States. 2 Washburn on Real Prop. 163. But the mortgagee cannot reduce the mortgage-debt to judgment, and levy upon the equity of redemption. *Lyster v. Doland*, 1 Ves. 431; *Washburn v. Goodwin*, 17 Pick. 137; *Atkins v. Sawyer*, 1 Pick. 351; *Palmer v. Foote*, 7 Paige Ch. 437; 2 N. Y. Rev. Stat. 368; *Goring v. Shreve*, 7 Dana, 67; *Deaver v. Parker*, 2 Ired. Eq. 40; *Camp v. Cox*, 1 Dev. & B. 52; *Tice v. Annin*, 2 Johns. Ch. 125; *Parker v. Bell*, 37 Ala. 358; *Duck v. Sherman*, 2 Dougl. (Mich.) 176; *Baldwin v. Jenkins*, 23 Miss. 206; *Waller v. Tate*, 4 B. Mon. 529; *Hill v. Smith*, 2 McLean, 446. *Contra*, *Porter v. King*, 1 Me. 297; *Trimm v. Marsh*, 58

§ 240. *The mortgagee's interest.*—Under the common-law theory, the mortgagee has the freehold estate both before and after the breach of the condition. Before, it is a defeasible estate, and after, an absolute estate. His interest, therefore, was a legal estate; it descended to his heirs, and required the same formalities of conveyance.⁹⁸ But under the lien theory he is said to have only a chattel interest, until foreclosure. The mortgage is not real estate; it is personal property, which descends with the debt to the personal representatives. And now the equity rule substantially prevails, whether the mortgagee's interest is considered real estate or personal property, and after his death the mortgagee's personal representatives exercise all his rights under the mortgage, a release or conveyance by the heir having no effect upon the rights of the personal representatives. The heir takes the mortgage as trustee for the personal representatives.⁹⁹ If a

N. Y. 599; 13 Am. Rep. 623; *Crooker v. Frazier*, 52 Me. 406; *Freeby v. Tupper*, 15 Ohio, 467; *Pierce v. Potter*, 7 Watts, 475. But if the mortgage-debt has been assigned to a *bona fide* holder, without the mortgage, such assignee may levy upon the equity of redemption. *Crane v. Marsh*, 4 Pick. 131; *Andrews v. Fisk*, 101 Mass. 424; *Waller v. Tate*, 4 B. Mon. 529. And it has also been held that the first mortgagee may levy upon the equity of redemption from the second mortgage. *Johnson v. Stevens*, 1 Cush. 431. See also, *Collins v. Davis*, 132 N. C. 106, 43 S. E. Rep. 579; *Rotschild v. Lumber Co.*, 139 Ala. 571, 36 So. Rep. 785; *Lest v. Armbruster*, 143 Cal. 663, 77 Pac. Rep. 653.

⁹⁸ 2 Washburn on Real Prop. 36, 97; Co. Lit. 205 a, Butler's note, 96; Jones on Mort., Secs. 11-59; see *ante*, Sec. 222; Williams on Real Prop. 422. The mortgagee's title is in the nature of a base, or qualified fee, the term of its existence being measured by the existence of the mortgage debt. When the debt is paid, or barred, the title of the mortgagee is determined, by operation of law. *Bradley v. Lightcap*, 195 U. S. 2-4, 49 L. Ed. 65; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. Rep. 221; *Esker v. Heffernan*, 159 Ill. 38, 41 N. E. Rep. 1113.

⁹⁹ *Connor v. Whitmore*, 52 Me. 185; *Collamer v. Langdon*, 29 Vt. 32; *Taft v. Stevens*, 3 Gray, 504; *Douglas v. Darin*, 57 Me. 121; *Kinna v. Smith*, 2 Green Ch. 14; *Dewey v. Van Deusen*, 4 Pick. 19; *Jackson v. Delancy*, 11 Johns. 365; *s. c.* 13 Johns. 535; *Chase v. Lockerman*, 11 Gill & J. 185; *Barnes v. Lee*, 1 Bibb. 526; *White v. Rittenmeyer*, 30 Iowa, 272; *Richardson v. Hildreth*, 8 Cush. 225; *Webster v. Calden*,

statute prohibits foreign corporations from lending money within the State, such corporations cannot acquire any valid interest in a mortgage, as a mortgagee. Such a mortgage would be void.¹

§ 241. **Devise of the mortgage.**—It has been held that a general devise in terms of lands, tenements and hereditaments, in the absence of any other evidence of intention, will be construed to cover the mortgages owned by the devisor.² But those decisions are from the English courts, which sustain the common-law theory of mortgages, and it is to be supposed that in the States, in which the lien theory has been more or less followed, a different conclusion would be reached.³

§ 242. **Merger of interests.**—The interests of the mortgagor and mortgagee are not separate and distinct titles to the land. They constitute together the one title, which can alone be predicated of property. When, therefore, the two interests unite in one person, the lesser or subordinate interest will generally merge in the greater, and be extinguished. The

56 Me. 204; *Haskins v. Hawkes*, 108 Mass. 379; *Palmer v. Stevens*, 11 Cush. 147; *George v. Baker*, 3 Allen, 326; *Green v. Hunt*, Cooke (Tenn.), 344; *Demarest v. Wynkoop*, 3 Johns. Ch. 145. And the trustee in a deed of trust has practically the same powers that a mortgagee usually possesses. *Robeson v. Dunn* (S. D. 1903), 96 N. W. Rep. 104; *Old Colony Trust Co. v. Wichita*, 123 Fed. Rep. 762. The heirs of a wife, who has permitted the title to stand in her husband's name, take subject to a mortgage, executed by him, in Missouri. *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. Rep. 202, 61 L. R. A. 166.

¹ *Farrior v. New Eng. Mortgage, etc., Co.*, 88 Ala. 275. Generally, only the State, in a direct proceeding, can object to a violation of a State statute, by a corporation. *Life Ins. Co. v. Smith*, 117 Mo. 261. And unless the act makes the violation of the statute void, the contract is valid. *Cowell v. Colo. Spgs. Co.*, 100 U. S. 55, 25 L. Ed. 549.

² *Jackson v. Delancey*, 13 Johns. 553-559; *Winn v. Littleton*, 1 Vern. 4; *Galliers v. Moss*, 9 B. & C. 267; *Braybroke v. Inskip*, 8 Ves. 417 n; Co. Lit. 205 a, *Butler's note*, 96; *contra*, *Casborne v. Scarfe*, 1 Atk. 605; *Atty.-Gen. v. Vigor*, 8 Ves. 276; *Strode v. Russell*, 2 Vern. 625; *Wilkins v. French*, 20 Me. 111.

³ *Moore v. Cornell*, 69 Pa. St. 3.

mortgagee's interest would be lost in the mortgagor's. But to effect a merger of interests, they must come together in one person at the same time, and in the same character or capacity. A conveyance of the equity to a trustee of the mortgagee, or to the mortgagee as trustee of another, would, in neither case, cause a merger.⁴ It is also a general rule in equity that the union of the two estates in one person will not be permitted to work a merger, where from the circumstances, an injury would result to parties interested in either. The existence of an outstanding second mortgage would prevent a merger in the hands of a person holding the first mortgage and the equity of redemption.⁵ But if the senior mort-

⁴ *Hunt v. Hunt*, 14 Pick. 384; *James v. Morey*, 2 Cow. 246; *Barnett v. Denniston*, 5 Johns. Ch. 35; *Stantons v. Thompson*, 49 N. H. 272; *Burhans v. Hutchinson*, 25 Kan. 625, 37 Am. Rep. 274; *Gregory v. Savage*, 32 Conn. 264; *Shin v. Fredericks*, 56 Ill. 443; *Warren v. Warren*, 30 Vt. 530; *Clary v. Owen*, 15 Gray, 525; *Bean v. Boothby*, 57 Me. 295; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532; *Barker v. Flood*, 103 Mass. 474; *Model Lodging House Assn. v. City of Boston*, 114 Mass. 133; *Pratt v. Bank of Bennington*, 10 Vt. 293; *Champney v. Coope*, 32 N. Y. 543; *Sherman v. Abbott*, 18 Pick. 448; *Bailey v. Richardson*, 15 E. L. & E. 218; *Dickason v. Williams*, 129 Mass. 182, 37 Am. Rep. 316; *Thomas v. Simmons*, 103 Ind. 538; *Bredenberg v. Landrum* (S. C.), 10 S. E. Rep. 956; *Collins v. Stocking*, 98 Mo. 290. The purchase, by a husband, of a mortgage, given by his wife, on her separate estate, is not merged in the legal estate of the husband, existing when the mortgage was given. *Skinner v. Hale*, 76 Conn. 223, 56 Atl. Rep. 524. Nor is the mortgage debt, paid by a wife, out of her separate estate, merged in her life estate, that she acquires on the death of her husband, but the debt can be enforced by her, against the premises. *Warner v. York*, 25 Ohio Cir. Ct. 310.

⁵ *Wade v. Howard*, 6 Pick. 492; *s. c.* 11 Pick. 289; *Evans v. Kimball*, 1 Allen, 240; *Cook v. Brightly*, 46 Pa. St. 439; *Frazee v. Inslee*, 1 Green Ch. 239; *Grover v. Thatcher*, 4 Gray, 526; *Bell v. Woodward*, 34 N. H. 90; *Hill v. Pixly*, 63 Barb. 200; *Warren v. Warren*, 30 Vt. 530; *Land v. Lane*, 8 Metc. 517; *Lyon v. McIlvaine*, 24 Iowa, 9; *New England Jewelry Co. v. Merriam*, 2 Allen, 390; *Stantons v. Thompson*, 49 N. H. 272; *Green v. Currier*, 63 N. H. 563; *Cohn v. Hoffman*, 45 Ark. 376; *Hospes v. Ahnstedt*, 83 Mo. 473; *Georgia Chemical Works v. Cartledge*, 77 Ga. 547; *Clements v. Griswold*, 46 Hun, 377; *Scrivner v. Dietz*, 84 Cal. 295; *Williams v. Brownlee* (Mo.), 13 S. W. Rep. 1049.

gagee enters into possession, after the assignment to him of the equity, he is not accountable to the junior mortgagee for the rents.* It is an almost universal rule, that equity will keep alive the mortgage in the hands of the holder of the equity whenever its merger would do injury to one in any way interested therein. Where, however, it is the plain intention of the parties, or in no wise injurious to their interests, that a merger should result from the union of the interests, equity will not interfere in their behalf.⁷ When a judg-

* *Gray v. Nelson*, 77 Iowa, 63. Where it is to the interest of a wife to keep alive a mortgage debt, after death of her husband, there is no merger of the mortgage into her life estate, by a payment of the debt. *Warner v. York*, 25 Ohio Cir. Ct. 310. Where there is an agreement between the holders of the junior and senior mortgages that a purchase of the equity of the mortgagor, under the junior mortgage should not constitute a merger, the payment thereon will not discharge the debt. *Continental Title & Trust Co. v. Devlin*, 209 Pa. 380, 58 Atl. Rep. 843. Although a husband and wife are the principal stockholders in a corporation, a purchase by the corporation of a mortgage on the wife's property, will not amount to a purchase, so as to constitute a merger. *Juckett v. Fargo Merc. Co.* (S. D. 1905), 102 N. W. Rep. 604. Where one of two joint mortgagors pays off and takes an assignment of the mortgage to himself, the lien of the mortgage is not merged in the fee, where he deeded his interest, subject to the mortgage. *Saint v. Cornwall*, 207 Pa. 270, 56 Atl. Rep. 440.

⁷ *Forbes v. Moffat*, 18 Ves. 384; *Gibson v. Crehore*, 3 Pick. 475; *Hunt v. Hunt*, 14 Pick. 374; *Bell v. Woodward*, 34 N. H. 90; *St. Paul v. Viscount Dudley and Ward*, 15 Ves. 167; *Grover v. Thatcher*, 4 Gray, 526; *Moore v. Beasom*, 44 N. H. 215; *Millsbaugh v. McBride*, 7 Paige Ch. 509; *Judd v. Seekins*, 62 N. Y. 266; *Vanderkemp v. Shelton*, 11 Paige Ch. 28; *Loomer v. Wheelwright*, 3 Sandf. Ch. 157; *Simonton v. Gray*, 34 Me. 50; *Van Wagner v. Brown*, 26 N. J. L. 196; *Duncan v. Smith*, 31 N. J. L. 325; *Mallory v. Hitchcock*, 29 Conn. 127; *Wallace v. Blair*, 1 Grant Cas. 75; *Brown v. Lapham*, 3 Cush. 551; *Eaton v. Simonds*, 14 Pick. 98; *James v. Morey*, 2 Cow. 285; *Savage v. Hall*, 12 Gray 364; *Fletcher v. Chase*, 16 N. H. 42; *Weeks v. Ostrander*, 52 N. Y. Super. Ct. 512, s. c. 15 Abb. N. C. 143; *Carpenter v. Gleason*, 58 Vt. 244; *Ann Arbor Sav. Bank v. Webb*, 56 Mich. 377; *Watson v. Dundee Mortgage, etc., Co.*, 12 Ore. 474; *Clark v. Clark* (Wis.), 45 N. W. Rep. 121; *Newton v. Manwaring*, 10 N. Y. S. 347; *Shipley v. Fox*, 69 Md. 572; *Citizens Bank v. Hejams* (La.), 7 So. Rep. 700; *Crombie v. Rosenbach*, 19 Abb. N. C. 312; *Christy v. Scott*, 31 Mo. App. 331; *Cox v. Led-*

ment *in personam* is obtained against the mortgagor, on the note or bond which is secured by the mortgage, the note or bond is merged in the judgment, but not the mortgage,⁸ and so likewise is there no merger of the judgment *in personam*, although the mortgage which secures it may become merged.⁹

§ 243. *Possession of the mortgaged premises.*—It is a general custom in this country, for the mortgagor to retain possession until the breach of the condition, and even afterwards it is not usual for the mortgagee to enter into possession until the land has been decreed to him by foreclosure. But in those States where the common-law theory prevails in its full force, the mortgagee may enter into possession at any time after the delivery of the mortgage. He possesses the freehold, and can exercise all the rights of ownership over the land. And if the mortgagor should resist his demand for possession he may bring an action of ejectment for its recovery.¹⁰ But

ward, 124 Pa. St. 335; *Gray v. Nelson*, 77 Iowa 63; *McIlhenny v. Shoemaker*, 76 Iowa 416; *Belknap v. Dennison*, 61 Vt. 520; *Collins v. Stocking*, 98 Mo. 290; *Beeckman v. Butler*, 77 Iowa 128; *Sanford v. Van Arsdall*, 53 Hun 70.

⁸ *Lalanne v. Payne* (La.), 7 So. Rep. 481.

⁹ *Clark v. Simmons*, 55 Hun 175. "That a merger of the lien of the first mortgage would operate to the disadvantage of the mortgagee, there can be no question. If the merger is not allowed to take place, he is, of course, bound to take subject to the second mortgage, in case of a purchase of the equity; but upon a sale he would be entitled to receive out of the proceeds all the money due on the first mortgage, or he could keep the property by paying only the excess it brings over the first mortgage, whereas, if there is a merger, he would be bound to pay the second mortgage in full in order to keep the property he bought, or obtain any of the proceeds of its sale." See also, *Hines v. Ward*, 121 Cal. 118, 53 Pac. Rep. 427; *Srivner v. Dietz*, 84 Cal. 298, 24 Pac. Rep. 171; *Brooks v. Rice*, 56 Cal. 428; *Rumpp v. Gerkens*, 59 Cal. 496; *Carpenter v. Brenham*, 40 Cal. 221; *Henderson v. Grammar*, 66 Cal. 335, 5 Pac. Rep. 488; *Wilson v. White*, 84 Cal. 243, 24 Pac. Rep. 114; *Tolman v. Smith*, 85 Cal. 289, 24 Pac. Rep. 743; *Shaffer v. McCloskey*, 101 Cal. 580, 36 Pac. Rep. 196; *Jones on Mortgages*, Secs. 870, 873.

¹⁰ *Erskine v. Townsend*, 2 Mass. 493; *Goodwin v. Richardson*, 11 Mass. 473; *Knox v. Easton*, 38 Ala. 345; *Bradley v. Fuller*, 23 Pick. 1;

in some of the States, where the common law has been modified in this respect by statute or judicial legislation, the mortgagor is entitled to possession until condition broken, but after condition broken the mortgagee has the right of possession, the same as at common law.¹¹ In other States, where the lien theory has met with more or less favor, the mortgagee is not entitled to possession until the mortgage is foreclosed and the estate made absolute in the mortgagee.¹²

Page v. Robinson, 10 Cush. 99; *Wales v. Miller*, 1 Gray 512; *Karnes v. Lloyd*, 52 Ill. 113; *Howard v. Houghton*, 64 Me. 445; *Stewart v. Barrow*, 7 Bush 368; *Sedman v. Sanders*, 2 Dana 68; *Treat v. Pierce*, 53 Me. 77; *Sumwalt v. Tucker*, 34 Md. 89; *Annapolis, etc., R. R., v. Gault*, 39 Md. 115; *Hemphill v. Ross*, 66 N. C. 477; *Jackson v. Dubois*, 4 Johns. 216; *Jackson v. Hull*, 10 Johns. 481; *Ellis v. Hussey*, 66 N. C. 501; *Tryon v. Munson*, 77 Pa. St. 250; *Youngman v. R. R. Co.*, 65 Pa. St. 278; *Den v. Stockton*, 12 N. J. L. 322; *Shute v. Grimes*, 7 Blackf. 1; *Ely v. McGuire*, 2 Ohio 223; *Carpenter v. Casper*, 6 R. I. 542; *Vance v. Johnson*, 10 Humph. 214; *Faulkner v. Brockenbrough*, 4 Rand. 245; *Tripe v. Marcy*, 39 N. H. 439; *Trustees v. Dickson*, 1 Freem. Ch. 474; *May v. Fletcher*, 14 Pick. 525. And he may likewise have trespass against the mortgagor, even before condition broken, for waste, or for resisting his entry. *Smith v. Johns*, 3 Gray 517; *Northampton Mills v. Ames*, 8 Metc. 1; *Page v. Robinson*, 10 Cush. 99; *Newall v. Wright*, 3 Mass. 138; *Furbish v. Goodwin*, 29 N. H. 321; *Clark v. Bench*, *supra*.

¹¹ *Cheever v. Rutland & B. R. R.*, 39 Vt. 653; *Sutton v. Mason*, 38 Mo. 120; *McIntyre v. Whitfield*, 13 Smed. & M. 88; *Kannady v. McCarron*, 18 Ark. 166; *Watson v. Dickens*, 12 Smed. & M. 608; *Reynolds v. Canal & Banking Co. of N. O.*, 30 Ark. 520; *Hall v. Tennell*, 1 Houst. 320; *Reddick v. Gressman*, 49 Mo. 389; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Sanderson v. Price*, 1 Zab. 646; *Shields v. Lozeau*, 34 N. J. L. 496; 3 Am. Rep. 256; *Hagar v. Brainerd*, 44 Vt. 294; *Walker v. King*, 44 Vt. 601; *Allen v. Everly*, 24 Ohio St. 602; *Rands v. Kendall*, 15 Ohio 671. In the following late cases the mortgagor has been held entitled to possession, until breach: *Davis v. Pollard* (1904), 99 Me. 345, 59 Atl. Rep. 520; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. Rep. 193; *White v. Smith*, 174 Mo. 186, 73 S. W. Rep. 610; *Ostengren v. Rice*, 104 Ill. App. 428; *Watkins v. Kaolin Mfg. Co.*, 131 N. C. 536, 42 S. E. Rep. 983, 60 L. R. A. 617; *Yingling v. Redwine* (Okl. 1902), 69 Pac. Rep. 810; *DuBois v. Bowles* (Colo. 1902), 69 Pac. Rep. 1067.

¹² Civil Code Cal., Sec. 2927; *Grattan v. Wiggins*, 23 Cal. 26; *Drake v. Root*, 2 Colo. 685; *Vason v. Ball*, 56 Ga. 268; 2 G. & H. Stat. 335

And it has been held in some of the last class of cases, that although the mortgagor is lawfully in possession, and cannot be ejected even after the condition has been broken, yet if he delivers the possession to the mortgagee, he cannot by any action regain it as long as the mortgage is not satisfied. His only remedy is to redeem the mortgage.¹²

§ 244. *Special agreements in respect to possession.*— But the right to possession before foreclosure may be changed by agreement of the parties. If, according to the law, the mortgagor is entitled to possession, by agreement the mortgagee may be given a right of entry at any time before foreclosure; (Ind.); *Smith v. Parks*, 22 Ind. 61; *Chase v. Abbott*, 20 Iowa 158; *Dassler's Stat. Kan.* (1876), Ch. 68 Sec. 1; *Ducland v. Rousseau*, 2 La. An. 168; *Comp. Laws Mich.* (1871) 1775; *Gorham v. Arnold*, 22 Mich. 247; *Berthold v. Fox*, 13 Minn. 501; *Trimm v. Marsh*, 54 N. Y. 604; *Besser v. Hawthorne*, 3 Ore. 129; *Hughes v. Edwards*, 9 Wheat. 489; *Durand v. Isaacks*, 4 McCord 54; *Walker v. Johnson*, 37 Texas 127. But where the common-law rule has been changed by statute, the statute will not affect the mortgagee's right of possession under mortgages already in existence. The statute will only apply to future mortgages. *Blackwood v. Van Fleet*, 11 Mich. 252; *Morgan v. Woodward*, 1 Ind. 321; *Shaw v. Hoadley*, 8 Blackf. 165.

¹² *Hubbell v. Moulson*, 53 N. Y. 225; *Watson v. Spence*, 20 Wend. 260; *Den v. Wright*, 7 N. J. L. 175; *Mitchell v. Bogan*, 11 Rich. L. 681; *Hennessy v. Farrell*, 20 Wis. 42; *Roberts v. Sutherland*, 4 Ore. 219; *Frank v. LeRoy*, 49 Cal. 314; *Eyster v. Gaff*, 2 Colo. 228; *Avery v. Judd*, 22 Wis. 262; *Newton v. McKay*, 30 Mich. 380; *Cook v. Cooper*, 18 Ore. 142; *Rodriguez v. Hayes*, 76 Tex. 225. In those States where the right of possession is held to be in the mortgagor, before breach of the condition, however, the right is not effected by the fact that the mortgage is in the form of an absolute deed or conveyance. *Yingling v. Redwine* (Okla. 1902), 69 Pac. Rep. 810; *DuBois v. Bowles* (Colo.), 69 Pac. Rep. 1067. A mortgagee who purchases and goes into possession, under a void foreclosure sale, is none the less a mortgagee in possession, with all the accompanying rights. *Investment Co. v. Adams* (Wash. 1905), 79 Pac. Rep. 625. In so far as the Illinois statute of 1872, applies to mortgagees in possession, making their title forfeited, if their master's deed be not taken in a specified time, after the expiration of the time for redemption, the statute is held to be void, by the United States Supreme Court, as impairing the obligation of the contract. *Bradley v. Lightcap*, 195 U. S. 2-4, 49 L. Ed. 65.

and if the mortgagee has by law the right of possession, his right of entry may be restrained until condition broken, or taken away altogether. If the purposes and the object of the mortgage require the possession to be given to the party not entitled thereto by law, the agreement to vest it in him will be implied from those circumstances. The implication must, however, be a necessary one; otherwise nothing but an express agreement will have that effect.¹⁴ The mortgagor may also agree to pay rent for his occupation of the land during the continuance of the mortgage. In which case the relation of landlord and tenant arises between the mortgagee and mortgagor, and on default in the payment of the rent, the mortgagee could recover the possession.¹⁵

§ 245. *Rents and profits.*—Whoever is in actual possession is entitled to the rents and profits issuing from the mortgaged

¹⁴ *Flagg v. Flagg*, 11 Pick. 475; *Smith v. Parks*, 22 Ind. 61; *Norton v. Webb*, 35 Me. 218; *Brown v. Leach*, 35 Me. 39; *Knox v. Easton*, 38 Ala. 345; *Stewart v. Barrow*, 7 Bush 368; *Redman v. Sanders*, 2 Dana 68; *Brown v. Stewart*, 1 Md. Ch. 87; *Leighton v. Preston*, 9 Gill 201; *O'Neill v. Gray*, 39 Hun 566; *Bryson v. June*, 55 N. J. Super. Ct. 374. But the right will not be implied from a silent acquiescence in the mortgagor's possession, or inferred from a clause in the mortgage that the mortgagee shall take possession upon default. *Stowell v. Pike*, 2 Greenl. 387; *Brown v. Cram*, 1 N. H. 169; *Rogers v. Grazebrook*, 8 Q. B. 898. But see *Jackson v. Hopkins*, 18 Johns. 487. Nor would a parol agreement change the law in reference to the right of possession. *Colman v. Packard*, 16 Mass. 39.

¹⁵ *Murray v. Riley*, 140 Mass. 490. It is not of the essence of a mortgage for the mortgagor to remain in possession. *Moore v. Boogin*, 111 La. 490, 35 So. Rep. 716. Possession delivered to a mortgagee to cut timber to pay taxes will not authorize the cutting of timber for other purposes. *Holbrook v. Greene*, 98 Me. 171, 56 Atl. Rep. 659. On taking possession, the mortgagee is not required to give notice to the mortgagor. *Ante idem*. But a mortgagee in possession is not, in the absence of agreement, entitled to any compensation for care of property. *Moss v. Odell*, 141 Cal. 335; *Turner v. Johnson*, 95 Mo. 431, 7 S. W. Rep. 570; *Elmer v. Loper*, 25 N. J. Eq. 475; *Blunt v. Symes*, 40 Hun 566. But see *contra*, *Gerish v. Black*, 104 Mass. 400; *Brown v. Bank*, 148 Mass. 300, 19 N. E. Rep. 382; *Waterman v. Curtis*, 26 Com. 241.

premises. If it be the mortgagor, he takes them free from any claim on the part of the mortgagee, even where he is in possession by sufferance only, and where the property is not sufficient to satisfy the mortgage debt.¹⁶ And even where the mortgagor is in possession by lawful right, if the property is an insufficient security, the mortgagee may apply for the appointment of a receiver, and the rents and profits accruing thereafter will be applied to the liquidation of the debt.¹⁷ But to entitle the mortgagee to the appointment of a receiver, special equitable grounds must be alleged; for example, that the mortgagor is insolvent, and the security insufficient. If the mortgagor is insolvent, or the mortgagee possesses other means of protecting himself, the insufficiency of the mortgage security will not support an application for a receiver.¹⁸

¹⁶ *Boston Bk. v. Reed*, 8 Pick. 459; *Mayo v. Fletcher*, 14 Pick. 525; *Kunkle v. Wolfersberger*, 6 Watts 131; *Noyes v. Rich*, 52 Me. 115; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Johnson v. Miller*, 1 Wills 416; *Gelston v. Burr*, 11 Johns. 482; *Astor v. Turner*, 11 Paige 436; *Mitchell v. Bartlett*, 52 Barb. 319; *Childs v. Hurd*, 32 W. Va. 66. It is held in Massachusetts, that if the mortgaged property is not sufficient in value to satisfy the debt, after entry to foreclose, the mortgagee may recover of the mortgagor for past use and occupation. *Merrill v. Bullock*, 105 Mass. 486; *Morse v. Merritt*, 110 Mass. 458. A trustee who gets possession before foreclosure, must account for rents received. *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. Rep. 193.

¹⁷ *Post v. Door*, 4 Edw. Ch. 412; *Lofsky v. Maujer*, 3 Sandf. Ch. 69; *Astor v. Turner*, 11 Paige 436; *Clason v. Corley*, 5 Sandf. Ch. 447; *Mitchell v. Bartlett*, 51 N. Y. 442; *Myers v. Estell*, 48 Miss. 372; *Douglas v. Cline*, 12 Bush 608; *Child v. Hurd*, 32 W. Va. 66.

¹⁸ *Bk. of Ogdensburg v. Arnold*, 5 Paige 40; *Williams v. Robinson*, 16 Conn. 517; *Shotwell v. Smith*, 3 Edw. Ch. 588; *Quincy v. Cheeseman*, 4 Sandf. Ch. 405; *Corttey v. Hathaway*, 11 N. J. Eq. 39; *Hackett v. Snow*, 10 Ired. 220; *Oliver v. Decatur*, 4 Cranch C. Ct. 458; *Frisbie v. Bateman*, 24 N. J. Eq. 28; *Williamson v. New Albany R. Co.*, 1 Biss. 201; *Whitehead v. Wooten*, 43 Miss. 523; *Pullan v. C. & C. R. R.*, 4 Biss. 35; *First Nat. Bk. v. Gage*, 79 Ill. 206; *Morrison v. Buckner*, 1 Hempst. 442; *Syracuse Bk. v. Tallman*, 31 Barb. 201. After a refusal of a receiver, the holder of the property is entitled to the rents, until an actual foreclosure. *Georgetown Water Co. v. Fidelity Trust Co.* (Ky. 1904), 78 S. W. Rep. 113. In the absence of a pledge thereof, a mortgagee has no lien on the rents, in Illinois. *West v. Adams*, 106

The mortgagee is entitled to a judgment for rents and profits from the date of the decree of foreclosure, or, if he has a right to possession before foreclosure, from his demand for possession, when he follows up such demand either by foreclosure or an action of ejectment.¹⁹ If the mortgagee is in possession he is entitled to the rents and profits accruing after his entry. And where the land has been leased by the mortgagor, the entry of the mortgagee vests in him the right to call upon the lessee to pay the rent to him.²⁰ If, however, the lease be subject to the mortgage, *i. e.*, executed subsequently, since there is no privity of estate between the mortgagee and the lessee, either party may consider the lease defeated by the entry, and no rent will become due thereon, if either party should so elect. And any agreement between the parties looking to a continuance of the lease, is in fact a

Ill. App. 114. But where a pledge thereof is made, in the mortgage, the mortgagee is entitled to a receiver, regardless of the solvency of the mortgagor. *West v. Adams, supra*.

¹⁹ *Wilder v. Houghton*, 1 Pick. 87; *Mayo v. Fletcher*, 14 Pick. 525; *Haven v. Adams*, 8 Allen 368; *Northampton Mills v. Ames*, 8 Metc. 1; *Hill v. Jordan*, 30 Me. 367; *Bk. of Washington v. Hupp*, 10 Gratt. 23; *Forlout v. Bowlin*, 29 Ill. App. 471; *Jones on Mort.* 670. This rule naturally can apply only to strict foreclosure, where the mortgagee is not entitled to possession after default. And where in strict foreclosure a certain time is given after the decree, within which the land might still be redeemed, the judgment for rents and profits can only be had after this period of redemption. And where the property is sold under foreclosure, the rents and profits do not accrue to the purchaser until the delivery of the deed to him, and perhaps not until he has made a demand for possession under his deed. *Clason v. Corley*, 5 Sandf. Ch. 447; *Mitchell v. Bartlett*, 52 Barb. 319; *Astor v. Turner*, 11 Paige 436.

²⁰ *West v. Adams*, 106 Ill. App. 114; *Sage v. Mendelson*, 85 N. Y. S. 1008; *DeBona v. Frost* (Tex. 1903), 77 S. W. Rep. 637; *Smith v. Shepherd*, 15 Pick. 147; *Stone v. Patterson*, 19 Pick. 476; *Russell v. Allen*, 2 Allen 42; *Welch v. Adams*, 1 Metc. 494; *Hill v. Jordan*, 30 Me. 367; *Northampton Mills v. Ames*, 8 Metc. 1; *Turner v. Cameron*, 5 Exch. 932; *Pope v. Biggs*, 9 B. & C. 245; *Bk. of Washington v. Hupp*, 10 Gratt. 23.

new lease.²¹ But where the lease takes precedence to the mortgage, the entry of the mortgagee will not defeat the lease in any event. The mortgagee may, however, compel the lessee to pay to him all rent accruing after entry, which has not been paid over to the mortgagor before the lessee received notice of the execution of the mortgage. But payment to the mortgagor before such notice, even of rent in advance which falls due afterwards, if *bona fide*, will constitute a good defense to any action by the mortgagee.²²

²¹ *Russell v. Allen*, 2 Allen 44; *Smith v. Shepherd*, 15 Pick. 147; *Mayo v. Fletcher*, 14 Pick. 525; *Watts v. Coffin*, 11 Johns. 495; *Jones v. Clark*, 20 Johns. 51; *Jackson v. Delancey*, 11 Johns. 365; *Kimball v. Lockwood*, 6 R. I. 138; *Syracuse City Bk. v. Tallman*, 31 Barb. 207; *Magill v. Hinsdale*, 6 Conn. 464; *McKircher v. Hawley*, 16 Johns. 289; *Hemphill v. Giles*, 66 N. C. 512; *Pope v. Biggs*, 9 B. & C. 245; *Doe v. Hales*, 7 Bing. 322; *Knox v. Easton*, 38 Ala. 345; *Lane v. King*, 8 Wend. 584; *Lynde v. Rowe*, 12 Allen 110; *Gartside v. Outley*, 58 Ill. 210; 11 Am. Rep. 59; *Weaver v. Belcher*, 3 East 449; *Rogers v. Humphreys*, 4 A. & E. 299; *Higginbotham v. Barton*, 11 Ad. & El. 307; *Henshaw v. Wells*, 8 Humph. 568; *Morse v. Goddard*, 13 Metc. 177; *Field v. Swan*, 10 Metc. 177. See *Hogsett v. Ellis*, 17 Mich. 351: The lessees in a subsequent lease must attorn in order to be liable to the mortgagee. A mere notice to pay rent will not render them liable. But judgment for *mesne* profits may be had if they continue in possession after demand. *Kimball v. Lockwood*, 6 R. I. 138; *Hill v. Jordan*, 35 Me. 367; *Northampton Mills v. Ames*, 8 Metc. 1; *Morse v. Goddard*, *supra*; *Field v. Swan*, *supra*; *Rogers v. Humphreys*, *supra*; *Evans v. Elliott*, 9 A. & E. 342. But without special agreement the acceptance of rent from the lessee will not bind the mortgagee to the terms and duration of the original lease. It creates only a tenancy from year to year. *Hughes v. Bucknell*, 8 C. & P. 566.

²² *Rogers v. Humphreys*, 4 Ad. & E. 299; *Moss v. Gallimore*, Dougl. 279; *Mirick v. Hoppin*, 118 Mass. 582; *McKircher v. Hawley*, 16 Johns. 289; *Russell v. Allen*, 2 Allen 42; *Demarest v. Willard*, 8 Cow. 206; *Kimball v. Lockwood*, 6 R. I. 138; *Henshaw v. Wells*, 9 Humph. 568; *Myers v. White*, 1 Rawle 353; *Hemphill v. Giles*, 66 N. C. 512. See *De Nicholls v. Saunders*, L. R. 5 C. P. 589; *Castleman v. Belt*, 2 B. Mon. 157. And although the lease is void, this is no defense to an application by the mortgagee for a receiver for the rents accruing thereunder. *De Berrero v. Frost* (Tex. 1903), 77 S. W. Rep. 637.

§ 246. **Mortgagee's liability for rents received.**—The mortgagee receives the rents and profits, not in his own right, but as trustee or agent for himself and the mortgagor. After deducting the necessary expenses of managing the estate, he must apply them, first, to the liquidation of the accruing interest, and then of the principal of the debt. Whatever surplus remains he holds in trust for the mortgagor, and all others claiming under him.²³ The mortgagee in possession cannot apply such surplus to the liquidation of any other debts due to him from the mortgagor, except with the latter's consent.²⁴ But where the mortgagor consents, a judgment creditor cannot interpose his objection.²⁵ If the mortgagee in possession holds under a second mortgage, it has

²³ *Bailey v. Myrick*, 52 Me. 136; *King v. Ins. Co.*, 7 Cush. 7; *Ten Eyck v. Craig*, 62 N. C. 406; *Clark v. Bush*, 3 Cow. 151; *Harrison v. Wyse*, 24 Conn. 1; *Seaver v. Durant*, 39 Vt. 105; *Hunt v. Maynard*, 6 Pick. 489; *Thorp. v. Feltz*, 6 B. Mon. 6; *Breckenridge v. Brook*, 2 A. K. Marsh. 335; *Gibson v. Crehore*, 5 Pick. 146; *Hill v. Hewitt*, 35 Iowa 563; *Freytag v. Hoeland*, 23 N. J. Eq. 36; *Anderson v. Lanterman*, 27 Ohio St. 104; *Strang v. Allen*, 44 Ill. 428; *Gilman v. Wills*, 66 Me. 273; *Roulhac v. Jones*, 78 Ala. 398; *Murdock v. Clarke (Cal.)*, 24 Pac. Rep. 272; *Caldwell v. Hall*, 49 Ark. 508. But the mortgagee is only accountable for the rents and profits in equity, and then only as an incident to an action for foreclosure, or for the redemption of the mortgaged premises. *Farrall v. Lovel*, 3 Atk. 723; *Gordon v. Hobart*, 2 Story 243; *Hubbell v. Moulson*, 53 N. Y. 225; *Boston Iron Co. v. King*, 2 Cush. 400; *Seaver v. Durant*, 39 Vt. 103; *Weeks v. Thomas*, 21 Me. 465; *Givens v. McCalmott*, 4 Watts 464; *Bell v. Mayor N. Y.*, 10 Paige 49. And where the rents and profits collected by the mortgagee are more than sufficient to satisfy the mortgage debt, and the mortgagee is irresponsible, a receiver may be appointed, pending the action to redeem, to take charge of subsequently accruing rents. *Bolles v. Duff*, 35 How. Pr. 481; *Quinn v. Brithaige*, 3 Edw. 314. Until applied by judgment of the court to the payment of the debt, there is no legal satisfaction of the mortgage by the receipt of rents and profits to the full amount of the mortgage-debt. *Hubbell v. Moulson*, 53 N. H. 225, 13 Am. Rep. 519; *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. Rep. 193; *Davis v. Pollard (1904)*, 99 Me. 345, 59 Atl. Rep. 520.

²⁴ *Caldwell v. Hall*, 49 Ark. 508; *Demick v. Cuddily*, 72 Cal. 110. But see, *contra*, *Borel v. Cappeler*, 79 Cal. 342.

²⁵ *Whitney v. Paynor*, 74 Wis. 289.

been held that he must apply the rents first to the liquidation of the first mortgage debt.²⁶ But it would seem that the first mortgagee would in that case have no more claim to the rents than he would when the mortgagor is in possession. Although the mortgagee does not, by taking possession of the land, assume the responsibilities of a guarantor of the rents, in the collection of the rent he is under an obligation to use that care, which might be expected from a reasonably prudent man. And if, by reason of his negligence in respect thereto, any portion of the rents and profits was lost, he would be held responsible for them to the same extent as if he had actually received them. Where he enters into possession before the breach of the condition, a much greater degree of care is required of him than after the breach.²⁷ And

²⁶ *Crawford v. Munford*, 29 Ill. App. 445.

²⁷ *Hood v. Easton*, 2 Giff. 692; *Robertson v. Campbell*, 2 Call 421; *Hughes v. Williams*, 12 Ves. 493; *Sparhawk v. Wills*, 5 Gray 429; *Strong v. Blanchard*, 4 Allen 538; *Richardson v. Wallis*, 5 Allen 78; *Saunders v. Frost*, 5 Pick. 259; *Bernard v. Jennison*, 27 Mich. 230; *Shaeffer v. Chambers*, 5 Halst. 548; *Milliken v. Bailey*, 61 Me. 316; *Van Buren v. Olmstead*, 5 Paige Ch. 9; *Walsh v. Rutgers Ins. Co.*, 13 Abb. Pr. 33; *Barron v. Paulling*, 38 Ala. 292; *Moore v. Titman*, 44 Ill. 367; *Bainbridge v. Owen*, 2 J. J. Marsh. 463; *Harper v. Ely*, 70 Ill. 581; *George v. Wood*, 11 Allen 42; *Hubbard v. Shaw*, 12 Allen 122; *Givens v. McCalmont*, 4 Watts 460; *Guthrie v. Kahle*, 46 Penn. 333; *Gerrish v. Black*, 104 Mass. 400; *Miller v. Lincoln*, 6 Gray 556; *Brandon v. Brandon*, 10 W. R. 287; *Hagthorp v. Hook*, 1 Gill & J. 270; *Reynolds v. Canal & Bkg. Co.*, 30 Ark. 520; *Murdock v. Clarke* (Cal.), 24 Pac. Rep. 272. If he has kept no account of the rents and profits received, the mortgagee will be charged with a reasonable rent, *i. e.*, what might be had with proper diligence. *Dexter v. Arnold*, 2 Sumn. 108; *Gordon v. Lewis*, *Id.* 150; *Van Buren v. Olmstead*, 5 Paige 9; *Clark v. Smith*, 1 N. J. Eq. 121; *Montgomery v. Chadwick*, 7 Iowa 114. And if the mortgagee remains in possession himself, he will be charged for rent to the full value of the land, the amount being determined by expert testimony. *Gordon v. Lewis*, *supra*; *Montgomery v. Chadwick*, *supra*; *Kellogg v. Rockwell*, 19 Conn. 446; *Moore v. Cable*, 1 Johns. Ch. 385; *Chase v. Palmer*, 25 Me. 341; *Trulock v. Robey*, 15 Sim. 265; *Van Buren v. Olmstead*, *supra*; *Saunders v. Wilson*, 34 Vt. 318; *Barrett v. Nielson*, 54 Iowa 41; 37 Am. Rep. 183; *Clark v. Clark*, 62 N. H. 267. A mortgagee in possession is held not to be entitled to compensation

as a corollary to this rule, if the mortgagee fails to obtain as high a rent as he might have secured — as where he refuses to let to the tenant offering the highest rent—he will be liable for this loss. But a clear case of negligence or willful disregard of the mortgagor's interest must be established, in order to hold him to account on this ground. The mere failure to obtain the highest rent possible is not a sufficient ground of liability.²⁸ Where the rents and profits have been increased by permanent improvements made by himself, whether he is accountable for such increase to the mortgagor depends upon the character of the improvements. If they be in the nature of accessions to the land, or, in other words, fixtures, the erection of costly buildings, etc., he need not account for the increased rents and profits, unless the mortgagor has indemnified him for the cost of their erection, or he has been so paid by the use of them. But where the improvement is the result of his labor upon the land, or where wild lands have been cleared, he must make returns of such improved rents.²⁹

§ 247. Tenure between mortgagor and mortgagee — Adverse possession.— Whether the actual possession is held by for care of the property, in *Moss v. Odell*, 141 Cal. 335, 74 Pac. Rep. 999; *Turner v. Johnson*, 95 Mo. 431, 7 S. W. Rep. 570; *Snow v. Warwick Inst.*, 17 R. I. 66, 20 Atl. Rep. 94. But see, *Bumen v. Bank*, 148 Mass. 300, 19 N. E. Rep. 382.

²⁸ *Hughes v. Williams*, 12 Ves. 493; *Hubbard v. Shaw*, 12 Allen 123; *Rowe v. Wood*, 2 J. & W. 553; *Anon.*, 1 Vern. 45; *Jones on Mort.*, Sec. 1123; *Brown v. South Boston Sav. Bank*, 148 Mass. 300. A mortgagee in possession is only liable for rents actually received and not for a reduction in the rent in order to hold the tenants. *Chapman v. Cooney*, 25 R. I. 657, 57 Atl. Rep. 928. Mortgagee cannot charge for collecting rents. *Bernard v. Patterson*, 100 N. W. Rep. 893. Willful neglect must be shown to charge a mortgagee with more rent than was actually received. *Pollard v. American Land Mtg. Co.* (Ala. 1903), 35 So. Rep. 767.

²⁹ *Moore v. Cable*, 1 Johns. Ch. 385; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Morrison v. McLeod*, 2 Ired. 108; *Givens v. McCalmont*, 4 Watts 460. See 2 Washburn on Real Prop. 224, 225; but see *Merriam v. Barton*, 14 Vt. 501; *Stoney v. Shultz*, 1 Hill 464.

the mortgagor or mortgagee, there is such a tenure existing between them that, for the purpose of protecting each other's title and seisin, the possession of one is deemed the possession of the other. If the one in possession is disseised, it will work the disseisin of the other; and where one is seised, a third person cannot set up a title by adverse possession against the other.³⁰ The mortgagee is estopped by his deed from denying the title of the mortgagor, and if he procures releases from persons claiming a superior title to the mortgaged premises, such deeds inure to the benefit of the mortgagor upon his payment of the expenses incurred in purchasing the superior title.³¹ So also, will the mortgagor not be permitted to set up against the mortgagee a paramount title which he has acquired subsequently to the execution of the mortgage.³² But it seems that a junior incumbrancer, a judgment creditor, for example, is not subject to any such estoppel as against the mortgagor or prior mortgagee. If he purchases a paramount title, he can enforce it against either or both.³³ Before condition broken, neither the mortgagor nor

³⁰ *Birch v. Wright*, 1 T. R. 383; *Cholmondeley v. Clinton*, 2 Meriv. 360; *Poignard v. Smith*, 8 Pick. 272; *Dadmum v. Lamson*, 9 Allen 85; *Lincoln v. Emerson*, 108 Mass. 87; *Doe v. Barton*, 11 A. & E. 307; *Partridge v. Bere*, 5 B. & Ald. 604; *Hunt v. Hunt*, 14 Pick. 374; *Newman v. Chapman*, 2 Rand. 93; *Boyd v. Beck*, 29 Ala. 703; *Sheridan v. Welch*, 8 Allen 166; *Currier v. Gale*, 9 Allen 522; *Woods v. Hildebrand*, 46 Mo. 284, 2 Am. Rep. 513.

³¹ *Brown v. Combs*, 5 Dutch. 36; *Doe v. Tunnel*, 1 Houst. 320; *Farmers' Bank v. Bronson*, 14 Mich. 369; *Connor v. Whitmore*, 52 Me. 185; *contra*, *Wright v. Sperry*, 25 Wis. 617; *Walthall v. Rives*, 34 Ala. 91; *Hall v. Westcott*, 15 R. I. 373; *Drew v. Morrill*, 62 N. H. 565; *Rogor v. Lomax*, 22 Ill. App. 628.

³² *Tefft v. Munson*, 57 N. Y. 97; *Lincoln v. Emerson*, 108 Mass. 87; *Conner v. Whitmore*, 52 Me. 185; *Miami Ex. Co. v. U. S. Bank*, *Wright* 249; *Fair v. Brown*, 40 Iowa 209; *Stears v. Hollenbeck*, 38 Iowa 550; *Ryan v. McGehee*, 103 N. C. 282; *Cook v. Rounds*, 60 Mich. 310. But if the mortgagee is under obligation to pay the taxes, the mortgagor may demand of him satisfaction for the expenses of the tax-title purchased by him. *Eaton v. Tallmadge*, 22 Wis. 526.

³³ *Wilson v. Gadiant*, 36 Minn. 59. An outstanding title acquired by one of several bondholders, inures to the benefit of all, on payment of

the mortgagee can disseise the other by any denial of title; but after the breach of the condition, the party in possession may acquire, by acts of hostility, such an adverse possession as will bar the other's title under the Statute of Limitations. The statute begins to run from the time of forfeiture; it cannot before. After the lapse of the statutory period of limitation the mortgagor loses his equity of redemption, and the mortgagee his right to foreclose; and whoever is in possession acquires an absolute title to the land. The respective assignees are governed by the same rules.³⁴ But any act by their *pro rata* part of the expense. *Booher v. Crocker*, 132 Fed. Rep. 7, 65 Cir. Ct. App. 627.

³⁴ *Hunt v. Hunt*, 14 Pick. 374; *Sheppard v. Pratt*, 15 Pick. 32; *Roberts v. Welch*, 8 Ired. 287; *Evans v. Huffman*, 5 N. J. L. 354; *Wilkinson v. Flowers*, 37 Miss. 579; *Chick v. Rollins*, 44 Me. 104; *Tripe v. Marcy*, 39 N. H. 439; *Crawford v. Taylor*, 42 Iowa 260; *Roberts v. Littlefield*, 48 Me. 61; *Haskell v. Bailey*, 22 Conn. 569; *Chick v. Rollins*, 44 Me. 104; *Rockwell v. Servant*, 63 Ill. 424; *Giles v. Baremore*, 5 Johns. Ch. 545; *Bacon v. McIntire*, 8 Metc. 87; *Harris v. Mills*, 28 Ill. 46; *Hughes v. Edwards*, 9 Wheat, 489; *Nevitt v. Bacon*, 32 Miss. 212; *Green v. Turner*, 38 Iowa 112; *Moore v. Cable*, 1 Johns. Ch. 385; *Hodgdon v. Heidman*, 66 Iowa 645; *Rodriguez v. Hayes*, 76 Texas 225; *Wilson v. Albert*, 89 Mo. 537; *Seawright v. Parmer* (Ala.), 7 So. Rep. 201; *Holmes v. Turner's Falls, etc., Co.*, 150 Mass. 535, 23 N. E. Rep. 305; *Leonard v. Binford*, 122 Ind. 200, 23 N. E. Rep. 704; *Orr v. Rode* (Mo.), 12 S. W. Rep. 1066. Where the mortgagee enters into possession before condition broken, notice must be given to the mortgagor that he holds possession for the purpose of foreclosure, before the statute will run against the mortgagor's right to redeem. But see, *Halbrook v. Green*, 98 Me. 171, 56 Atl. Rep. 659; *Newall v. Wright*, 3 Mass. 138; *Goodwin v. Richardson*, 11 Mass. 469; *Scott v. McFarland*, 13 Mass. 308. See *Yarborough v. Newell*, 10 Yerg. 376; *Green v. Turner*, 38 Iowa 112; *Hammonds v. Hopkins*, 3 Yerg. 525. And where, by agreement of the parties, the mortgagee is to hold possession, until the mortgage-debt was paid out of the rents and profits, the statute does not begin to run, until his claim has been satisfied and he has given the mortgagor notice of his adverse holding. *Anding v. Davis*, 38 Miss. 574; *Kohlheim v. Harrison*, 34 Miss. 457; *Frink v. Le Koy*, 49 Cal. 314. And no length of possession will bar the right to redeem, if by agreement the mortgagor has an unlimited time, within which to pay off the mortgage. *Wyman v. Babcock*, 2 Curtis 386; *Teulon v. Curtis*, 1 Younge 616. The possession of either party must be exclusive as well as ad-

the party in possession, which involves the recognition of the other's title, or is an acknowledgment that the mortgage-debt still exists, will rebut the presumption of adverse possession. Where the mortgagor is in possession, payment of the interest or a part of the principal of the mortgage-debt, and in the case of the mortgagee's possession, the acceptance of such payment, or rendering an account for the rents and profits, would be circumstances and facts which would negative the hostility of the possession, and prevent the statute from running against the one out of possession.³⁵

§ 248. Insurance of the mortgaged premises.—Both the mortgagor and the mortgagee have insurable interests in the premises, and they may insure their respective interests at the same time. The mortgagee can only insure to the amount of his debt. Where he takes out a policy in his own name and pays the premium, and he cannot, by the terms of the mortgage, call upon the mortgagor to refund such payments, he takes the insurance money, in case of loss by fire, free

verse, in order that the statute may run. *Burke v. Lynch*, 2 Ba. & Be. 426; *Archbold v. Scully*, 9 H. L. Cas. 360; *Drummond v. Sant*, L. R. 6 Q. B. 763. But see, *Lake v. Thomas*, 3 Ves. Jr. 17.

³⁵ To bar foreclosure, see *Heyer v. Pruyn*, 7 Paige 465; *Hughes v. Edwards*, 9 Wheat. 490; *Cheaver v. Perley*, 11 Allen 584; *Tripe v. Marcy*, 39 N. H. 439; *Zeller v. Eckert*, 4 How. 295; *Wright v. Eaves*, 10 Rich. Eq. 582; *Drayton v. Marshall*, Rice's Eq. 383; *Howland v. Shurlteff*, 2 Metc. 26; *Ayres v. Waite*, 10 Cush. 72; *Carberry v. Preston*, 13 Ired. Eq. 455; *Hough v. Bailey*, 32 Conn. 288; *Ward v. Carter*, L. R. 1 Eq. 29; *Hughes v. Blackwell*, 6 Jones Eq. 73; *Jackson v. Slater*, 5 Wend. 295; *Brocklehurst v. Jessop*, 7 Sim. 438. And see *Cunningham v. Hawkins*, 24 Cal. 409; *Harris v. Mills*, 28 Ill. 44; *Perkins v. Sterne*, 23 Texas 563; *Benton Co. v. Czarlinsky* (Mo.), 14 S. W. Rep. 114. To bar the equity of redemption, see *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Limerick v. Voorhis*, 9 Johns. 129; *Pendleton v. Rooth*, 1 Giff. 35; *Stansfield v. Hobson*, 16 Beav. 236; *Edsell v. Buchanan*, 2 Ves. Jr. 83; *Barron v. Martin*, 19 Ves. 327; *Hansard v. Hardy*, 18 Ves. 455; *Richardson v. Young*, L. R. 10 Eq. 297; *Marks v. Pell*, 1 Johns. Ch. 594; *Dexter v. Arnold*, 3 Sumn. 151; *Quint v. Little*, 4 Greenl. 495; *Shepherd v. Murdock*, 3 Murph. 218; *Roberts v. Littlefield*, 48 Me. 61; *Knowlton v. Walker*, 13 Wis. 264; *Jackson v. Lynch*, 129 Ill. 72.

from any right of the mortgagor to have it applied to the liquidation of the mortgage-debt. He can recover the insurance, and then proceed to collect the debt.³⁶ But if he insures the premises at the request of the mortgagor, or does so in consequence of the neglect of the mortgagor, and at his expense, as he may do if the mortgage contains a covenant providing for the insurance of the premises by the mortgagor, the mortgagor will be subrogated to the benefit of the insurance, and the insurance money must be applied to the debt.³⁷ Under such circumstances, the mortgagee would have

³⁶ *Ring v. State Ins. Co.*, 7 Cush. 1; *Sussex Mut. Ins. Co. v. Woodruff*, 2 Dutch. 541; *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Carpenter v. Ins. Co.*, 16 Pet. 495; *Russell v. Southard*, 12 How. 139; *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Springfield Fire Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *White v. Brown*, 2 Cush. 412; *Harding v. Townsend*, 43 Vt. 536; *Dobson v. Land*, 8 Hare 216; *Fowler v. Palmer*, 5 Gray 549; *Clark v. Wilson*, 103 Mass. 219; *Williams v. Ins. Co.*, 107 Mass. 377, 9 Am. Rep. 41; *Bellamy v. Bricken- den*, 2 Johns. & H. 137; *Ely v. Ely*, 80 Ill. 532; *Cushing v. Thompson*, 34 Me. 496; *Bean v. A. & St. L. R. R.*, 58 Me. 82; *King v. Mut. Ins. Co.*, 7 Cush. 1; *Brant v. Gallup*, 111 Ill. 487. See also, *McDowell v. Moroth*, 64 Mo. App. 290; *Dunbrock v. Neall* (W. Va. 1904), 47 S. E. Rep. 303.

³⁷ *Concord, etc., Ins. Co., v. Woodbury*, 45 Me. 447; *Graves v. Hampden Ins. Co.*, 10 Allen 285; *Callahan v. Linthicum*, 43 Md. 97, 20 Am. Rep. 106; *Gordon v. Ware Sav. Co.*, 115 Mass. 588; *King v. Mut. Ins. Co.*, 7 Cush. 1; *Clark v. Wilson*, 103 Mass. 221; *Larrabell v. Lumbert*, 32 Me. 97; *Suffolk Ins. Co. v. Boyden*, 9 Allen 123; *Waring v. Loder*, 53 N. Y. 581; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Fowler v. Palmer*, 5 Gray 549; *Martin v. Franklin Fire Ins. Co.*, 38 N. J. L. 140, 20 Am. Rep. 372; *Nichols v. Baxter*, 5 R. I. 491. And when the mortgage contains an insurance clause, and an insurance policy is taken out by the mortgagee upon the default of the mortgagor to do so, the policy is presumed to be taken out for the benefit of both parties, and the mortgagee cannot refuse to apply it to the debt. *Foster v. VanReed*, 5 Hun 321; *Buffalo Steam Engine Works v. Ins. Co.*, 17 N. Y. 406; *Blinton v. Hope Ins. Co.*, 45 N. Y. 454; *Waring v. Loder*, 53 N. Y. 581; *Honore v. Lamar Ins. Co.*, 51 Ill. 409. And in such cases, the fact that the debt has been paid will not prevent a recovery of the insurance money. The mortgagor's interest in the policy keeps it alive. *Norwich Ins. Co. v. Boomer*, *supra*; *Concord Ins. Co. v. Woodbury*, *supra*; *Waring v. Loder*, *supra*. Where the requirement of the

a claim against the mortgagor and against the mortgaged property for re-imbursement of the premiums paid by him.³⁸ But, although the mortgagee is entitled, as against the mortgagor, to the full benefit of the insurance, where there is no covenant of insurance, it is not so certain that he will, as against the insurance company, be permitted to recover to his own use both the debt and the insurance money. Some of the courts hold that the insurance company will be subrogated to the rights of the mortgagee under the mortgage in the proportion that the insurance paid bears to the mortgage-debt;³⁹ while the courts of Massachusetts sustain the doctrine that he may recover both the insurance and the debt, discharged of any right of subrogation in the insurance company, on the ground that the premiums paid on the policy are a good and adequate consideration for the risk assumed, and prevent any claim on the part of the company to the equitable right of subrogation.⁴⁰ The mortgagor may insure to the

mortgage is that a policy of insurance shall be procured by the mortgagor, for the benefit of the mortgagee — as is generally the case — the mortgagee is entitled to the insurance, in case of loss, though the policy is payable to the mortgagor alone. *Hyde v. Hartford Ins. Co.* (Neb. 1903), 97 N. W. Rep. 629; *Eastern Milling Co. v. Eastern Export Co.* (Pa. 1903), 125 Fed. Rep. 143.

³⁸ *McLean v. Burr*, 16 Mo. App. 240.

³⁹ *Concord Ins. Co. v. Woodbury*, 45 Me. 447; *Ætna Ins. Co. v. Tyler*, 16 Wend. 397; *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541; *Ulster Co. Sav. Inst. v. Leake*, 73 N. Y. 161, 29 Am. Rep. 115; *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Honore v. Lamar Ins. Co.*, 51 Ill. 409; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Callahan v. Linthicum*, 43 Md. 97, 20 Am. Rep. 106.

⁴⁰ *King v. Ins. Co.*, 7 Cush. 1; *Suffolk Ins. Co. v. Boyden*, 9 Allen 123; *Clark v. Wilson*, 103 Mass. 221; *Foster v. Equitable Ins. Co.*, 2 Gray 216; *Dobson v. Land*, 8 Hare 216. In *King v. Ins. Co.*, *supra*, Chief Justice Shaw said: "He (the mortgagee) surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity of contract between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because

full value of the premises, irrespective of the mortgagee's interest. A mortgage is not such an alienation as will defeat the policy of insurance — not even so far as to reduce the mortgagor's insurable interest to the equity of redemption.⁴¹

they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee." . . . "What, then, is there inequitable, on the part of the mortgagee, towards either party in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally secured in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent." Perhaps the true theory lies between these opposite positions of the courts. The Massachusetts court is undoubtedly correct in its position, that there is no equitable ground for the application of the doctrine of subrogation. But it is incorrect to go farther and hold that the mortgagee may recover both sums to his own use. A mortgagee insures only his interest in the mortgaged premises, and that interest is exhausted when the debt is paid. *Graves v. Hampden Ins. Co.*, 10 Allen 283; *Sussex Ins. Co. v. Woodruff*, 2 Dutch. 541. From this position it is an easy step to say, that when the mortgaged property, after the loss by fire is sufficient to satisfy the mortgage-debt, and it is *actually* satisfied, either by foreclosure or by payment by the mortgagor, the mortgagee has sustained no loss. See *Ætna Ins. Co. v. Tyler*, 16 Wend. 385; *Kernochan v. Bowery Ins. Co.*, 17 N. Y. 428; *Carpenter v. Providence, etc., Ins. Co.*, 10 Pet. 495; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253. *Contra*, *Excelsior Ins. Co. v. Ins. Co.*, 55 N. Y. 343. The mortgagee may proceed either against the insurance company on the policy, or against the mortgagor on the mortgage, and neither of them can object, or compel him to proceed against both. Nor has either a claim against the other. But if the mortgagee does recover from both, the position of the mortgagee, in respect to the insurance company, is the same as if the mortgagor had paid the debt, before application had been made for the insurance money. In the latter case, he could not recover of the insurance company, for he had suffered no loss.

⁴¹ *Strong v. Ins. Co.*, 10 Pick. 40; *Tuck v. Hartford Ins. Co.*, 56 N. H. 326; *Fame v. Wenans*, 1 Hopk. Ch. 283; *Stephens v. Mut. Ins. Co.*, 43 Ill. 325; *Dyers v. Ins. Co.*, 35 Ohio St. 606, 35 Am. Rep. 623; *Manhattan Ins. Co. v. Weill*, 28 Gratt. 382, 26 Am. Rep. 364; *Ill. Ins. Co. v. Stanton*, 57 Ill. 354; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Hartford Ins. Co. v. Walsh*, 54 Ill., 4 Am. Rep. 115. And the mortgagor continues to have an insurable interest in the prop-

And in the absence of the covenant requiring the mortgagor to keep the premises insured, the mortgagee has not the right to demand the appropriation of the insurance money to the payment of the mortgage-debt.⁴² But where the mortgage calls for the insurance of the premises, and the mortgagor performs the covenant, the mortgagee acquires therein a beneficial interest, and is entitled to have the insurance money applied to the debt.⁴³ And so, also, if the insurance covers one of two or more pieces of property included in the same mortgage, the owners of the other pieces of property have the right to require the application of the insurance money to the payment of the debt.⁴⁴ But where the loss is made payable, as long as his right of redemption is not completely barred. *Gordon v. Ins. Co.*, 2 Pick. 249; *Cheney v. Woodruff*, 54 N. Y. 98; *Strong v. Ins. Co.*, *supra*; *Waring v. Loder*, 53 N. Y. 581. Although the existence of a mortgage does not reduce the insurable interest of the mortgagor, still it is held in some of the States that, if inquiry is made as to this, it becomes a material fact, and misrepresentations, concerning the existence of the amount secured, will vitiate the policy. *Davenport v. Ins. Co.*, 6 Cush. 340; *Brown v. People's Ins. Co.*, 11 Cush. 280; *Bowditch Ins. Co. v. Winslow*, 8 Gray 38; *Packard v. Agawan Ins. Co.*, 2 Gray 334. *Contra*, *Norwich Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618.

⁴² *Carter v. Rockett*, 8 Paige Ch. 437; *Hantox v. Fishing Ins. Co.*, 3 Sumn. 132; *Stearns v. Quincy Mut. Ins. Co.*, 124 Mass. 61, 26 Am. Rep. 647; *Wilson v. Hill*, 3 Mete. 66; *Vandegraff v. Medlock*, 3 Port. 389; *Plimpton v. Ins. Co.*, 43 Vt. 497; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; *Foster v. Van Reed*, 70 N. Y. 19, 26 Am. Rep. 544; *Carpenter v. Providence, etc., Ins. Co.*, 66 Pet. 495; *Thomas v. Vonkapff*, 6 Gill & J. 372; *McDonald v. Black*, 20 Ohio 185; *Powles v. Innes*, 11 M. & W. 10; *Vernon v. Smith*, 5 B. & A. 1; *De Forest v. Fulton Ins. Co.*, 1 Hall 103; *Fame v. Winnons*, 1 Hopk. Ch. 283; *Neale v. Reed*, 3 Dowl. & Ry. 158.

⁴³ *Concord, etc., Ins., Co. v. Woodbury*, 45 Me. 447; *Gordon v. Ware Savings Ins. Co.*, 115 Mass. 588; *Carter v. Rockett*, 8 Paige 437; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442; *In re Sands Ale Brewing Co.*, 3 Biss. 175; *Miller v. Aldrich*, 31 Mich. 408; *Burns v. Collins*, 64 Md. 215; *Thomas v. Vonkapff*, 6 Gill & J. 372; *Brant v. Gallup*, 111 Ill. 487; *Hyde v. Hartford Ins. Co.* (Neb. 1903), 97 N. W. Rep. 629; *Eastern Milling Co. v. Eastern Export Co.* (Pa. 1903), 125 Fed. Rep. 143.

⁴⁴ *Conn. Mut. Life Ins. Co. v. Scammon*, 117 U. S. 634.

able to the mortgagor, or is assigned to the mortgagee without the consent of the company, alienation by the mortgagor of his interest will defeat the policy, even as to the mortgagee. For the complete protection of the mortgagee, the policy should be assigned to him with the consent of the company, and the assignment should be made to appear on the company's books as well as on the face of the policy. When the policy is in this shape, the mortgagee, in case of loss, receives the insurance money in trust to apply it to the debt, and such application may be enforced, not only by the mortgagor, but by every one claiming through him and subject to the mortgage. The surplus, if any, goes to the mortgagor and those in privity with him.⁴⁵

§ 249. *Assignment of the mortgage.*—Whether the mortgagee's interest be considered a legal estate or only a lien, it is clear, since the mortgage is in form a conveyance, and is required to be recorded like all other conveyances, that the proper mode of assigning it is by deed or instrument of the same character as the mortgage itself, either separate from

⁴⁵ *Macomber v. Cambridge Ins. Co.*, 8 Cush. 133; *Grosvenor v. Atlantic Ins. Co.*, 17 N. R. 391; *Luckey v. Gannon*, 37 How. Pr. 134; *Fowley v. Palmer*, 5 Gray, 549; *Graves v. Hampden Ins. Co.*, 10 Allen 382; *Concord, etc., Ins. Co., v. Woodbury*, 45 Me. 447; *Larrabee v. Lumbert*, 32 Me. 97; *Waring v. Loder*, 53 N. Y. 581; *Clark v. Wilson*, 103 Mass. 221; *Mix v. Hotchkiss*, 14 Conn. 32; *Hyde v. Hartford Ins. Co.* (Neb. 1903), 97 N. W. Rep. 629; *Eastern Milling Co. v. Eastern Export Co.* (Pa. 1903), 125 Fed. Rep. 143. Where the insurance is obtained in the name of the mortgagor, but the policy contained a provision, that the loss, if any, is to be paid to the mortgagee; generally it is required that suit on the policy must be instituted in the mortgagee's name, or jointly with the mortgagor. *Ennis v. Harmony Ins. Co.*, 3 Bosw. 516; *Concord Mut. Ins. Co. v. Woodbury*, 45 Me. 447; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y. 391; *Norwich Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Frink v. Hampden Ins. Co.*, 45 Barb. 384; *Martin v. Franklin Ins. Co.*, 38 N. J. L. 140. But with the consent of the mortgagee, the mortgagor may bring the suit alone in his own name. *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Farrow v. Ins. Co.*, 18 Pick. 53; *Jackson v. Farmers' Ins. Co.*, 5 Gray 52; *Turner v. Quincy Ins. Co.*, 109 Mass. 568; *Illinois Ins. Co. v. Stanton*, 57 Ill. 354.

or written on the back of the mortgage, together with the assignment and delivery of the instrument of indebtedness, if there be any. Such an assignment would vest the entire legal interest of the mortgagee in the assignee.⁴⁶ Whether a deed is absolutely required to assign the legal interest of the mortgagee depends upon the construction placed upon mortgages in the State in which the question arises. And, in determining this question, it must be observed that, although the assignment of the mortgage debt, irrespective of its effect upon the mortgage, will be governed by the *lex loci contractus*, the assignment of the mortgage itself must conform to the law of the place where the mortgaged land is situated.⁴⁷

§ 250. Common law assignment.—At common law, and under the prevailing common-law theory, nothing less than a deed will be sufficient to pass the legal interest of the mortgagee.⁴⁸ But the deed need not in express words be the as-

⁴⁶ Jones on Mort., Sec. 786; 2 Washburn on Real Prop. 113-118.

⁴⁷ Story on Confl., Secs. 363, 364; *Goddard v. Sawyer*, 9 Allen 78. But this is not the case in regard to the equitable assignment of the mortgage, effected by the transfer of the debt. The equitable rights of the parties are governed by the *lex loci contractus*. See *Hoyt v. Thompson*, 19 N. Y. 207; *Dundas v. Bowler*, 3 McLean, 397; *Murrell v. Jones*, 40 Miss. 565. Under N. Y. Laws (1896), p. 607, c. 547, Sec. 240, an assignment of a mortgage, when recorded, has the same standing with any other recorded instrument of writing. *Weideman v. Pech*, 92 N. Y. S. 493, 102 App. Div. 163. See also, in New Jersey Laws (1898), p. 690 Sec. 53, construed in *Higgins v. Jamesburg Co.*, 58 Atl. Rep. 1078. In Illinois, the holder and assignee of the debt takes the mortgage as an incident thereof. Such an assignee takes subject to equities of the makers, but not of third parties. *Kittler v. Studebaker*, 113 Ill. App. 342. This is also the rule, in Missouri. *Bank v. Ragsdale*, 158 Mo. 668, 71 S. W. Rep. 178; *Bishop v. Chase*, 156 Mo. 158, 56 S. W. Rep. 1080; *Investment Co. v. Fulton*, 86 Mo. App. 138. A tender to an assignee of the debt is a recognition of the title of the assignee to the mortgage. *Juckett v. Fargo Merc. Co.* (S. D. 1905), 102 N. W. Rep. 604.

⁴⁸ *Warden v. Adams*, 15 Mass. 233; *Adams v. Parker*, 12 Gray 53; *Ruggles v. Barton*, 13 Gray 506; *Douglass v. Durin*, 51 Me. 121; *Mitchell v. Burnham*, 44 Me. 286; *Burton v. Baxter*, 7 Blackf. 297;

signment of the mortgage. A quit-claim deed or an ordinary deed purporting to convey an absolute estate in fee will carry whatever legal interest the mortgagee has in the mortgaged premises, although it seems that it would have no effect upon the mortgage debt, unless it, too, was assigned. But a deed with a general warranty will in equity work an assignment of the debt, wherever the grantee has paid a valuable and substantial consideration for the same.⁴⁹ Under this theory an assignment of the mortgage debt would not operate as an assignment of the mortgage.⁵⁰ If the assignment of the mortgage does not carry with it the mortgage-debt, or the mortgage is assigned to one person and the debt to another, the assignee of the mortgage receives only the legal estate, which he holds in trust for the one who owns the debt.⁵¹ Such is

Cottrell v. Adams, 2 Biss. 351; *Twitchell v. McMurtrie*, 77 Pa. St. 383; *Sanders v. Cassaday*, 86 Ala. 246; but in New Jersey a seal is not now necessary. *Mulford v. Peterson*, 35 N. J. L. 127; *Hammond v. Lewis*, 1 How. 14.

⁴⁹ *Hunt v. Hunt*, 14 Pick. 374; *Savage v. Hall*, 12 Gray 364; *Hill v. More*, 40 Me. 525; *Connor v. Whitmore*, 52 Me. 186; *Collamer v. Langdon*, 29 Vt. 32; *Givan v. Doe*, 7 Blackf. 210; *Thompson v. Kenyon*, 100 Mass. 108; *Rodriguez v. Hayes*, 75 Tex. 225. But where there is a separate instrument of indebtedness, in order to pass the debt, it must also be delivered, unless the deed is a warranty deed, when there will be an equitable assignment of the debt. *Lawrence v. Stratton*, 6 Cush. 163; *Ruggles v. Barton*, 13 Gray 500; *Olmstead v. Elder*, 2 Sandf. Ch. 325; *Dixfield v. Newton*, 41 Me. 221; *Furbush v. Goodwin*, 25 N. H. 425; *Givan v. Doe*, 7 Blackf. 210; *Welsh v. Phillips*, 54 Ala. 309, 25 Am. Rep. 679; but see *Weeks v. Eaton*, 15 N. H. 145; *Hinds v. Ballou*, 44 N. H. 621; *Rodriguez v. Hayes*, 76 Tex. 225; *Fitts v. Beardsley*, 8 N. Y. S. 567.

⁵⁰ *Adams v. Gray*, 12 Gray 53; *Stanley v. Kempton*, 59 Me. 472; *Young v. Miller*, 6 Gray 152; *Bourland v. Kipp*, 55 Ill. 376.

⁵¹ *Story Eq.*, Sec. 1023 n; *Merritt v. Bartholick*, 36 N. Y. 44; *Moore v. Ware*, 38 Me. 496; *Warren v. Homestead*, 33 Me. 256; *Jackson v. Willard*, 4 Johns. 41; *Aymar v. Bill*, 5 Johns. Ch. 570; *Swan v. Jupp*, 35 Iowa 248; *Hutchins v. Carleton*, 19 N. H. 478; *Bailey v. Gould*, *Walk. (Mich.)* 478; *Peters v. Jamestown Bridge Co.*, 5 Cal. 334; *Johnson v. Cornett*, 29 Ind. 59; *Langster v. Love*, 11 Iowa 580; *Patton v. Pearson*, 57 Me. 434. To pass the beneficial interest in the mortgage, the mortgage-note or bond, if there be such, must be assigned with the

also the rule at common law, where the debt upon the death of the mortgagee vested in the personal representatives, while the mortgage descended to his heirs in trust for the personal estate.⁵² The assignee cannot acquire by such an assignment any beneficial interest in the mortgage, and the trust is binding upon him and all his privies who have actual or constructive notice. And where the mortgagor has notice of the assignments of the mortgage and debt to different persons, he cannot discharge the mortgage by payment or tender of payment to the assignee of the mortgage.⁵³ In a number of the States it is now held that the assignment of the mortgage without the debt is a nullity; it conveys no estate to the

mortgage, at least as against the mortgagor and subsequent assignees of the debt. *Bowers v. Johnson*, 49 N. Y. 432; *Hitchcock v. Merrick*, 18 Wis. 357; *Warden v. Adams*, 15 Mass. 233; *Kursheedt v. McCune*, 20 Abb. N. C. 265. And the note or bond need not be indorsed, if delivered. *Pratt v. Skolfield*, 45 Me. 386; *King v. Harrington*, *supra*; *Pease v. Warren*, 29 Mich. 9; *contra*, *Kelly v. Burnham*, 9 N. H. 20. But where the debt has not been assigned to another, it may, as against the mortgagee, pass by assignment in equity to the assignee of the mortgage without any formal transfer, if it be the intention of the parties that the assignee should acquire a beneficial interest in the mortgage. *Merritt v. Bartholick*, 36 N. Y. 44; *Buckley v. Chapman*, 9 Conn. 5; *Northampton Bk. v. Balliet*, 8 W. & S. 311; *Campbell v. Burch*, 1 Lans. 178; *Cooper v. Newland*, 17 Abb. Pr. 342. And where there is no separate instrument of indebtedness, the beneficial interest will always pass with the assignment of the mortgage unless it is expressly reserved. *Severance v. Griffith*, 2 Lans. 38; *Caryl v. Russell*, 7 Ib. 416; *Coleman v. Van Renssalaer*, 44 How. Pr. 368.

⁵² *Washburn on Real Prop.* 120, 121, 141; *Jackson v. Delancey*, 11 Johns. 365; *Wilkins v. French*, 20 Me. 111; *Dewey v. Van Deusen*, 4 Pick. 19; *Kinna v. Smith*, 2 Green Ch. 14; *Chase v. Lockerman*, 11 Gill & J. 185; *Taft v. Stevens*, 3 Gray 504; *Green v. Hunt*, Cooke 344; *White v. Rittenmyer*, 30 Iowa 272.

⁵³ *Mitchell v. Burnham*, 44 Me. 302; *James v. Johnson*, 6 Johns. Ch. 417; *Gregory v. Savage*, 32 Conn. 250; *Henderson v. Pilgrim*, 22 Texas 464. But the notice must be actual. The record of the assignment is not constructive notice to the mortgagor. *Williams v. Sorrell*, 4 Ves. Jr. 399; *Mitchell v. Burnham*, *supra*; *Wolcott v. Sullivan*, 1 Edw. Ch. 399; *Reed v. Marble*, 10 Paige Ch. 409; 3 *Washburn on Real Prop.* 316; see *post*, Sec. 260.

assignee, and he may be treated as a trespasser by the mortgagor or the assignee of the debt.⁵⁴

§ 251. *Assignment under the lien theory.*—Although it is still held in those States which have, to a greater or less degree, discarded the common-law theory, that an effectual *legal* assignment of the mortgage requires a deed proved and acknowledged like all other deeds of conveyance, it is there held that, the debt being the principal thing and the mortgage only a security or lien, an assignment of the debt will operate as an equitable assignment of the mortgage, binding upon all persons having notice, and giving to the assignee the power in equity to exercise all the rights of the mortgagee.⁵⁵

⁵⁴ *Wilson v. Troup*, 2 Cow. 195; *Jackson v. Willard*, 4 Johns. 43; *Merritt v. Bartholick*, 36 N. Y. 44; *Purdy v. Huntington*, 42 N. Y. 346; *Furbish v. Goodwin*, 25 N. H. 425; *Burdett v. Clay*, 8 B. Mon. 287; *Blair v. Bass*, 4 Blackf. 539; *Dick v. Mawry*, 9 Smed. & M. 448; *Ladue v. R. R. Co.*, 13 Mich. 396; *Perkins v. Stearne*, 23 Texas 503; *Peters v. Jamestown Bridge Co.*, 5 Cal. 335; *Bloomington v. Bowman*, 4 N. Y. S. 860. But if the mortgagee is in possession the rule is different, and sufficient title passes to the assignee of the mortgage to give him the right of possession, which he can maintain against all who do not show a better title. *Smith v. Smith*, 15 N. H. 58; *Hinds v. Ballou*, 44 N. H. 487; *Pickett v. Jones*, 63 Mo. 195.

⁵⁵ *Wolcott v. Winchester*, 15 Gray 461; *Vose v. Handy*, 2 Greenl. 322; *Northy v. Northy*, 45 N. H. 144; *Blake v. Williams*, 36 N. H. 39; *Keyes v. Wood*, 21 Vt. 331; *Lawrence v. Knap*, 1 Root 248; *Neillson v. Blight*, 1 Johns. Cas. 205; *Evertson v. Booth*, 19 Johns. 491; *Parmelee v. Daun*, 23 Barb. 461; *Wilson v. Troup*, 2 Cow. 242; *Craft v. Webster*, 4 Rawle, 242; *Danley v. Hays*, 17 Serg. & R. 400; *Partridge v. Partridge*, 38 Pa. St. 78; *Hyman v. Devereux*, 63 N. C. 624; *Muller v. Wadlington*, 5 S. C. 242; *Wright v. Eaves*, 10 Rich. Eq. 585; *Scott v. Turner*, 15 La. An. 346; *Graham v. Newman*, 21 Ala. 497; *Holmes v. McGinty*, 44 Miss. 94; *Martin v. McReynolds*, 6 Mich. 70; *U. S. Bank v. Covert*, 13 Ohio 240; *Mills v. Gray*, 4 B. Mon. 117; *Burdett v. Clay*, 8 *Id.* 287; *Mapps v. Sharpe*, 32 Ill. 165; *Potter v. Stevens*, 40 Mo. 229; *Burton v. Baxter*, 7 Blackf. 297; *Fisher v. Otis*, 3 Chand. 83; *Willis v. Farley*, 24 Cal. 497; *Chilton v. Brooks*, 71 Md. 445; *Lee v. Clark*, 89 Mo. 553. But as a general proposition, such an assignee acquires no legal interest, and can therefore exercise none of the rights of a legal owner, such as the maintenance of an action of ejectment or a writ of entry. *Cottrell v.*

Under this theory, whatever constitutes in the law of commercial paper a good assignment of the debt, will operate as an equitable assignment of the mortgage. Thus a parol sale and transfer of the debt is a good equitable assignment of the mortgage.⁵⁶ Where the mortgage is given to secure two or more debts, the assignment of one of them will operate as an assignment of a *pro rata* share in the mortgage, unless it is the expressed intention of the parties that the entire mortgage-security should be retained for the benefit of the

Adams, 2 Biss. 351; *Young v. Miller*, 6 Gray 152; *Dwinel v. Perley*, 32 Me. 197; *Edgerton v. Young*, 43 Ill. 464; *Partridge v. Partridge*, 38 Pa. St. 78; *Warden v. Adams*, 15 Mass. 232. But in the code States where all actions are instituted in the name of the party beneficially interested, the equitable assignee may enforce the mortgage in his own name. *Gower v. Howe*, 20 Ind. 396; *Clearwater v. Rose*, 1 Blackf. 138; *Garland v. Richeson*, 4 Rand. 266; see also to the same effect, *Kinney v. Smith*, 2 Green Ch. 14; *Mulford v. Peterson*, 35 N. J. Eq. 127; *South-erlin v. Mendum*, 35 N. H. 420; *Austin v. Burbank*, 2 Day 396; *Clark-sons v. Doddridge*, 14 Gratt. 44; *Runyan v. Mersereau*, 11 Johns. 534. And in those States where the legal title of the mortgage does not pass with the assignment of the debt, equity may compel the holder of the legal title to transfer it to the assignee of the debt, or to maintain the suits necessary for the protection of the assignee. *Wolcott v. Win-chester*, 15 Gray 461; *Crane v. March*, 4 Pick. 131; *Mount v. Suydam*, 4 Sandf. Ch. 399; *Lyon's App.*, 61 Pa. St. 15; *Baker v. Terrell*, 8 Minn. 195..

⁵⁶ *Lane v. Duchac*, 73 Wis. 646; *Tiedeman Com. Paper*, Sec. 250; *Bank v. Ragsdale*, 158 Mo. 668, 71 S. W. Rep. 178; *Bishop v. Chase*, 156 Mo. 158, 56 S. W. Rep. 1080; *Investment Co. v. Fulton*, 86 Mo. App. 138; *Kittler v. Studebaker*, 113 Ill. App. 342; *Mohuken Co. v. Pellefrenn*, 87 N. Y. S. 737, 93 App. Div. 420; *Barlow v. Cooper*, 109 Ill. App. 375; *Freeburg v. Eksell*, 123 Iowa 464, 99 N. W. Rep. 118; *Syracuse Bank v. Merrick*, 89 N. Y. S. 238, 96 App. Div. 581. As to defenses against the assignee of the debt, see *Brosseon v. Lowry*, 209 Ill. 405, 70 N. E. Rep. 901. The right to enforce a mortgage security, passes as an incident to the transfer of the mortgage debt. *Barlow v. Cooper*, 109 Ill. App. 375. As a mortgage is but an incident of the debt it is given to secure there can be no transfer of the mortgage, without the debt. *Merritt v. Bartholick*, 36 N. Y. 44; *Finch's Sel. Cas.* 1114; *Martin v. Nowlin*, 2 Burr. 969; *Green v. Hart*, 1 Johns. 580; *Jackson v. Blodgett*, 5 Cow. 231; *Cooper v. King*, 17 Abb. 342.

remaining debts.⁵⁷ This is always the case, in the absence of an express contract, where the debts secured by the same mortgage fall due at the same time. But where they fall due at different periods, in very many of the States one is generally held to have priority over the other in the order in which they fall due. The effect is the same as if there had been successive and independent mortgages, one for each debt.⁵⁸ But it is always competent for the parties to control the priority of the debts secured by the same mortgage, and they may altogether exclude one or more from the enjoyment of the security.⁵⁹ It has also been held that the mortgage-debts in the hands of assignees will have priority in the order of their assignment.⁶⁰ Inasmuch as under the lien theory the mortgagee has very few, if any, rights which are enforceable only in law, the equitable assignment of the mortgage affords sufficient protection for the assignee. This is particularly the case in those States where the mortgagee is prohibited from assigning the mortgage without the debt.

⁵⁷ *Donley v. Hays*, 17 Serg. & R. 400; *Belding v. Manly*, 21 Vt. 550; *Miller v. Rutherford*, etc., R. R., 40 Vt. 39; *Cooper v. Ulman*, Walk. (Mich.) 251; *Lane v. Davis*, 225; *Blair v. White*, 61 Vt. 110; *Pauzel v. Brookmire*, 51 Ark. 105; *In re Preston*, 54 Hun 10.

⁵⁸ *Stanley v. Beatty*, 4 Ind. 134; *McVay v. Bloodgood*, 9 Port. 547; *U. S. Bk. v. Covert*, 13 Ohio 240; *Preston v. Hodges*, 50 Ill. 56; *Thompson v. Field*, 38 Mo. 325; *Isett v. Lucas*, 17 Iowa 506; *G. Wathmays v. Ragland*, 1 Rand. 466; *Larrabee v. Lambert*, 32 Me. 97; *contra*, *Darby v. Hays*, 17 Serg. & R. 400; *Henderson v. Herrod*, 10 Smed. & M. 631; *English v. Carney*, 25 Mich. 178; *Grattan v. Wiggins*, 23 Cal. 30; *Gordon v. Hazzard* (S. C.), 11 S. E. Rep. 100.

⁵⁹ *Bryant v. Damon*, 6 Gray 165; *Mechanic's Bk. v. Bk. of Niagara*, 9 Wend. 410; *Eastman v. Foster*, 8 Metc. 19; *Stevenson v. Black*, 1 N. J. Eq. 338; *Wright v. Parker*, 2 Aik. 212; *Walker v. Dement*, 42 Ill. 272; *Bk. of England v. Tarleton*, 23 Miss. 178; *Cooper v. Ulman*, Walk. (Mich.) 251; *Grattan v. Wiggins*, 23 Cal. 30; *Willetts v. Johnson*, 84 Ky. 411; *Morgan v. Kline*, 77 Iowa 681.

⁶⁰ *Eastman v. Foster*, 8 Metc. 19; *Noyes v. White*, 9 Minn. 640; *contra*, *Page v. Pierce*, 26 N. H. 317; *Stevenson v. Black*, 1 N. J. Eq. 338; *Henderson v. Herrod*, 18 Mass. 631.

§ 252. **Assignment of the mortgagor's interest.**—The mortgagor's interest, whether before or after condition broken, at common law or under the lien theory, can only be assigned by deed, for in any case and under all circumstances the mortgagor is considered, as against all the world, except the mortgagee, as the owner of the legal estate, which he can convey as long as his equity of redemption has not been barred or foreclosed.⁶¹ As against the mortgagee, the mortgagor's assignee has merely the rights of the mortgagor under the mortgage; he takes the estate subject to the mortgage. And this is the case with the second mortgagee, as well as with the absolute purchaser.⁶²

§ 253. **Rights and liabilities of assignees.**—In respect to the mortgaged premises, the assignees enjoy all the rights, and assume all the liabilities, of their respective assignors. If the mortgagee is entitled to possession, his assignee will also be entitled to possession; he may appropriate the rents and profits while in possession and, in the same manner as the mortgagee, maintain all the actions given for the protection of his interests.⁶³ Whether the assignee of the mortgage takes

⁶¹ Co. Lit. 205 a, Butler's note, 96; *White v. Whitney*, 3 Metc. 81; *White v. Rittenmyer*, 30 Iowa 272; *Bigelow v. Wilson*, 1 Pick. 485; *Buchanan v. Monroe*, 22 Texas 537.

⁶² *Hartley v. Harrison*, 24 N. Y. 170; *Andrews v. Fisk*, 101 Mass. 424; *Flanagan v. Westcott*, 11 N. J. Eq. 264; *First National Bank v. Honeyman (Dak.)*, 42 N. W. Rep. 771. An assumption of a mortgage debt as a part consideration, in a purchase of the mortgagor's equity, is held to make the purchaser the principal debtor and the mortgagor a surety, in Missouri. *Nelson v. Brown*, 140 Mo. 580; *Pratt v. Conway*, 148 Mo. 291; *Wagman v. Jones*, 58 Mo. App. 313; *Regan v. Williams*, 185 Mo. 620, 84 S. W. Rep. 959.

⁶³ *Jackson v. Minkler*, 10 Johns. 480; *Jackson v. Bowen*, 7 Cow. 13; *Jackson v. Hopkins*, 18 Johns. 487; *Eastman v. Batchelder*, 36 N. H. 141; *Northampton Mills v. Ames*, 8 Metc. 1; *Henshaw v. Wells*, 9 Humph. 568; *Phyfe v. Riley*, 15 Wend. 248; *Strang v. Allen*, 44 Ill. 428; *Bolles v. Carli*, 72 Minn. 113; *Whitney v. McKinney*, 7 Johns. Ch. 144; *Miller v. Henderson*, 10 N. J. Eq. 320; *Andrews v. McDaniel*, 68 N. C. 385; *Green v. Marble*, 37 Iowa 95; *Macomb v. Prentiss (Mich.)*,

it and the debt subject to all existing equities between the original parties, depends in the first instance upon the nature of the instrument of indebtedness. If it be a bond or any other non-negotiable instrument, the assignee will take both it and the mortgage subject to all the defenses, which might be set up against the mortgagee.⁶⁴ But in some of the States if the instrument of indebtedness be a negotiable note, the mortgage, being treated as incident to the debt, receives from the note a negotiable character, and passes to the assignee free from the equities existing between the mortgagee and mortgagor, unless by express terms the mortgage is assigned subject to the equities. And to be free from them, the assignment must be made before the debt is due.⁶⁵ But if a mortgage covers more than one note, and one of the notes is overdue when all of them are assigned, the assignment is con-

44 N. W. Rep. 324; *Barnes v. Boardman*, 149 Mass. 106; *Goffert v. Wallace*, 66 Mich. 618; but the assignee can only maintain actions which accrue after the assignment. *Gobbert v. Wallace*, 66 Miss. 618.

⁶⁴ *Trustees Union College v. Wheeler*, 61 N. Y. 88; *Ingraham v. Disborough*, 47 N. Y. 421; *Davis v. Bechstein*, 69 N. Y. 440, 25 Am. Rep. 218; *Pendleton v. Fay*, 2 Paige Ch. 202; *Ellis v. Messervie*, 11 Paige Ch. 467; *s. v.* 2 Denio, 640; *Twitchell v. McMurtrie*, 77 Pa. St. 383; *Musgrove v. Kennell*, 23 N. J. Eq. 75; *Reeves v. Scully*, Walk. (Mich) 248; *Croft v. Bunster*, 9 Wis. 503; *Coulding v. Bunster*, *ib.* 503; *Hortsmann v. Gerker*, 49 Pa. St. 282; *Moffatt v. Hardin*, 22 S. C. 9; *Morris v. Peck*, 73 Wis. 482; *Morgan's Appeal*, 126 Pa. St. 500; *Harrison v. Burlingame*, 48 Hun 212.

⁶⁵ *Scott v. Magloughlin* (Ill.), 24 N. E. Rep. 1030; *Barnum v. Phenix*, 60 Mich. 388; *Carpenter v. Longan*, 16 Wall. 271; *Kenicott v. Supervisors*, 10 Wall. 452; *Pierce v. Faunce*, 47 Me. 507; *Gould v. Marsh*, 1 Hun 566; *Jackson v. Blodgett*, 5 Cow. 203; *Green v. Hart*, 1 Johns. 580; *Taylor v. Page*, 6 Allen 86; *Young v. Miller*, 6 Gray 152; *Breen v. Seward*, 11 Gray 118; *Webb v. Haselton*, 4 Neb. 308, 19 Am. Rep. 638. If a grantee of land purchases for full value and withholds part of the consideration, to satisfy an outstanding mortgage, he is personally liable therefor, if he does not pay it off. *Lobdell v. Ray*, 213 Ill. 389, 72 N. E. Rep. 1076. And a grantee who assumes and agrees to pay an outstanding mortgage is liable therefor, the same as the original mortgagor. *Santee v. Keefe* (Iowa 1905), 102 N. W. Rep. 803; *Regan v. Williams*, 185 Mo. 620, 84 S. W. Rep. 959.

sidered as to all of the notes so far made after maturity, as to destroy the negotiable character of the mortgage as a security for the notes which are not yet due.⁶⁶ But in other courts, the negotiable character of the note is held not to extend to the mortgage, which secures its payment. And although, as far as the personal liability of the mortgagor on the note is concerned, the assignee takes it free from the equities, the mortgage in his hands is subject to them.⁶⁷ If the mortgagee or other holder of the mortgage makes an assignment when the mortgage debt had been paid in whole or in part, he will be liable in damages to his assignee for such failure of the subject-matter of the assignment.⁶⁸ The assignee of the mortgagor on the other hand, has a right to redeem the estate and call the mortgagee to account for the rents and profits received by him while in possession, even though he has permitted the mortgagor to enjoy them after notice of the assignment. For while in possession the mortgagee is trustee as to the rents and profits, not only of the mortgagor, but also of the mortgagor's assignees, and he cannot after notice of the assignment, pay them over to the mortgagor. He must apply them to the satisfaction of the mortgaged debt.⁶⁹ But although the mortgagor's assignee has a right to redeem the mortgaged premises, he does not by the assignment assume the personal liability of the mortgagor, unless the deed of assignment in express terms imposes such liability upon the assignee as a part of the consideration.⁷⁰ Where there is an

⁶⁶ *Abele v. McGuigan* (Mich.), 44 N. W. Rep. 393. See to same general effect, *Whitney v. Traynor*, 74 Wis. 289.

⁶⁷ *Olds v. Cummings*, 31 Ill. 188; *Sumner v. Waugh*, 56 Ill. 531; *White v. Sutherland*, 64 Ill. 181; *Redin v. Branhan*, 43 Minn. 283; *Boone v. Clark*, 129 Ill. 466.

⁶⁸ *Eaton v. Knowles*, 61 Mich. 625.

⁶⁹ *Goodman v. White*, 26 Conn. 317; *Mannisig v. Markel*, 19 Iowa 104; *Smith v. Manning*, 9 Mass. 422; *Bell v. Mayor*, 10 Paige Ch. 49. But a clause in a deed, to a grantee of real estate, that he accepts and agrees to pay a mortgage on the land, is not binding on him, unless he accepts the deed. *Merriam v. Schmidt*, 211 Ill. 263, 71 N. E. Rep. 986.

⁷⁰ *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *McInteer v.*

agreement of that kind, it is clear that the mortgagor may enforce it, and recover of his assignee, if he, the mortgagor, has been compelled to pay the mortgage debt; but how far, and whether if at all, the mortgagee may take advantage of this agreement to which he is not a privy, and sue the assignee upon it, is a question upon which the authorities are not agreed. The better opinion seems to be that, though the

Shaw, 6 Allen 85; Strong v. Converse, 8 Allen 559; Pike v. Goodnow, 12 Allen 474; Braman v. Dowse, 12 Cush. 227; Belmont v. Coman, 22 N. Y. 438; Vrooman v. Turner, 69 N. Y. 286, 25 Am. Rep. 195; Shepherd v. May, 115 U. S. 505; Scheppelman v. Fuerth, 87 Mo. 351; Gage v. Jenkinson, 58 Mich. 161; Gerdine v. Menage, 41 Minn. 417; Brown v. South Boston Sav. Bk., 148 Mass. 300; Searing v. Benton, 41 Kan. 758. A covenant to assume a mortgage is equivalent to a covenant to pay it. Schley v. Fryer, 100 N. Y. 71; Ludington v. Low, 53 N. Y. Super. 391; Rice v. Sanders (Mass.), 24 N. E. Rep. 1079; Moran v. Pellifant, 28 Ill. App. 278; N. Y. Life Ins. Co. v. Aitkin, 57 N. Y. Super. 42. But see *contra*, Chancellor v. Traphagen, 41 N. J. Eq. 369. But if a deed only contains a clause to the effect that the conveyance is subject to a mortgage, it will not impose upon the grantee any personal liability for the debt. Trotter v. Hughes, 12 N. Y. 74; Tillotson v. Boyd, 4 Sandf. Ch. 516; Weed Sewing Machine Co. v. Emerson, 115 Mass. 554; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659; Baumgardner v. Allen, 6 Munf. 439; Dunn v. Rodgers, 43 Ill. 260; Fowler v. Fay, 62 Ill. 375; Chilton v. Brooks (Ind.), 20 N. E. Rep. 125; Brown v. Stillman, 43 Minn. 126; Gordon v. Avery, 105 N. C. 532. Nor where are added the words, the said mortgage debt "forms part of the consideration, and is deducted therefrom." Equitable Life Ins. Co. v. Boetwick, 100 N. Y. 628. In such a case, the only effect produced is that the grantee cannot impeach the validity of the mortgage. Ritter v. Phillips, 53 N. Y. 586; Green v. Turner, 38 Iowa 112; Perry v. Kearns, 13 Iowa 174; Sweetzer v. Jones, 35 Vt. 317. But it will not qualify a general covenant against incumbrances, so as to relieve the mortgagor from liability, unless the mortgage is expressly excepted from the operation of the covenant. Spurr v. Andrew, 6 Allen 420; Estabrook v. Smith, 6 Gray 592; Harlow v. Thomas, 15 Pick. 66. But the obligation of the purchaser, who agrees to pay the mortgage debt is so far a personal and independent obligation, that payments or acknowledgments by him, will not toll the statute of limitations as to the mortgagor. Regan v. Williams, 185 Mo. 620, 84 S. W. Rep. 959; Zoll v. Carnahan, 33 Mo. 43; Cottrell v. Shepard (Wis.), 57 N. W. Rep. 984; Ins. Co. v. Elwell, 70 N. W. Rep. 335; Trustees Old Almshouse v. Smith, 52 Conn. 434.

mortgagee cannot maintain an action at law upon the covenant for the want of privity between him and the assignee, he will in equity be subrogated to the rights of the mortgagor in the agreement, and can in equity enforce its performance in his own behalf.⁷¹ He could also, in those States where *choses in action* may be levied upon and sold under execution, pursue that remedy in a court of law. So completely vested is the right of the mortgagee to sue the purchaser of the land on his agreement to assume the payment of the mortgage, that a release of the purchaser from the obligation by the

⁷¹ *Lawrence v. Fox*, 20 N. Y. 268; *Garnsey v. Rogers*, 47 N. Y. 223; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 256; *Campbell v. Smith*, 71 N. Y. 26, 27 Am. Rep. 5; *Crawford v. Edwards*, 33 Mich. 354; *Wilson v. King*, 23 N. J. 150; *Lennig's Estate*, 52 Pa. St. 138; *Fitzgerald v. Barker*, 85 Mo. 13; *Kelso v. Fleming*, 104 Ind. 180; *Palmeter v. Carey*, 63 Wis. 426; *Keller v. Ashford*, 133 U. S. 610; *Cooper v. Foss*, 15 Neb. 516; *Shamp v. Meyer*, 20 Neb. 223; *Keedle v. Flack* (Neb.), 44 N. W. Rep. 34. *Contra*, *Mellon v. Whipple*, 1 Gray 317; *Drury v. Tremont Improvement Co.*, 13 Allen 168; *Marsh v. Pike*, 10 Paige Ch. 505; *s. c.* 1 Sandf. Ch. 210; *Carpenter v. Koons*, 20 Pa. St. 222. And the obligation is binding upon the grantee, although he does not sign the deed. By his acceptance of the deed he undertakes to perform all the conditions and obligations incident thereto. *Crawford v. Edwards*, 33 Mich. 354; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Huyler v. Atwood*, 26 N. J. Eq. 504; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35. And his ignorance of the fact that the deed contains such a stipulation is no defense, if the transaction is free from the taint of fraud. *Keller v. Ashford*, 133 U. S. 610; *Moran v. Pellifant*, 28 Ill. App. 278. The statement in the text, that the mortgagee cannot maintain an action at law on the purchaser's promise to pay the mortgage debt, is not in accord with the majority of the decisions. It involves the question whether a stranger can maintain an action on a contract, which was made to another for his benefit; and upon this general question, the authorities are not agreed. The author believes that there is not a sufficient privity of contract to support an action at law upon the promise to pay, unless the contract creates a bailment. If money be given to A. to hand to B., it is a *mandatum*, and B. may recover it from A.; B. is a *quasi cestui que trust*. But if A. promises B. to pay a sum of money to C., in satisfaction of a debt owing by A. to B., there is no bailment, and, therefore, no obligation to C. But see the author's article on the subject in 11 Cent. L. J. 161. See to the same effect *Willard v. Wood*, 4 Mackey 538; *s. c.* 135 U. S. 309; *Keller v. Ashford*, 133 U. S. 610.

mortgagor has been held to have no effect as to the mortgagee's right of action.⁷² Likewise, so independent of the mortgagor's liability is the grantee's liability to the mortgagee on his covenant to assume or pay the mortgage debt, that such a grantee cannot escape the liability thereby assumed by questioning the validity of the mortgage or the mortgage debt.⁷³ And where, by mistake, a mortgage did not include within the description one tract of land, which the mortgagor subsequently sold under an agreement that the purchaser shall assume the payment of the mortgage debt, it was held that the lien of the mortgage attached to the land in the hands of the grantee.⁷⁴ On the other hand, the obligation of the mortgagor on his note or bond for the mortgage debt is not in any wise affected by the purchaser's agreement to assume the payment of the mortgage debt, unless the mortgagee has consented to the novation.⁷⁵

§ 254. *Effect of payment or tender of payment.*—If payment or tender of payment, by parties having the right to redeem, be made when the debt falls due, it works a complete discharge of the mortgage, divests the mortgagee of all his rights and remits to the mortgagor all his rights at common law, as fully as if there had been no mortgage. And if the mortgagee is in possession, ejectment will lie, and he will be ousted without any formal release or discharge of the mortgage.⁷⁶ A formal discharge of the mortgage would, however,

⁷² *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Gifford v. Corrigan*, 117 N. Y. 257.

⁷³ *Altman v. Banholzer*, 36 Minn. 57.

⁷⁴ *Sidwell v. Wheaton*, 114 Ill. 267.

⁷⁵ *Shepherd v. May*, 115 U. S. 505; *Union Mut. L. Ins. Co. v. Hanford*, 27 Fed. Rep. 588; *Kelso v. Fleming*, 104 Ind. 180; *Hutchinson v. Wells*, 67 Iowa 430; *Chilton v. Brooks* (Ind.), 20 N. E. Rep. 125; *Searling v. Benton*, 41 Kan. 758.

⁷⁶ *Whitcomb v. Simpson*, 39 Me. 21; *Camp v. Smith*, 5 Conn. 80; *Erskine v. Townsend*, 2 Mass. 495; *Holman v. Bailey*, 3 Metc. 55; *Doody v. Pierce*, 9 Allen 141; *Stewart v. Crosby*, 50 Me. 130; *Currier v. Gale*, 9 Allen 522; *Maynard v. Hunt*, 5 Pick. 240; *Munson v. Munson*, 30

be required, if the mortgage contained a clause which provides for a conveyance when the condition is performed.⁷⁷ This will be found to be the general rule in all the States. But where the tender or payment is made after the condition has been broken, the same variance of opinion is encountered as in other branches of the law of mortgages, where the common-law and lien theories conflict. At common law, since the default made the estate absolute in the mortgagee, and left in the mortgagor only the equity of redemption, the mere payment or tender of payment will not revert the legal title in the mortgagor. A formal discharge is requisite, and if the mortgagee refuses to make it, the mortgagor's only remedy is in equity, by a proceeding to redeem the property. He cannot maintain an action of ejectment, for he has no legal estate.⁷⁸

Conn. 425. But the payment cannot be enforced by either party before the debt falls due, and the mortgagee may refuse to accept it. But if the debt and interest up to the fixed day of payment be tendered, it will have the same effect upon the mortgage as if tendered on the proper day. *Burgoyne v. Spurling*, Cro. Car. 283; *Brown v. Cole*, 14 Sim. 427; *Scott v. Frink*, 53 Barb. 533; *Abbe v. Goodwin*, 7 Conn. 377; *Hoyle v. Cazabat*, 25 La. An. 438. And although nothing but actual payment will extinguish the debt, a simple tender of payment will discharge the mortgage, and prevent a subsequent foreclosure. Co. Lit. 299 b; *Martindale v. Smith*, 1 Q. B. 389; *Willard v. Harvey*, 5 N. H. 252; *Kortright v. Cady*, 21 N. Y. 343; *Darling v. Chapman*, 14 Mass. 101; *Maynard v. Hunt*, *supra*; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37. Since a tender of the sum due on a mortgage, re-vests the title in the mortgagor, he can maintain ejectment against a subsequent purchaser. *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. Rep. 653.

⁷⁷ See cases cited in preceding note (76).

⁷⁸ *Smith v. Kelly*, 27 Me. 237; *Stewart v. Crosby*, 50 Me. 130; *Howard v. How*, 3 Metc. 548; *Holman v. Bailey*, *Id.* 55; *Howe v. Lewis*, 14 Pick. 329; *Grover v. Flye*, 5 Allen 543; *Pillsbury v. Smyth*, 25 Me. 427; *Dyer v. Toothaker*, 51 Me. 380; *Cross v. Robinson*, 21 Conn. 379. Technically, this is true. But even in those States, proof of payment or tender of payment will prevent the enforcement of the mortgage against the mortgagor. *Wade v. Howard*, 11 Pick. 289; *Breckenridge v. Brooks*, 2 A. K. Marsh 337; *Slayton v. McIntire*, 11 Gray 271; *Gray v. Jenks*, 3 Mason 520; *Williams v. Thurlow*, 31 Me. 392; *Faulkner v. Breckenbrough*, 4 Rand. 245; *Pike v. Goodnow*, 12 Allen 472; *Arnot v. Post*, 6 Hill. 65.

In those States where the mortgage is regarded as a lien, even after condition broken, a tender of payment as well as payment will operate as a discharge or extinguishment of the mortgage both before and after the default. And if the mortgagee is in possession, an ejectment suit may be instituted against him. The mortgagor is not obliged to resort to equity to obtain a formal cancellation of the mortgage.⁷⁹ If there are two or more mortgagees, payment to one of them, unless it is made with the consent of the others, will not affect the rights of the others in the mortgage.⁸⁰

§ 255. Who may redeem.— If the mortgage debt is actually paid, the payment will, as against the mortgagee, extinguish the mortgage and the mortgagee's rights thereunder, whoever pays the debt. But in order that a tender of payment may have that effect, it must be made by some one who is entitled to redeem.⁸¹ Any one, who has an interest in the mortgaged premises, claiming under the mortgagor, has this right. And this is the case, whether his interest be legal or equitable, an estate or a lien. The only requisite is a privity of estate with the mortgagor. Among such may be enumerated grantees, subsequent incumbrancers, whether they be junior mortgagees or judgment-creditors, heirs, devisees, personal representatives, tenants for years, the husband for his curtesy, and the widow for her dower or join-

⁷⁹ *Jackson v. Stackhouse*, 1 Cow. 122; *Farmers' Ins., etc., Co. v. Edwards*, 26 Wend. 541; *Runyan v. Mersereau*, 11 Johns. 538; *Den v. Spinning*, 1 Halst. 471; *Shields v. Lozeur*, 34 N. J. L. 496; *Rickett v. Madeira*, 1 Rawle 325; *Paxon v. Paul*, 3 Har. & McH. 399; *Furbish v. Goodwin*, 25 N. H. 425; *Howard v. Gresham*, 27 Ga. 347; *Champney v. Coope*, 32 N. H. 543; *Griffin v. Lovell*, 42 Miss. 402; *Holt v. Rees*, 44 Ill. 30; *Armitage v. Winkliffe*, 12 B. Mon. 488; *Briggs v. Seymour*, 17 Wis. 255; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 37; *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. Rep. 653.

⁸⁰ *Maddox v. Bramlett*, 84 Ga. 84.

⁸¹ *McCulla v. Beadleston* (R. I.), 20 Atl. Rep. 11.

ture.⁸² And in tendering payment the mortgagee or assignee may be required to deliver up the notes or other evidences of indebtedness before actual payment, such a demand would not affect the effectiveness of the tender.⁸³ But, in order that tender of payment may have the effect of extinguishing the mortgage, the whole debt must be tendered, together with all the interest and costs that have accrued thereon to the date of the tender. Therefore, if the widow, for example, desires to redeem for the preservation of her dower right, she must offer to pay the whole debt. The mortgagee can refuse to accept only her share of it. And

⁸² *Lomax v. Bird*, 1 Vern. 182; *Gibson v. Crehore*, 5 Pick. 146; *Grant v. Duane*, 9 Johns. 591; *Ex parte Willard*, 5 Wend. 94; *Boarman v. Catlett*, 13 Smed. & M. 149; *Moore v. Beasom*, 44 N. H. 215; *Fray v. Drew*, 11 Jur. (N. S.) 130; *Burnett v. Dennistor*, 5 Johns. Ch. 35; *Thompson v. Chandler*, 7 Greenl. 377; *Bacon v. Bowdoin*, 22 Pick. 401; *Goodman v. White*, 26 Conn. 317; *Newhall v. Savings Bank*, 101 Mass. 431; *Rogers v. Myers*, 68 Ill. 92; *Kimmel v. Willard*, 1 Dougl. (Mich.) 217; *Wiley v. Ewing*, 47 Ala. 418; *Calkins v. Munsell*, 2 Root, 333; *McLaughlin v. Curts*, 27 Wis. 644; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Hitt v. Holiday*, 2 Litt. 332; *Van Buren v. Olmstead*, 5 Paige Ch. 9; *Stainback v. Geddy*, 1 Dev. & B. Eq. 479; *Chandler v. Dyer*, 37 Vt. 345; *Bridgeport v. Blinn*, 43 Conn. 274; *Kingsbury v. Buckner*, 70 Ill. 514; *Casserly v. Witherbee*, 119 N. Y. 522; *Buchanan v. Reid*, 43 Minn. 172; *Sanford v. Kane*, 24 Ill. App. 504; *s. c. reversed*, 127 Ill. 591; *Ryan v. Newcomb*, 23 Ill. App. 113; *s. c. reversed*, 125 Ill. 91; *Willard v. Finnegan*, 43 Minn. 476; *Barr v. Van Alstine*, 120 Ind. 590. A tenant for years (*Kebabian v. Shinkle*, 26 R. I. 505, 59 Atl. Rep. 743), attaching creditors (*Whitney v. Mfg. Co.*, 187 Mass. 557, 73 N. E. Rep. 663) and subsequent lienholders, are all entitled to redeem. *Dickenson v. Duckworth* (Ark. 1905), 85 S. W. Rep. 82. The purchaser of standing trees, subject to a mortgage, is entitled to redeem as to such trees, the same as the mortgagor could have done. *Rothschild v. Lumber Co.*, 139 Ala. 571, 36 So. Rep. 785; *Hefin v. Bingham*, 56 Ala. 566, 28 Amer. Rep. 776.

⁸³ *Stiger v. Bent*, 111 Ill. 328. A right of redemption cannot be extended beyond that which existed when the mortgage was executed. *Barnitz v. Beverly*, 163 U. S. 118, 41 L. Ed. 93. And see, as to effect of act forfeiting title of mortgagee for not recording deed of foreclosure, as required by Illinois statute of 1872, *Bradley v. Lightcap*, 195 U. S. 2-4, 49 L. Ed. 65.

this is true of any one who owns only a portion of the mortgaged premises.⁸⁴

§ 256. **What acts extinguish the mortgage.**—No acts, which do not amount to a payment of the debt or a release of the mortgage, will cause an extinguishment of the mortgage. A mere change in the form of the debt—as the substitution of a bond for a note, or the execution of a new note in the place of the old one—will not have that effect, unless such substitution or change is made with the intention that the new instrument of indebtedness shall be accepted as an actual payment of the old debt. And this has been held to be the case where a note for a smaller amount has been substituted. When and how the intention of payment can be shown in such a case is a very difficult matter to explain by any concise and comprehensive statement. It depends upon the facts of each case, and is itself a question of fact, whether the person making the change intended it to operate as a satisfaction of the old debt.⁸⁵ The mortgagee may, of course, release any part of the mortgaged property from the mortgage lien. This is a very common transaction, where

⁸⁴ *McCabe v. Bellows*, 7 Gray 148; *McCabe v. Swap*, 14 Allen 191; *Gibson v. Crehore*, 5 Pick. 146; *Norris v. Moulton*, 34 N. H. 392; *Downer v. Wilson*, 38 Vt. 1; *Seymour v. Davis*, 35 Conn. 264; *Douglass v. Bishop*, 27 Iowa, 216; *Lamb v. Montague*, 112 Mass. 352; *Franklin v. Gorham*, 2 Day, 142; *Hunter v. Dennis*, 112 Ill. 568; *Watts v. Bonner*, 66 Mich. 629; *Detweiler v. Breckenkamp*, 83 Mo. 45. Where a note is payable on demand, a suit to redeem will lie at any time before foreclosure. *Kebabian v. Shinkle*, 26 R. I. 505, 59 Atl. Rep. 743.

⁸⁵ *Parkhurst v. Cummings*, 56 Me. 159; *Fowler v. Bush*, 21 Pick. 230; *Grafton Bk. v. Foster*, 11 Gray, 265; *Mitchell v. Clark*, 35 Vt. 104; *Boxheimer v. Gunn*, 24 Mich. 376; *Hadlock v. Bullfinch*, 31 Me. 246; *Euston v. Friday*, 2 Rich. Eq. 427; *Bank v. Rose*, 1 Strobh. Eq. 257; *Brinkerhoff v. Lansing*, 4 Johns. Ch. 65; *Barker v. Bell*, 37 Ala. 359; *Vogle v. Ripper*, 34 Ill. 106; *Rogers v. Traders' Ins. Co.*, 6 Paige, Ch. 583; *Jordan v. Smith*, 30 Ohio, 500; *Citizen's Bank v. Dayton*, 116 Ill. 257; *Reid v. Abernethy*, 77 Iowa, 438; *Burson v. Andes*, 83 Va. 445. A tender of the amount due is held to extinguish the mortgage, in California. *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. Rep. 653.

the mortgagor sells a part of such property.⁸⁶ And the parties may, and often do, stipulate for such partial release, on payment of installments on the debt.⁸⁷ It is doubtful what is the effect of a substitution of a new mortgage. If a new note and mortgage is given for the balance after part payment, the old mortgage is held to be completely extinguished, and the new mortgage cannot claim priority over junior incumbrances already recorded.⁸⁸ On the other hand, it has been held that the substituted mortgage may take the place of the original mortgage, on the ground that there had not in that case been any absolute payment or extinguishment of the original debt.⁸⁹

§ 257. The effect of a discharge.—Where the mortgage is discharged by the mortgagor's payment of the debt, it is extinguished altogether; particularly, where there are junior incumbrances. The mortgagor cannot keep it alive, even though he goes through the formality of an assignment. A merger results from the union of the two interests in one person.⁹⁰ This is, however, not the rule where the assignee

⁸⁶ *Werner v. Tuch*, 52 Hun 269; *Vawter v. Crafts*, 41 Minn. 14; *Boone v. Clarke*, 129 Ill. 466. By statute, in Missouri, on payment of one or more notes secured by mortgage, the Recorder is authorized to cancel the debt, *pro tanto* and to release any part of the mortgaged premises. See Laws Missouri, 1897, p. 203; R. S. Mo. 1899, Secs. 4360, 4361.

⁸⁷ *Vawter v. Crafts*, 41 Minn. 14; *McComber v. Mills*, 80 Cal. 111; *Boone v. Clark*, 129 Ill. 466; *Werner v. Tuch*, 52 Hun, 269.

⁸⁸ *Smith v. Bynum*, 92 N. C. 108; *Edwards v. Thorn*, 25 Fla. 222.

⁸⁹ *Clark v. Bullard*, 66 Iowa, 747; *Council Bluffs Lodge v. Bullards*, 67 Iowa, 674; *Van Duyne v. Shaun*, 41 N. J. Eq. 311, reversing *s. c.* 39 N. J. Eq. 6; *Ponder v. Ritzinger*, 102 Ind. 571; *s. c.* 119 Ind. 597.

⁹⁰ *Wadsworth v. Williams*, 100 Mass. 126; *Strong v. Converse*, 8 Allen, 559; *Wade v. Beldmeir*, 40 Mo. 486; *McGiven v. Wheelock*, 7 Barb. 22; *Mead v. York*, 6 N. Y. 449; *Thomas' Appeal*, 30 Pa. St. 378; *Richard v. Talbird*, Rich. Ch. 158; *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Perkins v. Steame*, 23 Texas, 561; *Champney v. Coope*, 32 N. Y. 543; *Bowman v. Manter*, 33 N. H. 530; *Large v. Van Doren*, 14 N. J. Eq. 208; *Kremerer v. Bloom*, 65 Iowa, 363; *Shipley v. Fox*,

of the mortgagor has assumed the payment of the debt. Payment by the mortgagor in that case operates as an equitable assignment.⁹¹ And so, also, will there be a merger, where the payment is made by an assignee of the mortgagor who has assumed the payment of the debt.⁹² It has, also, been held that if there are no junior incumbrancers, a satisfied mortgage may be revived, and be made a good and effectual security for a new debt between new parties. But the position is not without doubt as to its soundness.⁹³ And it is certainly not recognized as valid against junior incumbrancers.⁹⁴ If the mortgage has been delivered up and cancelled through fraud, accident or mistake, the court of equity

69 Md. 572; *Eaton v. Simonds*, 14 Pick. 98; *Crafts v. Crafts*, 13 Gray, 360; *Cherry v. Monro*, 2 Barb. Ch. 618; *Brown v. Lapham*, 3 Cush. 551, 554; *Wedge v. Moore*, 6 *Id.* 8; *Robinson v. Urquhart*, 1 Beasl. 515; *Comm. v. Chesapeake, etc., Co.*, 32 Mod. 501; *Kilborn v. Robins*, 8 Allen, 466, 471; *Bemis v. Call*, 10 *Id.* 512.

⁹¹ *Baker v. N. W. Guaranty Loan Co.*, 36 Minn.; *Funk v. McReynold*, 33 Ill. 481, 495; *Halsey v. Reed*, 9 N. J. Eq. 446; *Kinnear v. Lowell*, 34 Me. 299; *Stillman v. Stillman*, 21 N. J. Eq. 126; *Jumel v. Jumel*, 7 Paige, 591; *Cox v. Wheeler*, 7 *Id.* 248, 257.

⁹² *Mickles v. Townsend*, 18 N. Y. 575; *Stoddard v. Rotton*, 5 Bosw. 378; *Butler v. Seward*, 10 Allen, 466; *Mickles v. Dillaye*, 15 Hun, 296; *Pike v. Goodnow*, 12 Allen, 472; *Weed, etc., Co. v. Emerson*, 115 Mass. 554; *Fowler v. Fay*, 62 Ill. 375; *Fitch v. Cotheal*, 2 Sandf. Ch. 29; *Lilly v. Palmer*, 51 Ill. 331; *Fry v. Vanderhoof*, 15 Wis. 397. See *Kellogg v. Ames*, 41 N. Y. 250. A conveyance by either the mortgagee or his assignee to the mortgagor, or his assignee, discharges the mortgage. *Nickell v. Tracy*, 91 N. Y. S. 287; 100 App. Div. 80.

⁹³ *Marvin v. Vedder*, 5 Cow. 671; *Walker v. Snediker*, 1 Hoffm. Ch. 145; *Star v. Ellis*, 6 Johns. Ch. 392; *Johnson v. Anderson*, 30 Ark. 745; *Hurser v. Anderson*, 4 Edw. Ch. 17; *International Bk. v. Bowen*, 80 Ill. 541; *Jordan v. Furlong*, 19 Ohio St. 89. And it seems the objection to this principle is greatly lessened, if not altogether removed, if the assignment is made at the mortgagor's request to a third person. Although lifeless in this third person's hands, it will be a good and binding security when assigned to a new creditor upon a new or different consideration. *Bolles v. Wade*, 4 N. J. Eq. 458; *Sheddy v. Gervan*, 113 Mass. 378; *Hoy v. Bramhall*, 11 N. J. Eq. 563; *Goulding v. Bunster*, 8 Wis. 513; *Wilson v. Schoenlaub*, 99 Mo. 96.

⁹⁴ *Man v. Elkins*, 10 N. Y. S. 488.

will revive it and enforce it, at least against the mortgagor and all parties claiming under him, who have notice of the equity. And a subsequent purchaser will be bound by the equity if the mortgage has not been satisfied on the records; for he is compelled to take notice of that fact, and it is sufficient to put him on his inquiry.⁹⁵

§ 258. **When payment will work an assignment.**— Payment of the debt by the mortgagor, as has been explained, always discharges the mortgage, though the satisfaction by the mortgagee be in form an assignment to himself or to one in trust for him.⁹⁶ And where the debt is paid by a volunteer—a stranger who is not interested in the mortgaged premises—

⁹⁵ *Grimes v. Kimball*, 4 Allen, 578; *Joslyn v. Wyman*, 5 Allen, 63; *Howe v. Wilder*, 11 Gray, 267; *Lawrence v. Stratton*, 6 Cush. 163; *Stover v. Wood*, 26 N. J. Eq. 417; *Fassett v. Smith*, 23 N. Y. 252; *Middlesex v. Thomas*, 20 N. J. Eq. 39; *De Yampert v. Brown*, 28 Ark. 166; *Stanley v. Valentine*, 79 Ill. 544; *Robinson v. Sampson*, 23 Me. 388. And such relief will also be afforded where mortgage has been satisfied, instead of being assigned. *Dudley v. Bergen*, 23 N. J. Eq. 397; *Champlin v. Laytin*, 18 Wend. 407; *Russell v. Mixer*, 42 Cal. 475; *Bruce v. Bonney*, 12 Gray, 107; *Hughes v. Torrence*, 111 Pa. St. 611; *Charleston City Council v. Ryan*, 23 S. C. 339; 53 Am. Rep. 713; *Crippen v. Chappel*, 35 Kan. 495; *Stiger v. Bent*, 111 Ill. 328. But it must be a mistake of fact. If the satisfaction is obtained through a mistake of law, no relief will be granted, unless from the tender age or weak mind of the person injured, the charge of undue influence may be established. *Peters v. Florence*, 38 Pa. St. 194; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Smith v. Smith*, 15 N. H. 55. A mortgage executed or satisfied under duress, by threats of a prosecution, is void and can be cancelled, in equity. *Gray v. Freeman* (Tex. 1905), 84 S. W. Rep. 1105. See, also, *Galusha v. Sherman*, 81 N. W. Rep. 495, 47 L. R. A. 417; *Landa v. Obert*, 78 Tex. 33, 14 S. W. Rep. 297; *Bank v. Sargent* (Neb.), 91 N. W. Rep. 595; *Bond Ass'n v. Klee* (Neb.), 97 N. W. Rep. 476; *Cribs v. Soule* (Mich.), 49 N. W. Rep. 587, 24 Am. St. Rep. 166; *Bryant v. Peck*, 154 Mass. 460, 28 N. E. Rep. 678; *Schauerner v. Lissauer* (N. Y.), 18 N. E. Rep. 741; *Earle v. Hosiery Co.*, 36 N. J. Eq. 192; *Adams v. Bank*, 23 N. E. Rep. 7, 15 Am. St. Rep. 447, 6 L. R. A. 491; *Bank v. Kusworm* (Wis.), 59 N. W. Rep. 564, 43 Am. St. Rep. 880, 26 L. R. A. 48.

⁹⁶ See *ante*, Secs. 254, 257.

the mortgage will be discharged and extinguished, unless an assignment has actually been made to him. He cannot set up the claim to an equitable assignment, although he may have paid the debt at the mortgagor's request.⁹⁷ On the other hand, if there is an actual assignment to the volunteer payor, no additional circumstances can make the transaction work a discharge of the mortgage.⁹⁸ But when the payment is made by one who is not under a primary personal obligation to pay, who is secondarily liable as surety or indorser, or who has an interest in the mortgaged property, and, consequently, a right to redeem, payment does not always operate as a discharge. And the question is not determined so much by the form of the acknowledgment of payment as the intention of the party paying. That intention may be derived from the facts connected with the transaction and established by parol evidence. And where it is, beyond a doubt, to the interest of the one paying that the mortgage should be kept alive, equity will look upon the transaction as an assignment and not a discharge.⁹⁹ Especially is this the case where the person paying has only a part interest in the premises, or is a surety, and by paying becomes entitled to contribution or satisfaction from the mortgagor and others interested in the property. Payment in such cases never works a discharge; the mortgage survives, and may afterwards be enforced against all parties affected with notice.¹ But when

⁹⁷ *Downer v. Wilson*, 33 Vt. 1. See *Guy v. De Uprey*, 16 Cal. 196. But see *Crippen v. Chappel*, 35 Kan. 495, where it has been held that one paying the debt at the request of the deceased mortgagor's administrator, in reliance upon the validity of a new mortgage given by the administrator, can claim the rights of an assignee of the old mortgage, although it has been duly cancelled.

⁹⁸ *Brown v. Scott*, 87 Ala. 453.

⁹⁹ A payment by a widow, of a mortgage on her homestead will be kept alive, in equity, and the heirs can be made to contribute. *Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. Rep. 1003. And for similar payment by a subsequent mortgagee, see *Brethaur v. Schorer*, 77 Conn. 575, 60 Atl. Rep. 125.

¹ *Hinds v. Ballou*, 44 N. H. 619; *Stantons v. Thompson*, 49 N. H.

such a person pays the mortgage debt, he can insist upon the transfer to him of the notes or other evidences of indebtedness and the mortgage.² It has, however, been held that he cannot require them to be assigned to him.³

272; *Butler v. Seward*, 100 Allen, 466; *Leavitt v. Pratt*, 53 Me. 14; *Kellogg v. Ames*, 41 N. Y. 259; *Abbott v. Kasson*, 72 Pa. St. 185; *Walker v. King*, 44 Vt. 601; *Wadsworth v. Williams*, 100 Mass. 126; *Champlin v. Laytin*, 18 Wend. 407; *Dudley v. Bergen*, 23 N. J. Eq. 397; *Russell v. Mixer*, 42 Cal. 475; *Baker v. Flood*, 103 Mass. 47; *Ebert v. Gerding*, 116 Ill. 216; *Stelzich v. Weidel*, 27 Ill. App. 177; *Loud v. Lane*, 8 Met. 517; *Bacon v. Bowdoin*, 22 Pick. 401; *McCabe v. Bellows*, 7 Gray, 148; *Houghton v. Hapgood*, 13 Pick. 158; *Spencer v. Waterman*, 36 Conn. 342; *Foster v. Hilliard*, 1 Story, 77; *Swaine v. Perine*, 5 Johns. Ch. 490; *Bell v. Mayor, etc.*, 10 Paige, 49; *Lamson v. Drake*, 105 Mass. 567; *Davis v. Wetherell*, 13 Allen, 63; *McCabe v. Swap*, 14 Allen, 191; *Newhall v. Savings Bank*, 101 Mass. 431. And payment by a purchaser of the equity of redemption will not operate in equity as an extinguishment of the mortgage, as against the mortgagor, sureties and junior incumbrancers, although the mortgage is formally satisfied and cancelled, unless he has become primarily liable by his assumption of the payment of the mortgage, as the consideration of the conveyance to him. *Savage v. Hall*, 12 Gray, 363; *Pitts v. Aldrich*, 11 Allen, 39; *Abbott v. Kasson*, 72 Pa. St. 183; *Pool v. Hathaway*, 22 Me. 85; *Skeel v. Spraker*, 8 Paige Ch. 182; *Millspauch v. McBride*, 7 Paige Ch. 509; *Shin v. Fredericks*, 56 Ill. 443; *Fitch v. Cotheal*, 2 Sandf. Ch. 29; *Lilly v. Palmer*, 51 Ill. 331; *Carpenter v. Gleason*, 58 Vt. 244; *Georgia Chemical Works v. Cartledge*, 77 Ga. 547; *Gerdine v. Menage*, 141 Minn. 417. But in law, an actual formal assignment is required to keep the mortgage alive. *Den v. Dimon*, 10 N. J. L. 156; *Kinna v. Smith*, 17 N. J. Eq. 14; *Wade v. Howard*, 11 Pick 289. And a part owner who pays the debt may require a formal assignment to him. *Bayles v. Hunted*, 40 Hun, 376. But if the mortgage is paid off by such part owner with funds, in which all the owners are interested, as where the widow pays the debt with the proceeds of the growing crop, she cannot enforce the mortgage against the deceased mortgagor's heirs and distributees. *Skinner v. Chapman*, 78 Ala. 376; *Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. Rep. 1003; *Brethaur v. Schorer*, 77 Conn. 575, 60 Atl. Rep. 125.

² *Stiger v. Bent*, 111 Ill. 328.

³ *Holland v. Citizen's Sav. Bank (R. I.)*, 19 Atl. Rep. 654; *McCulla v. Beadlester (R. I.)*, 20 Atl. Rep. 11. But see *contra*, *Nelson v. Loder*, 55 Hun, 173.

§ 259. **Registry of mortgages and herein of priority.**—It is a general rule in this country that if a mortgage is duly registered in the recorder's office, the record will be constructive notice of the mortgage to all subsequent purchasers and incumbrancers, and gives to it a priority over such subsequently acquired interests.⁴ But the record is only notice of the mortgage as recorded; and if there is an error in the registration, as, for example, showing the mortgage to be security for a less amount, it has priority over subsequent purchasers for the amount recorded, and not for the actual amount expressed in the mortgage. The purchaser is not required by the registry laws to inspect the original deeds, for he is permitted to presume that the record is a correct copy. So, also, if a mortgage appears on the record, through an error in registration, to be invalid from defective execution, the investigator of titles is not required to go behind the registry and inquire into the cause of the invalidity; nor is he affected by such a record with notice of the equities which might arise out of the irregular deed between the parties to the same.⁵ But the index is not a part of the record, and an error appearing therein will not prejudice the rights of the mortgagee. It is not even necessary for the mortgage

⁴ See *post*, Secs. 578, 580, where the recording law is discussed generally.

⁵ *Russell v. Shields*, 11 Ga. 636; *Frost v. Beekman*, 1 Johns. Ch. 288; *s. o.* 18 Johns. 544; *Terrell v. Andrew Co.*, 44 Mo. 309; *Farmers' Bk. v. Bronson*, 14 Mich. 369. A different rule is held in other States, under the peculiar phraseology of their statutes of registration. *Brook's Appeal*, 64 Pa. St. 127; *Wood's Appeal*, 82 Pa. St. 116; *Atkinson v. Hewett*, 63 Wis. 396; *Ward v. Ward*, 131 Fed. Rep. 946. Where the recording law provides for the separate registration of deeds and mortgages, the fact that a deed, absolute in form, may, in fact, be a mortgage, does not authorize the recording of such deed as a mortgage. *Kent v. Williams* (Cal. 1905), 79 Pac. Rep. 527. In some States statutes have been passed, making defectively recorded instruments valid, after a given time. Such statutes of repose are generally enforced. See R. S. Mo. 1899, Sec. 3118 construed in *German Bank v. Real Est. Co.* 150 Mo. 570, 51 S. W. Rep. 691.

to be indexed.⁶ It has also been held that the subsequent purchaser is not charged with constructive notice of the existence of a mortgage, because the land had been previously sold under the order of a court of record in which the execution of a mortgage to secure the unpaid balance of the purchase money was expressly required.⁷ The registration must also comply with the essential requirements of the registry laws, in order to raise a constructive notice of the mortgage.⁸ What constitutes a proper record is the same in most of the States, whether the deed be a mortgage or an absolute conveyance. The subject, therefore, will be more clearly elucidated under the head of titles to real property.⁹

§ 260. Rule of priority from registry, its force and effect.—

But, notwithstanding the registry laws provide for the recording of mortgages like other deeds, the general rule is that an unrecorded mortgage is still good between the parties themselves, and all other persons claiming under them, without a valuable consideration, or with notice of the mortgage.¹⁰

⁶ *Curtis v. Lyman*, 24 Vt. 338; *Dodge v. Potter*, 18 Barb. 193; *Mutual Life Ins. Co. v. Dake*, 1 Abb. N. C. 381; *Throckmorton v. Price*, 28 Texas, 605; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Shell v. Stein*, 76 Pa. St. 398, 18 Am. Rep. 416; *contra*, *Walley v. Small*, 25 Iowa, 184; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

⁷ *Piester v. Piester*, 22 S. C. 139.

⁸ *Wood v. Reeves*, 23 S. C. 382.

⁹ See *post*, Secs. 580, 582. In respect to the priority of a substituted mortgage over incumbrances already recorded, see *ante*, Sec. 256.

¹⁰ And the rule is the same if the mortgage has been defectively executed. *Nice's Appeal*, 54 Pa. St. 200; *Raconillet v. Sansevain*, 32 Cal. 376; *Bibb v. Baker*, 17 B. Mon. 292; *Sparks v. State Bank*, 7 Blackf. 469; *Harris v. Norton*, 16 Barb. 264; *Leggett v. Bullock*, Busb. L. 283; *Wyatt v. Stewart*, 34 Ala. 716; *Ray v. Hallenbeck*, 42 Fed. Rep. 381; *Short v. Fogle*, 42 Kan. 349; *Mann v. State*, 116 Ind. 363; *contra*, *White v. Denman*, 1 Ohio St. 110; *Henderson v. McGee*, 6 Heisk. 55. But see *post*, Secs. 580, 581. Under the New York statute, the absence of registration does not effect the validity of the mortgage, as between the original parties. *Ward v. Ward*, 131 Fed.

If the subsequent purchase is for value and without notice, the recorded deed has the priority over the unrecorded mortgage. And a recorded mortgage has been held to take precedence to a prior unrecorded mortgage, even though the debt of the former was incurred at a time anterior to the execution of the latter. Though the record be destroyed, the priority gained by registration will not be affected thereby, if it can be established by other evidence.¹¹ The parties may also by agreement change the order of priority, and give to a subsequently recorded deed priority over one already recorded, but the agreement will only bind the parties and their privies with notice.¹² But where two mortgages are executed and recorded simultaneously, they are concurrent liens on the property.¹³ And where they are executed simultaneously, and by the understanding of the parties, express or implied, one is not to have priority, an earlier record of one will not give it priority over the other.¹⁴ But if one of the mortgages is for the purchase-money, it will have priority over one for some other debt, although they are simultaneously recorded.¹⁵ If both are for purchase money they will be concurrent liens.¹⁶ A mortgage will have the characteristics of a pur-

Rep. 946. See also, *Singer Mfg. Co. v. Shull*, 74 Mo. App. 486; *Hard v. Harlan*, 143 Mo. 469, 45 S. W. Rep. 274.

¹¹ *Alvis v. Morrison*, 61 Ill. 181, 14 Am. Rep. 354; *Steele v. Boone*, 75 Ill. 457; *Alston v. Alston*, 4 S. C. 116; *Gloss v. Kelly*, 212 Ill. 314, 72 N. E. Rep. 378.

¹² *Gillig v. Mass*, 28 N. Y. 191; *Rhoades v. Canfield*, 8 Paige Ch. 545; *Freeman v. Shroeder*, 43 Barb. 618; *Conover v. Van Mater*, 18 N. J. L. 481; *Sparks v. State Bank*, 7 Blackf. 469; *Iowa College Trustees v. Fenno*, 67 Iowa, 244; *Raleigh Bank v. Moore*, 94 N. C. 734; *Dinsmore v. Matthews*, 58 Mich. 616; *Brower v. Witmeyer*, 121 Ind. 83; *Foxwell v. Slaughter*, 5 Del. Ch. 396.

¹³ *Stafford v. Van Rensselaer*, 9 Cow. 816; *Green v. Tomlinson*, 23 N. J. Eq. 405.

¹⁴ *Daggett v. Rankin*, 31 Cal. 327; *Howard v. Case*, 104 Mass. 249. ¹⁵ *Clark v. Brown*, 3 Allen, 509; *Turk v. Funk*, 68 Mo. 18; 30 Am. Rep. 771; *Brower v. Witmeyer*, 121 Ind. 83; *Boies v. Gardner*, 53 Hun, 236.

¹⁶ *Jones v. Phelps*, 2 Barb. Ch. 440; *Pomeroy v. Layting*, 15 Gray, 435.

chase money mortgage even though it be executed subsequently, provided it is done in performance of a contemporaneous agreement for such a mortgage.¹⁷ So, also, will a purchase money mortgage have priority over a prior judgment lien.¹⁸ Whether a mortgage unrecorded will be postponed to the lien of a judgment docketed subsequently has been decided differently in different States. In some of the States the judgment is invariably given priority,¹⁹ while in others the unrecorded mortgage will take precedence, unless the mortgaged property has been levied upon in execution of the judgment and sold to a purchaser for value.²⁰ If there is any doubt as to the priority of the judgment in such a case, the true rule would seem to require the question to depend upon the priority in execution of the debts, represented respectively by the mortgage and the judgment. If the judgment debt was incurred subsequently to the execution of the mortgage, the judgment when docketed should have priority over the unrecorded mortgage, for the judgment-creditor, in entering into the contract which caused the

¹⁷ *Stewart v. Smith*, 36 Minn. 82; see *ante*, Sec. 94.

¹⁸ *Stewart v. Smith*, 36 Minn. 82; *Jacoby v. Crowe*, 36 Minn. 93.

¹⁹ *Semple v. Bird*, 7 Serg. & R. 290; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Davidson v. Cowan*, 1 Dev. Eq. 470; *Van Thorniley v. Peters*, 26 Ohio St. 471; *Barker v. Bell*, 37 Ala. 354; *Moore v. Watson*, 1 Root, 388; *Hawkins v. Files*, 51 Ark. 417. But if the judgment-creditor has notice of the prior unrecorded mortgage, the mortgage will of course take precedence to the judgment. *Wertz's Appeal*, 65 Pa. St. 306; *Britton's Appeal*, 45 Pa. St. 172; *Williams v. Tatnall*, 29 Ill. 553. See, also, *Edwards v. Mo. Kan., etc., Ry. Co.*, 82 Mo. App. 96; *Griffin v. Idem*, 81 Mo. App. 93.

²⁰ *Finch v. Winchelsea*, 1 P. Wms. 278; *Burn v. Burn*, 3 Ves. 582; *Schmidt v. Hoyt*, 1 Edw. Ch. 652; *Jackson v. Dubois*, 4 Johns. 216; *Knell v. Green St. Building Assn.*, 34 Md. 67; *Hackett v. Callender*, 32 Vt. 97; *Hampton v. Levy*, 1 McCord Ch. 107 (but see *Miles v. King*, 5 S. C. 146); *Righter v. Forester*, 1 Bush, 278; *Morton v. Robards*, 4 Dana, 258; *Orth v. Jennings*, 8 Blackf. 420; *Kelley v. Mills*, 41 Miss. 267; *First Nat. Bank v. Hayzlett*, 40 Iowa, 659; *Iowa Loan & T. Co. v. Mowery*, 67 Iowa, 113; *Laidley v. Aikin* (Iowa), 45 N. W. Rep. 384; *Flayler v. Malloy*, 9 N. Y. S. 573; *Devin v. Eagleson* (Iowa), 44 N. W. Rep. 545.

debt, may have relied upon the apparently unincumbered condition of the debtor's property.

§ 261. **Registry of assignments of mortgages and equities of redemption.**—Since the registration of a deed is constructive notice only to *subsequent* purchasers and incumbrancers, the recording of an assignment of the mortgage, although a protection against other assignees and purchasers from the mortgagee, is no notice to the mortgagor and his assigns, either before or after the execution of the mortgage, which has been the subject of assignment; in other words, to senior mortgagees as well as to purchasers of the equity of redemption.²¹ In order not to be bound by the acts of the mortgagee after the assignment, which have the effect of extinguishing the mortgage—as, for example, acceptance of payment from the mortgagor—actual notice of the assignment must be brought to the mortgagor and subsequent purchasers of his equity of redemption.²² But the absence of the instrument of indebtedness which has been secured by the mortgage from the possession of the mortgagee, is sufficient notice to all parties of the equitable assignment of the mortgage.²³ So, also, must actual notice be given to the mortgagee of the assignment of the mortgagor's estate, in order that the rights of the assignee may be fully protected against the unlawful acts of the mortgagor.²⁴

²¹ Holliger v. Bates, 43 Ohio St. 437.

²² Jones v. Gibbons, 9 Ves. 410; Mitchell v. Burnham, 44 Me. 302; James v. Johnson, 6 Johns. Ch. 417; Walcott v. Sullivan, 1 Edw. Ch. 399; Ely v. Schofield, 35 Barb. 330; Belden v. Meeker, 47 N. Y. 307; Titus v. Haynes, 9 N. Y. S. 742; Castle v. Castle (Mich.), 44 N. W. Rep. 378. In some of the States, notably California, Indiana, Kansas, Michigan, Minnesota, Nebraska, New York, Oregon, Wisconsin and Maryland, the same rule is established by statute. Jones on Mort., Sec. 473; 2 Washburn on Real Prop. 148. See Watson v. Dundee Mortgage, etc., Co., 12 Or. 47, and see *post*, Sec. 579.

²³ Rice v. McFarland, 34 Mo. App. 404; Kellogg v. Smith, 26 N. Y. 18, 23.

²⁴ 4 Kent's Com. 174; Stuyvesant v. Hall, 2 Barb. Ch. 158; Bell v.

§ 262. **Tacking of mortgages.**—In England, if there are three or more mortgages upon the same property, and the first and third, or other subsequent mortgages, are held by the same person with the intervening second mortgage outstanding in another, by obtaining possession under the first mortgage, the mortgagee may hold the mortgaged premises against the second mortgagee, until the third or other subsequent mortgage in his possession has been satisfied. This doctrine is called “the tacking of mortgages,” and is based upon the theory that, since one mortgagee has no notice of the other mortgages, the equities of successive junior mortgagees are equal; and the first mortgagee, having the full legal title in possession, may use his possession for the benefit of whatever liens he may have upon the premises to the exclusion of other subsequent mortgagees, who would otherwise have taken subject only to the first mortgage.²⁵ But in this country the general prevalence of recording laws has taken from the doctrine its practical value, since the record is constructive notice to all subsequent incumbrancers, and such notice destroys the equality of the equities said to exist between junior mortgagees. It may be said that the doctrine does not prevail at all in the United States.²⁶ But the same

Fleming, 12 N. J. Eq. 16; *Groesbeck v. Mattison*, 43 Minn. 547; *Clark v. McNeal*, 114 N. Y. 287; *First Nat. Bank v. Honeyman* (Dak.), 42 N. W. Rep. 771. See *post*, Sec. 579.

²⁵ *Young v. Young*, L. R. 3 Eq. 805; *Marsh v. Lee*, 2 Vent. 337; *s. o.* 1 Ch. Cas. 162; *Brace v. Marlborough*, 2 P. Wms. 491.

²⁶ *Grant v. Bissett*, 1 Caine's Cas. 112; *McKinstry v. Merwin*, 3 Johns. Ch. 466; *Burnett v. Denniston*, 5 Johns. Ch. 35; *Loring v. Cooke*, 3 Pick. 48; *Green v. Tanner*, 8 Metc. 411; *Anderson v. Neff*, 11 Serg. & R. 208; *Thomas' App.*, 30 Pa. St. 378; *Brigden v. Carhart*, 1 Hopk. Ch. 231; *Averill v. Guthrie*, 8 Dana, 82; *Wing v. McDowell*, Walk. (Mich.) 175. But it has been held in a number of the courts that, as between mortgagor and mortgagee, the mortgagee may hold the mortgage and refuse a satisfaction, until all subsequent advances made by the mortgagee shall have been paid. *Orvis v. Newell*, 17 Conn. 97; *Chase v. McDonald*, 7 Har. & J. 160; *Lea v. Stone*, 5 Gill & J. 611; *Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 Allen, 74; *Siter v. McClanachan*, 2 Gratt. 280; *Colquhoun v. Atkinson*, 6 Munf.

principle is now applied to the right of the mortgagee in possession to apply the rents and profits to the liquidation of any one of the mortgages which he may hold, and the intervening mortgagee has no right to object to the application of them to a third or other subsequent mortgage.²⁷

§ 263. *Priority in mortgages for future advances.*—Where the first recorded mortgage is to secure future advances, it becomes a question of importance to what extent will such a mortgage have priority over a subsequently recorded mortgage; and, although there was at one time a considerable diversity of opinion, the general rule now prevailing seems to be the following: If the mortgagee has entered into a binding contract to furnish the advances under all circumstances, and his failure to do so would expose him to an action on the covenant, even if such refusal or failure occurred after the execution of the second mortgage, then his mortgage will take precedence to the second mortgage for the amounts advanced both before and after the execution of the latter.²⁸ But if the continuance of the advances be voluntary, and his refusal to make them after the second mortgage

550; *Walling v. Aiken*, 1 McMull. Eq. 1; *Hughes v. Worley*, 1 Bibb. 200; *Downing v. Palmetteer*, 1 B. Mon. 64; *Coombs v. Jordan*, 3 Bland, 284. The "tacking" of mortgages, being based upon the "legal estate" in the mortgagee in possession, irrespective of the question of notice, imparted by registration laws, the right could not exist in States where the "lien theory" of mortgages obtains. 2 *Tiffany, Real Prop.*, Sec. 543, p. 1243; 4 *Kent's Com.* 178.

²⁷ *Leeds v. Gifford*, 41 N. J. Eq. 464.

²⁸ *Ladue v. Detroit, etc.*, R. R., 13 Mich. 380; *Griffin v. Burnett*, 4 Edw. Ch. 673; *Boswell v. Goodwin*, 31 Conn. 74; *s. c.* 12 Am. Law Reg. 79, note; *Rowan v. Sharpe, etc.*, Mfg. Co., 29 Conn. 329; *Lyle v. Duncomb*, 5 Binn. 585; *Hopkinson v. Rolt*, H. L. Cas. 9514; *Nelson v. Iowa, etc.*, R. R., 8 Am. R. R. Rep. 82. See also, *Hamilton v. Rhodes* (Ark. 1904), 83 S. W. Rep. 351, a mortgage for future advances to a "cropper." But as to requirement of definiteness in description of debts for future advances secured, see, *Powell v. Harrison*, 85 N. Y. S. 452, 88 App. Div. 228; *Belcher Land & Mfg. Co. v. Norris* (Texas 1903), 78 S. W. Rep. 390.

would not constitute a breach of the covenant, the first mortgage will have priority only for such amounts as have been advanced before the first mortgagee received notice of the second mortgage.²⁹ It has also been a much discussed question whether the registration of the second mortgage is such constructive notice to the first mortgagee as to prevent him from claiming priority for advances made after the recording, and before the receipt of actual notice. In Ohio, Pennsylvania and Michigan it is held that the recording of the second mortgage is constructive notice to the first mortgagee (in a mortgage for future advances), and Mr. Redfield, the late chief justice of the Supreme Court of Vermont, has expressed the opinion that such will finally be the prevailing rule in this country.³⁰ But this view is certainly in conflict, not only with the other English and American decisions on this particular question, but also with the general theory of the effect of recording a deed. It has been explained that the registry is notice only to those who *subsequently* acquire interests in the same property, and unless strong grounds are shown for making an exception in this case to the general rule, we must hold, with the majority of the American and English courts, that actual notice must be brought home to the first mortgagee, in order to give to the second mortgage priority over the advances made afterwards under the first.³¹

²⁹ *Boswell v. Goodwin*, 31 Conn. 74; *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Robinson v. Williams*, 22 N. Y. 380; *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320; *Bk. of Montgomery Co.'s Appeal*, 36 Pa. St. 172; *Cox v. Hoxie*, 115 Mass. 120; *contra*, *Wilson v. Russell*, 19 Md. 494; *Witezieski v. Everman*, 51 Miss. 841, which hold that any mortgage for future advances will be good against subsequent purchasers, as to advances made after the second conveyance, whether the mortgagee is bound to make them or not.

³⁰ *Bk. of Montgomery Co.'s Appeal*, 36 Pa. St. 170; *Parmentier v. Gillespie*, 9 Pa. St. 86, 12 Am. Law Reg. 92, Judge Redfield's note to *Boswell v. Goodwin*; *s. c.* 31 Conn. 74; *Ladue v. Detroit, etc.*, R. R., 13 Mich. 380.

³¹ *McDaniels v. Colvin*, 16 Vt. 300; *Craig v. Toppin*, 2 Sandf. Ch. 78; *Ward v. Cooke*, 17 N. J. Eq. 93; *Robinson v. Williams*, 22 N. Y.

§ 264. Satisfaction of the mortgage on the records.—In every State, provision is made for the entry on the records of satisfaction of the mortgage and deed of trust, either by an original acknowledgment on the margin of the records of the mortgage, or by the registration of an independent certificate or acknowledgment of satisfaction, which has been signed by the mortgagee or present holder of the mortgage debt, in compliance with the provisions of the statute. The statutory provisions are almost as various as there are independent statutes relating to the subject, and it would be manifestly impossible in this connection to give an account of these divergent provisions.³² Whatever provisions there may be in a particular State they must be complied with, in order that the discharge of the mortgage may prove effective. Suffice it to say that when the satisfaction has been properly entered on the records by one who has the right to receive payment, it operates to discharge the mortgage completely as to subsequent purchasers, who take the title of the land without notice of any defect in the apparently valid discharge of the mortgage. But if it has been improperly entered upon the record, or the entry has been made by one who is not the holder of the note or bond which is secured by the mortgage or the agent of such holder, and who therefore cannot discharge the mortgage, the entry is a nullity, and does not affect the title to the mortgage, even as to subsequent purchasers.³³ The signature of the acknowledgment of satisfaction must of course be genuine. If it be forged, it will have

380; *Rowan v. Sharpe's Rifle Co.*, 29 Conn. 329; *Nelson v. Boyce*, 7 J. J. Marsh. 401; *Jones on Mort.*, Sec. 372.

³² In many States a penalty is provided, by statute, for a failure to enter satisfaction, on the records, by a mortgagee. Ala. Code, 1896, Sec. 1066; *Partridge v. Wilson*, 37 So. Rep. 441; Rev. St. Mo. 1899, Sec. 4367; Civ. Code Mont., Sec. 3845; *Henderson v. Wilson*, 36 So. Rep. 516.

³³ *Cornog v. Fuller*, 30 Iowa, 212; *Ayers v. Hayes*, 60 Ind. 452; *Viele v. Judson*, 15 Hun, 328; *Begein v. Brehm* (Ind.), 23 N. E. Rep. 496; *Lee v. Clark*, 89 Mo. 553; *O'Neill v. Douthitt*, 40 Kan. 689. But *contra*, *Lewis v. Kirk*, 28 Kan. 497; *Fisher v. Cowles*, 41 Kan. 418.

no effect upon the mortgage, not even against subsequent purchasers without notice.³⁴ But, except as against subsequent purchasers without notice and for value, an entry of satisfaction, through accident, mistake, or fraud, and to the detriment of one who has a right to enforce the mortgage against the mortgagor, may be vacated and the mortgage be revived.³⁵ The mortgagor or owner of the land can always compel the holder of the mortgage to make this formal satisfaction, and in many of the States recover of him a penalty for failing to do so.³⁶ And in many of the States the courts will order a discharge from the records of a mortgage which has been barred by the statute of limitations.³⁷ If a satisfaction has been made subject to the performance of a condition by the mortgagor, upon the breach of the condition, the satisfaction will be set aside on application to a court.³⁸

³⁴ *Chandler v. White*, 84 Ill. 435; *Meley v. Collins*, 41 Cal. 663. See *Costello v. Meade*, 55 How. Pr. 356.

³⁵ *Hale v. Morgan*, 68 Ill. 244; *Steiger v. Bent*, 111 Ill. 328; *Ferguson v. Glassford*, 68 Mich. 36; *Wilton v. Mayberry*, 75 Wisc. 191; *Beal v. Congdon*, 75 Mich. 77. In California, where a mortgage was satisfied through a mistake, it was held not necessary to secure a cancellation, before foreclosure. *White v. Stevenson*, 144 Cal. 104, 77 Pac. Rep. 828.

³⁶ *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Radcliffe v. Rowley*, 2 Barb. Ch. 23; *Tuthill v. Morris*, 81 N. Y. 94; *Sweet v. Ward*, 43 Kan. 695; *Campbell v. Seeley*, 38 Mo. App. 298; *Dodson v. Clark*, 38 Mo. App. 150; *Steiner v. Ellis* (Ala.), 7 So. Rep. 803; *Ashbey v. Ashbey*, 41 La. An. 138; *Murdock v. Cox*, 118 Ind. 266; *Woolsey v. Bohn*, 41 Mich. 235; *Hall v. Hurd*, 40 Kan. 740; *Partridge v. Wilson* (Ala. 1904), 37 So. Rep. 441.

³⁷ *Kingman v. Sinclair* (Mich.), 45 N. W. Rep. 187.

³⁸ *Smith v. Smith*, 8 N. Y. S. 637. But equity will not interfere to compel a cancellation or satisfaction of a mortgage, unless the evidence of payment and discharge is clear. *Dinner v. Van Dyke*, 25 Pa. Super. St. 433. The remedy of heirs of a deceased mortgagee, in Pennsylvania, to set aside a satisfaction procured by fraud during the lifetime of the mortgagee, is by bill in the Orphans Court. *Gilkeson v. Thompson*, 210 Pa. 355, 59 Atl. Rep. 1114.

SECTION III.

REMEDIES AND REMEDIAL RIGHTS INCIDENT TO MORTGAGES.

SECTION 265. Actions for waste.

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§ 265. Actions for waste.— If the party in possession — whether mortgagor or mortgagee, or their respective assignees — does anything in respect to the mortgaged property which constitutes waste, and as such essentially impairs the value of the inheritance, he will be responsible in damage to the

other parties who are interested in the property. But a mortgagor is not guilty of waste, on account of acts of omission. In the absence of an express covenant to repair, he is not guilty of waste, as against the mortgagee, if he fails to keep the premises in repair.³⁹ The action is not the technical legal action, but is one in the nature of waste, and in the code pleading would be simply an action for damages.⁴⁰ But the most effective remedy for the prevention of waste by the parties to a mortgage is a bill in equity for an injunction, or the appointment of a receiver to take charge of the mortgaged property. Any one who has an interest, either in the mortgaged premises or in the mortgage debt, may avail himself of these remedies.⁴¹

³⁹ *Union Mut., etc., Ins. Co. v. Union Mills, etc.*, 37 Fed. Rep. 286.

⁴⁰ *Stowell v. Pike*, 2 Greenl. 387; *Hagar v. Brainard*, 44 Vt. 302; *Sanders v. Reed*, 12 N. H. 558; *Burnside v. Twitchell*, 43 N. H. 390; *Mayo v. Fletcher*, 14 Pick. 525; *Wilmarth v. Baneroft*, 10 Allen 348; *Page v. Robinson*, 10 Cush. 99; *Mitchell v. Bogan*, 11 Rich. Eq. 886; *Lane v. Hitchcock*, 14 Johns. 205; *Haskin v. Woodward*, 45 Pa. St. 44; *Van Pett v. McGraw*, 4 Comst. 110; *Gardner v. Heatt*, 3 Denio 232; *Barnett v. Nelson*, 54 Iowa 41, 37 Am. Rep. 183; *Moriarty v. Ashworth*, 43 Minn. 1. And after condition broken, in the common-law States, the mortgagee may have trover or replevin for the timber cut by the mortgagor, against the purchaser of the mortgagor, as well as against the mortgagor himself. *Langdon v. Paul*, 22 Vt. 205; *Frothingham v. McKusick*, 24 Me. 403; *Kennerly v. Burgess*, 38 Mo. 440; *Kimball v. Lewiston, etc., Co.*, 55 Me. 494; *contra*, *Peterson v. Clark*, 14 Johns. 205; *Wilson v. Malthy*, 59 N. Y. 126.

⁴¹ *Brady v. Waldron*, 2 Johns. 148; *Johnson v. White*, 11 Barb. 194; *Cooper v. Davis*, 15 Conn. 556; *Salmon v. Claggett*, 3 Bland Ch. 126; *Capner v. Farmington Co.*, 2 Green Ch. 467; *Brick v. Getsinger*, 1 Halst. Ch. 391; *Ensign v. Colburn*, 11 Paige, 503; *Scott v. Wharton*, 2 Hen. & M. 25; *Gray v. Baldwin*, 8 Blackf. 164; *McCaslin v. The State*, 44 Ind. 151; *Morrison v. Buckner*, Hempst. 442; *Fairbank v. Cudworth*, 33 Wis. 358; *Robinson v. Russell*, 24 Cal. 467; *Hampton v. Hodges*, 8 Ves. 105; *Robinson v. Litton*, 3 Atk. 210; *Goodman v. Kline*, 8 Beav. 379. But the mortgagee is under no obligation to enjoin, or bring action for waste, and a subsequent incumbrancer or purchaser cannot hold him liable for failing thus to protect the inheritance, and reduce the debt. *Knarr v. Conaway*, 42 Ind. 260. For discussion of the relative rights of mortgagee and mortgagor of mining property, to mine the mortgaged

§ 266. **Process to redeem.**—In those States where the payment or tender of payment after condition broken extinguishes the mortgage, and enables the mortgagor to recover the possession by an action of ejectment, no further process is needed to restore him to the complete title in the land. But where payment or tender of payment, *i. e.*, after breach of the condition, does not have that effect—as is the case under the common law theory—the mortgagor is obliged to resort to a bill in equity to enforce a redemption and cancellation of the mortgage. This equitable remedy may be instituted by the mortgagor or any one claiming under him. The bill must be accompanied with a tender of payment into the court or with the statement of a willingness to pay if a balance is found to be due after an accounting,⁴² and the decree orders the mortgagee to cancel and deliver up the mortgage and the instrument of indebtedness.⁴³ The action for redemption must be instituted within the period of limitation prescribed for such actions.⁴⁴ Where there are several parties before

premises and when mining constitutes waste, see *White, Mines & Min. Rem.*, Secs. 273–282, and cases cited. For list of late cases on injunction against mortgagee to prevent waste, see, 2 *Am. & Eng. Dec. in Eq.*, p. 673.

⁴² *Pryor v. Hollinger*, 88 Ala. 405; *Franklin v. Ayer*, 22 Fla. 654; *Genhardt v. Tucker*, 187 Mo. 46, 85 S. W. Rep. 552. But see, *Marvin v. Prentice*, 49 How. Proc. 385.

⁴³ *Beekman v. Frost*, 18 Johns. 544; *Silsbee v. Smith*, 41 How. Pr. 418; *Barton v. May*, 3 Sandf. Ch. 450; *Perry v. Carr*, 41 N. H. 371; *Daughdrill v. Sweeney*, 41 Ala. 310; *Pitman v. Thornton*, 66 Me. 469; *Gerrish v. Black*, 122 Mass. 76; *Halt v. Rees*, 46 Ill. 181; *Brobst v. Brock*, 10 Wall. 536; *Manning v. Elliott*, 92 N. C. 48; *Washburn v. Hammond* (Mass.), 24 N. E. Rep. 33; *Hazard v. Robinson*, 15 R. I. 226; *Payor v. Hallinger*, 88 Ala. 405. In Pennsylvania redemption may be asked for in an action of ejectment. *Mellon v. Lemmon*, 111 Pa. St. 56; *Franklin v. Ayer*, 22 Fla. 654. But see *contra*, *Cassery v. Witherbee*, 119 N. Y. 522.

⁴⁴ See *ante*, Sec. 247. See also, *Schlawig v. Fleckenstein* (Iowa), 45 N. W. Rep. 770. A tenant for years, whose lease is subsequent to the mortgage (*Kebabian v. Shinkle*, 26 R. I. 505, 59 Atl. Rep. 743); a dowress (*McKenna v. Trust Co.*, 90 N. Y. S. 493, 98 App. Div. 480) attaching creditors (*Whitney v. Metallic Mfg. Co.*, 187 Mass. 537, 73

the court claiming the right to redeem, the court will grant the right of redemption to them in the order of their priority, the one who is last in point of priority being required to redeem all the preceding mortgages, in order that he may acquire the first lien or absolute title.⁴⁵ All persons who are interested in the mortgage, either as privies of the mortgagor or mortgagee, are proper parties to an action for redemption. The mortgagee and his assigns are necessary parties. And where there are several parcels of land covered by the mortgage, and the owner of the equity of one wishes to redeem, the owners of the other parcels must be made parties. But this rule does not apply where there are separate mortgages over each for the same debt.⁴⁶

N. E. Rep. 663); subsequent lienholders (*Dickinson v. Duckworth* (Ark. 1905), 85 S. W. Rep. 82), and anyone having a substantial interest in the property (*Mercer v. McPherson* Kan. 1905, 79 Pac. Rep. 118) can generally redeem. But a willingness and ability to pay the debt, must be alleged and proved. *Gerhardt v. Tucker*, 187 Mo. 46, 85 S. W. Rep. 552. But see, *Marvin v. Prentice*, 59 How. Prac. 385.

⁴⁵ *Moore v. Beasum*, 44 N. H. 215; *Brewer v. Hyndman*, 18 N. H. 9; *Arcedechare v. Bowes*, 3 Meriv. 216; *Buchanan v. Reid*, 43 Minn. 172; *Parke v. Hush*, 29 Minn. 434. See *ante*, Sec. 255, for a discussion of the persons who may redeem.

⁴⁶ 1 Dan. Ch. Pr. 306, 307; *Winslow v. Clark*, 47 N. Y. 261; *Dias v. Merle*, 4 Paige 259; *Hilton v. Lathrop*, 46 Me. 297; *Brown v. Johnson*, 53 Me. 246; *Wigg v. Davis*, 8 Greenl. 31; *Elliott v. Patton*, 4 Yerg. 10; *Wolcott v. Sullivan*, 6 Paige Ch. 117; *Shaw v. Hoadley*, 8 Blackf. 165; *Beals v. Cobb*, 51 Me. 348; *Doody v. Pierce*, 9 Allen 141; *Boyd v. Allen*, 15 Lea 81; *Perkins v. Brierfield & Co.*, 77 Ala. 403. Upon the death of the mortgagor, either his heir or the personal representatives may bring the suit, because both are interested in the liquidation of the mortgage. *Enos v. Southerland*, 11 Mich. 538; *Guthrie v. Sorrell*, 6 Ired. Eq. 13; Gen. Stat. Mass. (1860), Secs. 32, 33. And at common law, upon the death of the mortgagee, both the heirs and personal representatives had to be made parties. *Anon.* 2 Freem. 52; *Osbourne v. Fallows*, 1 Russ. & M. 741; *Story's Eq. Pl.*, Sec. 188; *Haskins v. Homes*, 108 Mass. 379. But under the lien theory of mortgages, the personal representatives of the mortgagee are the only necessary parties. *Copeland v. Yoakum*, 38 Mo. 349. And where a junior mortgagee redeems, he must make the mortgagor, as well as the prior mortgagee, parties

§ 267. **Accounting by the mortgagee.**—In the action for redemption, in order to determine the amount then due on the mortgage it is sometimes necessary to have an accounting. An accounting may be ordered whenever the mortgage debt involves a long and tedious account of charges and counter-charges, but it is particularly necessary when the mortgagee has been in possession of the premises, has received the rents and profits of the land, and expended sums of money in keeping the premises in repair. The mortgagor, or other person, praying for redemption, asks for an accounting by the mortgagee. An accounting is an equitable remedy which may be instituted independently of, or in conjunction with, another and the principal suit. The mortgagor and his assigns may ask for an accounting without filing a bill to redeem, or they may request it in connection with the action for redemption. The case is referred to a master in chancery, if there be one, or to a special referee, who ascertains and determines the propr debits and credits of the account between the parties, and reports to the court the balance found due.⁴⁷ The approval by a court of competent jurisdiction of the mortgagee's account fixes his liability thereon definitely, and the account cannot thereafter be attacked collaterally.⁴⁸

§ 268. **Continued — What are lawful debits?**—In the first place the mortgagee will be charged with whatever rents he

defendant. *Farmer v. Curtis*, 2 Sim. 466; *Caddick v. Cook*, 32 Beav. 70; *Rhodes v. Buckland*, 16 Beav. 212; *Palk v. Clinton*, 12 Ves. 48.

⁴⁷ *Hunt v. Maynard*, 6 Pick. 439; *Gibson v. Crehore*, 5 Pick. 146; *Bailey v. Myrick*, 52 Me. 136; *Doody v. Pierce*, 9 Allen 141; *Harper's Appeal*, 64 Pa. St. 315; 5 *Wait's Prac.* 288; *Adams v. Brown*, 7 Cush. 220; *Hubbell v. Moulson*, 53 N. Y. 225; *Farris v. Houston*, 78 Ala. 250; *Pryor v. Hollinger*, 88 Ala. 405; *Shuler v. Bonander* (Mich.), 45 N. W. Rep. 487. The mortgagee's assigns, as well as the mortgagee, are liable to be called to account, and the mortgagor's assigns have a right to demand an account. *Brayton v. Jones*, 5 Wis. 117; *Harrison v. Wise*, 24 Conn. 1; *Strang v. Allen*, 44 Ill. 428; *Ruckman v. Astor*, 9 Paige Ch. 517; *Gelston v. Thompson*, 29 Md. 595.

⁴⁸ *In re Helfenstein's Estate* (Pa.), 20 Atl. Rep. 151.

may have received, or which he could have received but for his negligence in the management of the estate. This matter has been already discussed in a previous section, and a complete statement of the mortgagee's liability in this connection need not here be repeated.⁴⁹ The mortgagee is also chargeable with all damage done to the inheritance by himself, or by others with his authority or permission, whether the acts constitute affirmative or negative waste. Thus he is liable for damages resulting from the opening and working of a mine, as well as from letting the premises fall into decay.⁵⁰

§ 269. Continued — What are lawful credits? — Since the mortgagee in possession is under an obligation to keep the premises in repair, he is entitled to credit himself with all sums expended for that purpose. But he will not be allowed the expenses incurred in making costly improvements—such as the erection of new buildings, or for any repairs which are not of permanent benefit to the inheritance. The true rule seems to be, that he will be allowed only such expenses as he incurred in making repairs, which were necessary to keep the premises in the same condition as he received them, and for such improvements beyond that limit which were necessary to the ordinary and reasonable enjoyment of the premises. For any other expenses of repair he can be credited only when he has incurred them by and with the consent of the mortgagor.⁵¹ But it has been held in some of

⁴⁹ See *ante*, Sec. 246. For accounting from mortgagee in possession, for net proceeds of mineral taken from the mortgaged premises, see, White, Mines & Min. Rem., Sec. 275, and cases cited.

⁵⁰ See *ante*, Sec. 265; White, Mines & Min. Rem., Sec. 273 *et sub*.

⁵¹ Russell v. Blake, 2 Pick. 505; Reed v. Reed, 10 Pick. 398; Crafts v. Crafts, 13 Gray 303; Moore v. Cable, 1 Johns. Ch. 385; Gordon v. Lewis, 2 Sumn. 143; Norton v. Cooper, 39 Eng. Law & Eq. 130; Sparhawk v. Wills, 5 Gray, 423; Daugherty v. McColgan, 6 Gill & J. 275; Harper's Appeal, 64 Pa. St. 315; Lowndes v. Chisolm, 2 McCord Ch. 455; Hopkinson v. Stephenson, 1 J. J. Marsh. 341; McCumber v. Gilman, 15 Ill. 381; Tharpe v. Feltz, 6 B. Mon. 15; Hidden v. Jordan, 28

the States that where lasting and permanent improvements of a truly beneficial character were made by the mortgagee in possession, or by a purchaser, under the mistaken belief that he had, by foreclosure, acquired the absolute title, he will be allowed the value of them.⁵² This, probably, is but a deduction from the general betterment laws, which have been enacted in several of the States.⁵³ Although the mortgagee is not obliged to purchase a superior or paramount title held by a third person, or to pay the taxes due upon the estate, or to effect an insurance where the mortgage requires the mortgagor to insure, yet if he does any of these acts and incurs expenses for the protection of their joint interests against such forfeiture or loss, he will be permitted to charge them against the mortgagor.⁵⁴ But in all of these cases the claim for reimbursement is against the mortgaged property, and not a personal one which may be enforced against the mortgagor in a personal action.⁵⁵ The mortgagee, however, can-

Cal. 301; *Neale v. Hagthorp*, 3 Bland Ch. 590; *Ballinger v. Choultan*, 20 Mo. 80; *Ford v. Philpot*, 5 Har. & J. 312; *Miller v. Curry* (Ind.), 24 N. E. Rep. 219, 374. A mortgagee in possession cannot charge for repairs, not necessary to save the estate from loss or injury. *Barnard v. Peterson* (Mich. 1904), 100 N. W. Rep. 893; *Wilmarth v. Johnson* (Wis. 1905), 102 N. W. Rep. 562.

⁵² *Miner v. Beekman*, 50 N. Y. 337; *Putnam v. Ritchie*, 6 Paige Ch. 390; *Vanderhaise v. Hughes*, 2 Beas. 410; *Harper's Appeal*, 64 Pa. St. 315; *Neale v. Hagthorp*, 3 Bland 590; *Gillis v. Martin*, 2 Dev. Eq. 470; *Troost v. Davis*, 31 Ind. 34; *Roberts v. Fleming*, 53 Ill. 198; *McLorley v. Larissa*, 100 Mass. 270; *Bacon v. Cottrell*, 13 Minn. 194.

⁵³ See *post*, Sec. 500.

⁵⁴ *Clark v. Smith*, 1 N. J. Eq. 421; *Muller v. Whittier*, 36 Me. 577; *Hubbard v. Shaw*, 12 Allen 122; *Williams v. Hilton*, 35 Me. 547; *Slee v. Manhattan Co.*, 1 Paige Ch. 81; *Folny v. Palmer*, 5 Gray, 649; *Davis v. Bean*, 114 Mass. 360; *Harper v. Ely*, 70 Ill. 581; *Rowan v. Sharpe Rifle Co.*, 29 Conn. 282; *Burr v. Veeder*, 3 Wend. 412; *Miller v. Curry* (Ind.), 24 N. E. Rep. 219, 374; *Young v. Omohundro*, 69 Md. 424; *West v. Hayes*, 117 Ind. 290; *McCreery v. Shaffer* (Neb.), 41 N. W. Rep. 996. A mortgagee is not liable for taxes. *Hood v. Clark* (Ala. 1904), 37 So. Rep. 550; *McLaughlin v. Acom*, 58 Kan. 514, 50 Pac. Rep. 441.

⁵⁵ *Kersenbrock v. Muff* (Neb.), 45 N. W. Rep. 778; *Zabriskie v. Bandistel* (N. J.), 20 Atl. Rep. 263.

not charge for his personal services in the management of the estate; but if it is necessary to employ others—as, for example, a person to collect the rents—he will be allowed such expenses. And, in some of the States, notably Massachusetts, he is allowed a commission where he collects them himself. But the general rule is that he will not be permitted to make any charge for his own services, whatever may be their nature.⁵⁶

§ 270. **Making rests.**—In applying the rents and profits received from the estate the mortgagee may first deduct therefrom the expenses incurred in the management of the mortgaged premises, and then he must apply the remainder to the liquidation of the interest and principal of the debt in that order. If, in making the account, it is ascertained that in any one period—determined by the time when the interest falls due—the rents and profits received are more than sufficient to cover the expenses and the accrued interest, the balance is applied to the principal; and the interest subsequently accruing is computed on the reduced principal. This is called *making a rest*. And rests will be made under such circumstances as often as the interest falls due.⁵⁷

⁵⁶ And any agreement that he shall be permitted to charge for such services will not be binding upon the mortgagor. *French v. Barron*, 2 Atk. 120; *Gilbert v. Dyneley*, 3 Man. & G. 12; *Eaton v. Simonds*, 14 Pick. 98; *Moore v. Cable*, 1 Johns. Ch. 385; *Elmer v. Loper*, 25 N. J. Eq. 475; *Breckenridge v. Brooks*, 2 A. K. Marsh 335; *Benham v. Rowe*, 2 Cal. 387; *Harper v. Ely*, 70 Ill. 381; *Snow v. Warwick Institution of Savings (R. I.)*, 20 Atl. Rep. 94. In Massachusetts, Connecticut, Pennsylvania and Virginia, the mortgagee may charge a reasonable percentage, usually 5 per cent., for the collection of the rents. *Gerish v. Black*, 104 Mass. 400; *Waterman v. Curtis*, 26 Conn. 241; *Wilson v. Wilson*, 3 Binn. 557; *Granberry v. Granberry*, 1 Wash. (Va.), 246; *Brown v. South Boston Sav. Bk.*, 148 Mass. 300.

⁵⁷ *Reed v. Reed*, 10 Pick. 308; *Shaffer v. Chambers*, 6 N. J. Eq. 548; *Van Vronker v. Eastman*, 7 Metc. 538; *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Stone v. Seymour*, 15 Wend. 16; *Jencks v. Alexander*, 11 Paige Ch. 619; *Gordon v. Lewis*, 2 Sumn. 147; *Patch v. Wilde*, 30 Beav. 100; *Gladding v. Warner*, 36 Vt. 54; *Knight v. Houghtaling*, 91 N. C. 246.

§ 271. **Balance due.**—If, when the account is stated, it is found that there is a balance still due on the mortgage to the mortgagee, a decree for redemption will be granted upon the payment of that sum. And the report of the referee or master, when confirmed by the court, is conclusive as to the amount still owing. On the other hand, if the report shows that the rents and profits received by the mortgagee exceed the expenses and the amount of the mortgage combined, redemption will be decreed, together with an order, directing the mortgagee to pay over to the mortgagor whatever balance is found due to him.⁵⁸

§ 272. **Foreclosure — Nature and kinds of.**—In order to bar the mortgagor's equity of redemption, and acquire the absolute title to the property, or to satisfy his debt by a sale of the premises, the mortgagee must bring an action for foreclosure. And the action lies on a deed which is absolute on its face, as soon as it is shown that it was intended to operate as a mortgage, as well as on one which has been executed in proper form.⁵⁹ The decree in such a case bars completely the right to redeem. There are two principal kinds of foreclosure, although the details in both are different in different States, and are governed more or less by local statutes. The more ancient kind is what is called *strict foreclosure*. This is an action in which a decree is rendered barring the mortgagor's equity, and vesting the absolute estate in the mortgagee, if the debt is not paid within a certain time after the rendition of the decree. This kind of foreclosure is generally resorted to in the New England States, although in some of

⁵⁸ *Pitman v. Thornton*, 66 Me. 469; *Holt v. Rees*, 40 Ill. 181; *Gerrish v. Black*, 122 Mass. 76; *Seaver v. Durant*, 39 Vt. 103; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Freytag v. Hoeland*, 23 N. J. Eq. 36; *Wood v. Felton*, 9 Pick. 171.

⁵⁹ *Lyon v. Powell*, 78 Ala. 351. When it is shown that a deed, absolute in form, is a mortgage, the grantee, until foreclosure of the equity of redemption, cannot maintain ejectment. *Faulkner v. Cody*, 91 N. Y. S. 633.

them—particularly Massachusetts—the form of the proceeding has been somewhat changed from the old common-law foreclosure. But the decree is essentially the same.⁶⁰ By strict foreclosure, if the mortgagee is out of possession, he may recover the possession in an action of ejectment.⁶¹ The other so-called *equitable foreclosure* is effected by a decree ordering the property to be sold, and the proceeds of sale applied to the payment of the expense of the foreclosure suit and sale of the property,⁶² and the liquidation of the mortgage-debt. If any surplus remains, it is paid over to the mortgagor and his assigns,⁶³ and the junior incumbrancers will be entitled to share in the surplus in the order of their equities.⁶⁴ This mode of foreclosure is juster and fairer to

⁶⁰ In Massachusetts, Maine and New Hampshire, the action for strict foreclosure is called a writ of entry, in form, an action at law, but in effect, an equitable proceeding. Gen. Stat. Mass., Ch. 140, Secs. 1-11; Me. Rev. Stat., Ch. 90; Gen. Stat. N. H., Chs. 112, 213; *Bartlett v. Sanborn*, 64 N. H. 70; *Snow v. Piessey*, 82 Me. 552. But in addition to this action, a strict foreclosure may be effected in the New England States, by entry into possession after condition broken, with a formal notice to the mortgagor, attested by witnesses, that the entry is for the purpose of foreclosure. Generally this notice is also required to be published in the newspapers, and a certificate of the entry recorded in the general recording office. And after the lapse of a certain time, fixed by the statute, usually three years, the equity of redemption is foreclosed without any resort to the courts. 2 Jones on Mort., Secs. 1237-1275.

⁶¹ *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Schenck v. Conover*, 13 N. J. L. 220; *Sutton v. Stone*, 2 Atk. 101. But the decree in strict foreclosure may include an order to the mortgagor to vacate the premises, and then it will not be necessary for the mortgagee to resort to his legal remedies. *Kendall v. Treadwell*, 5 Abb. Pr. 76; *Buswell v. Peterson*, 41 Wis. 82.

⁶² *Castle v. Castle* (Mich.), 44 N. W. Rep. 378; *Snow v. Warwick Institution for Savings* (R. I.), 20 Atl. Rep. 94; *Barry v. Guild*, 25 Ill. App. 39; *Moran v. Gardemeyer*, 82 Cal. 96; *Tefford v. Garnell* (Ill.), 24 N. E. Rep. 573; *Casler v. Byers*, 28 Ill. App. 128; *s. c.* 129 Ill. 657; *Balfour v. Davis*, 14 Ore. 47; *Schallard v. Eel River, etc., Co.*, 70 Cal. 144.

⁶³ *Mitchell v. Weaver*, 118 Ind. 55.

⁶⁴ *Armstrong v. Warrington*, 111 Ill. 430. A decree of foreclosure

all parties, and, very probably, everywhere in this country, except the New England States, foreclosure is always made by a sale of the premises, even though the right to a strict foreclosure may still exist.⁶⁵ Courts of equity will exercise their ordinary power of discretion, and will order a sale of the premises whenever a strict foreclosure would be manifestly to the detriment of the mortgagor.⁶⁶ A bill for foreclosure may be filed at any time after the breach of the condition, provided the action has not been barred by the Statute of Limitations, the same time being given for actions of foreclosure, as for actions of ejectment.⁶⁷ The condition

should provide for the disposition of the surplus, after payment of the mortgage debt. *Griffin v. Smith*, 82 S. W. Rep. 684. But it is not error to fail to do so. *Brier v. Brinkman*, 44 Kan. 570, 24 Pac. Rep. 1108.

⁶⁵ Strict foreclosures are regarded with disfavor by the courts, in all cases where a decree of foreclosure and sale can be equitably rendered. *South Omaha Bank v. Levy*, 95 N. W. Rep. 603; *State ex rel Wyandotte Lodge v. Evans*, 176 Mo. 310, 75 S. W. Rep. 914.

⁶⁶ In most of the States there are statutes authorizing foreclosure by sale of the premises, but they are only confirmatory of the power which a court of equity always possessed. *Lansing v. Goelet*, 9 Cow. 352; *Mills v. Dennis*, 3 Johns. Ch. 367; *William's Case*, 3 Bland Ch. 193; *Hinds v. Allen*, 34 Conn. 193; *McCurdy's Appeal*, 65 Pa. St. 290; *Shaw v. Norfolk Co. R. R.*, 5 Gray 162; *Green v. Crockett*, 2 Dev. & B. Eq. 393; *Fox v. Wharton*, 5 Del. Ch. 200. Strict foreclosure is recognized now in Alabama, Florida, Illinois, Maryland, Minnesota and New York, but it is only used in special cases, and is generally looked upon as a severe remedy. *Hitchcock v. U. S. Bank of Pa.*, 7 Ala. 386; *R. S. Ill.* (1877), pp. 120, 540; *Dorsey v. Dorsey*, 30 Md. 522; *Wilder v. Haughey*, 21 Minn. 101; *Bolles v. Duff*, 43 N. Y. 474; *Greisbaum v. Baum*, 18 Ill. App. 614; *Ellis v. Leek*, 127 Ill. 60. In the other States it does not seem to be at all applicable. *O'Fallon v. Clopton*, 89 Mo. 284. In all the States the foreclosure of mortgages is regulated by statute and they differ widely as to details. See 2 Jones on Mort., Secs. 1317-1368, where the distinguishing features of the statutory remedies are fully and accurately presented.

⁶⁷ *Smith v. Woolfolk*, 115 U. S. 143; *McLaughlin v. Cecconi*, 141 Mass. 252; *Palmer v. Snell*, 111 Ill. 161. But see *contra*, *Clough v. Rowe*, 63 N. H. 562. Twenty years' delay will not prevent foreclosure unless, by statute, limitation would apply to the mortgage. *Bailey v.*

is broken when the debt falls due. In other words, suit for foreclosure can be brought as soon as an action at law will lie on the debt.⁶⁸ The mortgage may be made to fall due upon the default in the payment of an installment of interest or principal, and the mortgage may then be foreclosed for the entire debt, although the time for payment has not yet arrived, unless it is expressly provided that the default in payment of interest or installment of principal will not give the right to foreclose.⁶⁹ But where it is not provided that the entire debt shall fall due upon the default in interest or in installments of principal, there may yet be given the right of foreclosure for the purpose of enforcing payment of the interest or installment of principal which is due, by the sale of so much property as is necessary, and a subsequent sale of the remaining property when the rest of the debt falls due.⁷⁰ The mortgage may also provide that the default in

Butler (Ala. 1903), 35 So. Rep. 111. But see, in Missouri, R. S. 1899, Sec. 4276.

⁶⁸ Gladwyn v. Hitchman, 2 Vern. 134; Harding v. Mill River Co., 34 Conn. 458; Giles v. Baremore, 5 Johns. Ch. 545; Hughes v. Edwards, 9 Wheat. 489; Blethen v. Dwindal, 35 Me. 556; Tripe v. Marcy, 39 N. H. 439; Gillett v. Balcom, 6 Barb. 370; Williams v. Townsend, 31 N. Y. 411; Fetrow v. Merriwether, 53 Ill. 275; Pope v. Durant, 26 Iowa 233; Brown v. Miller, 63 Mich. 413; Ohio Cent. R. R. Co. v. Central Trust Co., 133 U. S. 83; Leonard v. Binford, 122 Ind. 200, 23 N. E. Rep. 704; Orr v. Rode (Mo.), 13 S. W. Rep. 1066; Curtis v. Cutler, 37 L. R. A. 737; Central Trust Co. v. N. Y. & N. R. Co., 33 Hun 513; L. I. L. & T. Co. v. L. I. & N. R. Co., 82 N. Y. S. 644, 85 App. Div. 36.

⁶⁹ Stanhope v. Manners, 2 Eden 197; Richards v. Holmes, 18 How. 143; Seaton v. Twyford, L. R. 11 Eq. 591; Burrowes v. Malloy, 2 Jones & Lat. 521; Sire v. Wightman, 25 N. J. Eq. 102; Terry v. Eureka College, 70 Ill. 236; Harshaw v. McKesson, 66 N. C. 266; Magruder v. Eggleston, 41 Miss. 284; Schooley v. Romain, 31 Md. 574; Hosie v. Gray, 71 Pa. St. 198; Adams v. Essex, 1 Bibb. 149; Goodman v. Cin. & C. C. R. R., 2 Disney 176. See Poweshiek Co. v. Dennison, 36 Iowa 352, 19 Am. Rep. 521; Hoodless v. Reid, 112 Ill. 105; Scheibe v. Kennedy, 64 Wis. 564.

⁷⁰ Bank of Ogdensburg v. Arnold, 5 Paige 38; Cauffman v. Sayre, 2 B. Mon. 202; Magruder v. Eggleston, 41 Miss. 284; Poweshiek Co. v. Dennison, 36 Iowa 254; Johnson v. Buckhaults, 77 Ala. 276; Cleveland

payment of the interest or installment of principal, may cause the entire debt to fall due, "at the election of the mortgagee."⁷¹ In such a case the mortgagee is not obliged to make his election immediately after the default.⁷² And like the action on the debt, it is not dependent upon any previous demand of payment or notice of intention to bring the action.⁷³ The time for foreclosure may be postponed by an agreement for forbearance, if the agreement is supported by a valuable consideration. The foreclosure can under these circumstances only be brought at the close of the time for forbearance.⁷⁴

§ 273. Continued — Who should be made parties? — Generally all persons should be made parties to a suit for foreclosure who are interested in the mortgage or mortgaged property. The holder of the equity of redemption, subsequent purchasers, and junior mortgagees, must always be made parties, including any one in possession, whatever may be his title.⁷⁵ But a vendee, under an executory contract of

v. Booth, 43 Minn. 16; *Fox v. Whaston*, 5 Del. Ch. 200; *Bacon v. N. W., etc., Inc. Co.*, 131 U. S. 258; *Anderson v. Pilgram*, 30 S. C. 499; *Kempner v. Comer*, 73 Tex. 196; *Bank of Napa v. Godfrey*, 77 Cal. 612.

⁷¹ *Randolph v. Middleton*, 26 N. J. Eq. 543; *Harper v. Ely*, 56 Ill. 179; *Princeton, etc., Co. v. Munson*, 60 Ill. 371; *Bosse v. Gallagher*, 7 Wis. 442.

⁷² *Wheeler & Wilson, etc., Co. v. Howard*, 28 Fed. Rep. 741. Filing suit in foreclosure is generally held sufficient evidence of the mortgagee's election to regard the debt due, on default in any interest payment, where this is the condition of the mortgage. *Holdroff v. Renlee*, 105 Ill. App. 671.

⁷³ *Manning v. Elliott*, 92 N. C. 48; *Maxwell v. Newton*, 65 Wis. 261.

⁷⁴ *Chiles v. Wallace*, 83 Mo. 84.

⁷⁵ *Ruyter v. Reid* (N. Y.), 24 N. E. Rep. 791; *Finley v. U. S. Bank*, 11 Wheat. 304; *Caldwell v. Taggart*, 4 Pet. 100; *McCall v. Yard*, 9 N. J. Eq. 358; *Goodrich v. Staples*, 2 Cush. 258; *Webster v. Vandeventer*, 6 Gray 428; *Williamson v. Field*, 2 Sandf. Ch. 533; *Vanderkamp v. Shelton*, 11 Paige Ch. 28; *Winslow v. Claik*, 47 N. Y. 261; *Haines v. Beach*, 3 Johns. Ch. 459; *Bates v. Miller*, 48 Mo. 409; *Colter v. Jones*, 52 Ill. 84; *Lyon v. Powell*, 98 Ala. 351; *Bobbles v. Munnerlyn*, 83 Ga. 727; *Johnston v. McDuffee*, 83 Cal. 30; *Ostrander v. Hart*, 8 N. Y. S.

sale, is not a necessary party; he becomes a necessary party only when he receives a deed of conveyance.⁷⁶ So, also, is it unnecessary to make a contingent remainderman, who takes subject to the mortgage, a party to the foreclosure suit.⁷⁷ The assignee of a junior incumbrance must be made a party in the place of the original junior mortgagee, and a decree of foreclosure against the latter would not have any effect upon the right of redemption of the assignee, who has not been made a party to the suit for foreclosure.⁷⁸ But one who purchases the equity during the pendency of the suit takes the mortgagor's interest subject to the decree, and need not be made a party, unless this is required by statute, as is the case in some of the States.⁷⁹ It has also been held in some States that a prior mortgagee should be made a party. Making a prior mortgagee a party is equivalent to instituting an action for redemption.⁸⁰ But by the weight of authority, prior mortgagees and grantees are not necessary,

809; *Watts v. Julian*, 122 Ind. 124; *Armstrong v. Warrington*, 111 Ill. 430; *Mendenhall v. Hall*, 134 U. S. 559; *Richards v. Thompson*, 43 Kan. 209; but see *Cooper v. Loughlin*, 75 Tex. 524, where it is held that beneficiaries of a trust property need not be joined, if the trustee is. To same effect see, *Harlem Co-op. Bldg. & Loan Assn. v. Quinn*, 10 N. Y. S. 682; *United States Trust Co. v. Roache*, 116 N. Y. 120. See *Douthit v. Hipp*, 23 S. C. 205. Holders of subsequent liens, or of equity of redemption are necessary parties to suit to foreclose. *Dickinson v. Duckworth* (Ark. 1905), 85 S. W. Rep. 82.

⁷⁶ *Stanbrough v. Daniels*, 77 Iowa 561.

⁷⁷ *Townshend v. Frommer*, 125 N. Y. 446.

⁷⁸ *Bigelow v. Stringfellow*, 25 Fla. 366.

⁷⁹ *Smith v. Davis* (N. J.), 19 Atl. Rep. 541; *Lloyd v. Passingham*, 16 Ves. 66; *Parkes v. White*, 11 Ves. 236; *Watt v. Watt*, 2 Barb. Ch. 371; *Jackson v. Losse*, 4 Sandf. Ch. 387; *Ostrom v. McCann*, 21 How. Pr. 431; *McPherson v. Honsel*, 13 N. J. Eq. 299; *Loomis v. Stuyvesant*, 10 Paige Ch. 490; *Crooker v. Crooker*, 57 Me. 396; *Haven v. Adams*, 8 Allen 367; *Poston v. Eubank*, 3 J. J. Marsh. 43; *Bennett v. Calhoun Assn.*, 9 Rich. Eq. 163; *Dickson v. Todd*, 43 Ill. 507; *Gordon v. Lee*, 102 Ind. 125; *Tierney v. Spiva*, 97 Mo. 98; *Wise v. Griffith*, 78 Cal. 152.

⁸⁰ *Hudnit v. Nash*, 16 N. J. Eq. 550; *Finley v. U. S. Bk.*, 11 Wheat. 306; *Stanish v. Dow*, 21 Iowa 363; *Shiveley v. Jones*, 6 Mon. 274; *Redin v. Branhan*, 43 Mich. 283.

and hardly proper parties.⁸¹ But it may be stated that wherever the mortgage is to be foreclosed by a sale of the premises, the prior mortgagee may be joined in the suit, though he is not a necessary party; it is also advisable to do so, since without him the property can only be sold subject to his outstanding mortgage.⁸² Although in some of the States the wife of the holder of the equity is not held to be a necessary party, it is best always to make her one, and in the cases cited below it has been held to be necessary.⁸³ Whether judgment-creditors should be made parties has been differently decided in different States.⁸⁴ Where the mortgagor

⁸¹ *Jerome v. Carter*, 94 U. S. 734; *Kay v. Whittaker*, 44 N. Y. 505. But see *Morris v. Wheeler*, 45 N. Y. 708; *Tome v. Loan Co.*, 34 Md. 12; *Bogey v. Shute*, 4 Jones Eq. 174; *Crawford v. Munford*, 29 Ill. App. 445; *Hague v. Jackson*, 71 Tex. 761. The owner of a senior mortgage need not be joined, in a suit to foreclose by a junior mortgagee, in Texas. *Garza v. Howell*, 85 S. W. Rep. 461.

⁸² *Holcomb v. Holcomb*, 2 Barb. 20; *Vanderkemp v. Shelton*, 11 Page Ch. 28; *Howard v. Handy*, 35 N. H. 315; *Wood v. Oakley*, 11 Paige Ch. 400; *Ducker v. Belt*, 34 Md. Ch. 13; *Hagan v. Walker*, 14 How. 37; *Chaplin v. Foster*, 7 B. Mon. 104; *Clark v. Prentice*, 3 Dana 468; *Troth v. Hunt*, 8 Blackf. 580; *Rucks v. Taylor*, 49 Miss. 552; *Mims v. Mims*, 1 Humph. 425; *Rowan v. Mercer*, 10 Humph. 359; *Hague v. Jackson*, 71 Tex. 761.

⁸³ That is necessary when her dower right is subject to the mortgage. *Mills v. Van Voorhies*, 28 Barb. 125; *s. c.* 20 N. Y. 412; *Merchants' Bk. v. Thomson*, 55 N. Y. 7; *Mooney v. Maas*, 22 Iowa 380; *Byrne v. Taylor*, 46 Miss. 95; *Foster v. Hickox*, 38 Wis. 408; *Tadlock v. Eccles*, 20 Texas 783; *Anthony v. Nye*, 30 Cal. 401. But see *Eslana v. Le Petre*, 21 Ala. 504; *Fletcher v. Holmes*, 32 Ind. 497; *Amphlett v. Hibbard*, 29 Mich. 298; *Etheridge v. Vernoy*, 71 N. C. 184; *Kursheedt v. Union Dime Sav. Inst.*, 118 N. Y. 358; *Barr v. Van Alstine*, 120 Ind. 590. But where she has not joined in the execution of the mortgage, she cannot be made a party, so as to bar her dower right, unless there is some special defense to her claim. *Brackett v. Baum*, 50 N. Y. 8; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Merchants' Bk. v. Thomson*, 55 N. Y. 7; *Baker v. Scott*, 62 Ill. 86; *Heth v. Cocke*, 1 Rand. 344; *Foster v. Hickox*, 38 Wis. 408; *Sheldon v. Patterson*, 55 Ill. 507. Where the mortgage was executed by a husband and wife, the wife is a necessary party to the foreclosure suit. *Franklin v. Beegle*, 92 N. Y. S. 449, 102 App. Div. 412; *Sloane v. Lucas* (Wash. 1905), 79 Pac. Rep. 949.

⁸⁴ That they must be, in order to extinguish their equity of redemp-

has parted with his entire interest in the premises he is not a necessary party, but he may be joined, and must be, if the mortgagee wishes to obtain a personal judgment against him in the same suit for the balance of the debt left unsatisfied by a sale of the mortgaged property.⁸⁵ If, however, the assignment has not been recorded, and the mortgagee does not know of the assignment of the equity of redemption, it is not necessary to make the assignee a party. His interest is barred by foreclosure.⁸⁶ But the mortgagor's surety or guarantor is not a proper party to an action for foreclosure. A personal judgment against him can only be obtained in a suit at law.⁸⁷ Where the mortgagor is dead, his heirs and his widow must be made parties, and his personal representatives need be, only when a judgment against the mortgagor's estate for the balance is desired, except in Missouri, where they are by statute required to be parties in every case.⁸⁸

tion, see *Adams v. Taynter*, 1 Coll. 530; *Sharpe v. Scarborough*, 4 Ves. 538; *Gaines v. Walker*, 16 Ind. 361. So also, a subsequently attaching creditor. *Lyon v. Sanford*, 5 Conn. 544; *Bullard v. Leach*, 27 Vt. 491. But in the following cases, judgment-creditors are held not to be necessary parties. *Downer v. Fox*, 20 Vt. 388; *Felder v. Murphy*, 2 Rich. Eq. 58; *Mims v. Mims*, 1 Humph. 425; *Van Dyne v. Shaun*, 41 N. J. L. 311.

⁸⁵ *Lockwood v. Benedict*, 3 Edw. Ch. 472; *Drury v. Clark*, 16 How. Pr. 424; *Heyer v. Pruyn*, 7 Paige Ch. 465; *Andrews v. Steele*, 22 N. J. Eq. 478; *Wilkins v. Wilkins*, 4 Port. 245; *Shaw v. Hoadley*, 8 Blackf. 165; *Heyman v. Lowell*, 23 Cal. 106; *Dickerman v. Lust*, 66 Iowa 444. But see *Bigelow v. Bush*, 6 Paige Ch. 343; *Buchanan v. Munroe*, 22 Texas 557. Nor are purchasers of the equity of redemption necessary or proper parties after they have assigned it. *Soule v. Albee*, 31 Vt. 142; *Lockwood v. Benedict*, 3 Edw. Ch. 472; *Hall v. Yoell*, 45 Cal. 584.

⁸⁶ *Dickerman v. Lust*, 66 Iowa 444.

⁸⁷ *Walsh v. Vanhorn*, 22 Ill. App. 170.

⁸⁸ *Farmer v. Curtis*, 2 Sim. 466; *Bradshaw v. Outram*, 13 Ves. 234; *Wood v. Moorhouse*, 1 Lans. 405; *Graham v. Carter*, 2 Hen. & M. 6; *Worthington v. Lee*, 2 Bland Eq. 678; *Mayo v. Tomkins*, 6 Munf. 52; *Boyce v. Bowers*, 11 Rich. Eq. 41; *Averett v. Ward*, Busb. Eq. 192; *McIver v. Cherry*, 8 Humph. 713; *Bissell v. Marine Co.*, 55 Ill. 165; *Shively v. Jones*, 6 B. Mon. 274; *Byrne v. Taylor*, 46 Miss. 95; *Slaughter v. Foust*, 4 Blackf. 379; *Hogden v. Heidman*, 66 Iowa 645; *Richards*

§ 274. **Parties to foreclosure — Continued.**— All persons — such as joint mortgagees, assignees, etc., whether their interest be legal or equitable—who are interested in the mortgage or mortgage-debt, should join in the suit as parties plaintiff. But if any should refuse they must be made defendants.⁸⁹ One not interested in the mortgage which is to be foreclosed cannot be a party plaintiff. A junior judgment-creditor cannot compel the foreclosure of the senior mortgage. His only remedy is the redemption of the mortgage.⁹⁰ Where the mortgagee has assigned the mortgage and debt absolutely, the assignee is the proper party to bring the suit, and the mortgagee need not join; but he is a necessary party, if the assignment is only conditional.⁹¹ But if the mortgagee has only assigned one of two or more debts, secured by the same mortgage, he can institute the action, making the assignee a party defendant, if he refuses to join as party plaintiff.⁹²

v. Thompson, 43 Kan. 209; *Weir v. Field* (Miss.), 7 So. Rep. 355. But in Georgia and Missouri the personal representatives are necessary parties. *Dixon v. Cuyler*, 77 Ga. 248; *Magruder v. Offut*, Dudley 227; *Perkins v. Woods*, 27 Mo. 547; *Hall v. Klepzig*, 99 Mo. 83. The holder of a known unrecorded deed, is not a necessary party, to a suit to foreclose, in California. *Hager v. Astorg*, 145 Cal. 548, 79 Pac. Rep. 68. But see *contra*, *Hodson v. Treat*, 7 Wis. 263.

⁸⁹ *Carpenter v. O'Dougherty*, 58 N. Y. 681; *Noyes v. Sawyer*, 3 Vt. 100; *Stucker v. Stucker*, 3 J. J. Marsh. 301; *Shirkey v. Hanna*, 3 Blackf. 403; *Goodall v. Mopley*, 45 Ind. 355; *Johnson v. Brown*, 31 N. H. 405; *Jenkins v. Smith*, 4 Metc. (Ky.) 380; *Bell v. Shrock*, 2 B. Mon. 29; *Hartwell v. Blocker*, 6 Ala. 581; *Graydon v. Church*, 7 Mich. 51; *Saunders v. Frost*, 5 Pick. 259; *Wiley v. Pierson*, 23 Texas, 486; *Webster v. Vandeventer*, 6 Gray 428; *Hopkins v. Ward*, 12 B. Mon. 185; *Beals v. Cobb*, 51 Me. 349; *Lambert v. Hyers*, 22 Ill. App. 616. But in *Rankin v. Major*, *supra*, and *Thayer v. Campbell*, *supra*, it was held that the holder of one of two notes secured by the same mortgage may sue alone.

⁹⁰ *Kelly v. Longshore*, 78 Ala. 203.

⁹¹ *Whitney v. McKinney*, 7 Johns. Ch. 144; *Miller v. Henderson*, 10 N. J. Eq. 320; *Newman v. Chapman*, 2 Rand. 93; *Kittle v. Van Dyck*, win, 9 Ves. 264; *Gage v. Stafford*, 1 Ves. Sr. 544; *Sowles' Trustee v. Buck* (Vt.), 20 Atl. Rep. 146; *Smythe v. Brown*, 25 S. C. 89; *Haven v. Lyons*, 9 N. Y. S. 211; *Stiger v. Bent*, 111 Ill. 328.

⁹² *Boone v. Clarke*, 129 Ill. 466.

But whether the assignee of the debt can bring the suit independently of the mortgagee or legal holder of the mortgage, depends upon the construction given by the courts to the effect of such an assignment. At common law the holder of the legal title to the mortgage must institute the suit as trustee for the assignee of the debt, while, under the lien theory in those States, where the assignment of the debt is held to work an equitable assignment of the mortgage, the assignee may maintain the suit in equity without joining the legal owner of the mortgage. In other States, where the assignment of the debt is held to transfer the legal as well as the equitable title to the mortgage, the assignee may maintain all suits, both in law and equity.⁹³ It is now the general rule in this country, that upon the death of the mortgagee the mortgage descends with the debt to the personal representatives, and they must, consequently, be the plaintiffs in a suit for foreclosure.⁹⁴ If the mortgage be given to two jointly to secure a joint debt, the survivor is the proper party plaintiff, and the deceased mortgagee's representatives are not necessary parties. But if the joint mortgage is given for two separate debts, the rule is different; both the sur-

⁹³ *Austin v. Burbank*, 2 Day 476; *Stone v. Locke*, 46 Me. 445; *Moore v. Ware*, 38 Me. 496; *Calhoun v. Tullass*, 35 Ga. 119; *Story Eq. Pl.*, Secs. 201-209; *Martin v. McReynolds*, 6 Mich. 70; see *ante*, Secs. 250, 251. And in the Code States it is expressly provided that all actions should be prosecuted in the name of the real party in interest. Under this provision, whether the assignee be considered a legal or only an equitable owner of the mortgage, in either case he is the proper party to institute the suit for foreclosure. 2 *Jones on Mort.*, Sec. 1370.

⁹⁴ *Kinna v. Smith*, 3 N. J. Eq. 14; *Dewey v. Van Dusen*, 4 Pick. 19; *Worthington v. Lee*, 2 Bland 678; *Ratliff v. Davis*, 38 Miss. 107; *Grattan v. Wiggins*, 23 Cal. 16; *Comp. Laws Mich.* (1871), 1393; *Rev. Stat. Wis.* (1871), 1223; *Rev. Stat. Ohio*, Ch. 43, Sec. 66; *Citizens' Bank v. Dayton*, 116 Ill. 257. *Contra*, *Etheridge v. Verney*, 71 N. C. 174; *McIver v. Cherry*, 8 Humph. 713. But if the mortgagee's heir is in possession he must be made a party. *Osborne v. Tunis*, 25 N. J. L. 633; *Huggins v. Hall*, 10 Ala. 283; *Gilkerson v. Thompson*, 210 Pa. 355, 59 Atl. Rep. 1114.

vivor and the representatives of the deceased must join in the suit, and either may institute the proceedings.⁹⁵

§ 275. **Effect of decree in foreclosure upon the land.**—A decree in foreclosure bars the interest in the land of the mortgagor, and all claiming under him who have been made parties to the suit. It will have no effect upon the interest of any one who is not a party, and as to him the equity of redemption continues to exist.⁹⁶ A mortgagee in possession under a defective foreclosure is not in any sense a trespasser but he holds the possession in the character of a mortgagee.⁹⁷ And if the foreclosure is defective because one who had a right to redeem had not been made a party, the only remedy for such a person against the purchaser is an action for redemption. He cannot maintain an action for possession before redemption.⁹⁸ So, also, if a junior incumbrancer, non-resident, has been made a party by service by publication, without receiving actual knowledge of the pendency of the suit, the court may in its discretion re-open the foreclosure

⁹⁵ *Blade v. Sanborn*, 8 Gray 184; *Williams v. Hilton*, 35 Me. 547; *Lannay v. Wilson*, 30 Md. 536; *Milroy v. Stockwell*, 1 Cart. (Ind.) 35; *Minor v. Hill*, 58 Ind. 176, 26 Am. Rep. 71. *Contra*, if the debt is several or there are conflicting claims. *Freeman v. Scofield*, 16 N. J. Eq. 28; *Vickers v. Cowell*, 1 Beav. 529; *Mitchell v. Burnham*, 44 Me. 305; *Burnett v. Pratt*, 22 Pick. 556.

⁹⁶ *Packer v. Rochester, etc.*, R. R., 17 N. Y. 287; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *DeHaven v. Landell*, 31 Pa. St. 124; *Hindo v. Allen*, 34 Conn. 193; *Ritger v. Parker*, 8 Cush. 149; *Watts v. Julian*, 122 Ind. 124; *Steinhardt v. Cunningham*, 55 Hun 375; *Franece v. Armbruster* (Neb.), 44 N. W. Rep. 481; *Glide v. Dwyer*, 83 Cal. 477; *Barr v. Van Alstine*, 120 Ind. 590. A bill for foreclosure is not strictly a proceeding *in rem*, but is for the enforcement of a contract obligation against specific persons and to foreclose their equity of redemption and, hence, the decree does not effect those not made parties to the action. *Lohmeyer v. Durbin*, 213 Ill. 498, 72 N. E. Rep. 1118.

⁹⁷ *Blair v. Rivard*, 19 Ill. App. 477; *Cook v. Cooper*, 18 Ore. 142.

⁹⁸ *Evans v. Pike*, 118 U. S. 241. For equitable relief by mortgagee who had failed to make some of the deceased mortgagor's heirs parties to suit to foreclose, see, *Investment Co. v. Adams* (Wash. 1905), 79 Pac. Rep. 625.

to enable him to redeem.⁹⁹ In equitable foreclosure by sale, some of the statutes require that a certain time be given to the mortgagor after the sale to redeem the estate, and a court of equity, in the exercise of its discretion, may, in the absence of statute, provide for such a period of redemption before sale.¹ In such a case, however, it is held that the mortgagor can redeem the land on paying, not the amount of the mortgage debt, but the amount of the bid, for which the property was sold under foreclosure.² And where there is a time for redemption after the sale, the decree must not direct a delivery of the deed until this period for redemption has expired. But a certificate is generally given to the purchaser.³ Until delivery of the deed, the mortgagor is entitled to the rents and profits of the land. And if a mortgagee is permitted to enter into possession before the expiration of the period of redemption, he takes possession in his character as mortgagee.⁴ But when the deed is delivered, it operates *nunc pro tunc* from the date of the sale, and bars any intervening attaching rights. And although the decree be er-

⁹⁹ Russell v. Gunn, 40 Minn. 463.

¹ Perine v. Dunn, 4 Johns. Ch. 140; Durrett v. Whiting, 7 B. Mon. 547; Harkins v. Forsyth, 11 Leigh 294; Gaskell v. Viquesney, 122 Ind. 244; Nelms v. Kennon, 88 Ala. 329; Willard v. Finnegan, 42 Minn. 476; Buchanan v. Reid, 43 Minn. 172; Wood v. Holland (Ark.), 13 S. W. Rep. 739; Emmons v. Sowden (Mich.), 43 N. W. Rep. 1100; Johnson v. Golder, 9 N. Y. S. 739.

² Williamson v. Dickerson, 66 Iowa 105. In Alabama, California, Oregon, Michigan, Minnesota, Wisconsin, Tennessee, Iowa and Illinois, there are statutes regulating the right of redemption. 2 Washburn on Real Prop. 261-269, note.

³ Boester v. Byrne, 72 Ill. 466; Rhinehart v. Stevenson, 23 Ill. 524; Walker v. Jarvis, 16 Wis. 28; Harlan v. Smith, 6 Cal. 173. The Illinois act of 1872, Sec. 30, providing for a forfeiture of all rights of a mortgagee, who fails to procure a master's deed in foreclosure, within a certain time after the expiration of the period for redemption, is held to impair the obligation of the contract and to deny due process of law to a mortgagee, whose mortgage antedated the act, in Bradley v. Lightcap, 195 U. S. 1, 49 L. Ed. 65.

⁴ Jones v. Rigby, 41 Minn. 530; Clason v. Corley, 5 Sandf. Ch. 447; Whalin v. White, 25 N. Y. 464; Whitney v. Allen, 21 Cal. 233.

aneous for some irregularity, it cannot be attacked collaterally, and the title of a *bona fide* purchaser, in a sale during the pendency of the suit, cannot thereby be avoided, notwithstanding the decree has subsequently been reversed.⁵ In strict foreclosure, the decree makes the estate absolute in the mortgagee. His title, whatever it is held to be before foreclosure, becomes afterwards a legal estate in lands and descends to the heirs, instead of to the personal representatives.⁶ But, in some of the States, if the mortgagee dies before a suit for strict foreclosure has been instituted, and it is brought by the personal representatives, the estate, for the purpose of distribution, partakes of the character of personality, and the title vests in those who became, by the death of the mortgagee, entitled to the mortgage-debt.⁷ The decree in a foreclosure suit is binding upon infant holders of the equity to the same extent as adults, except that if the foreclosure is irregular on account of some defect in the proceeding, he may take advantage of such error within a reasonable time after arriving at his majority. And this is the rule, whether the foreclosure is in equity or at law; but for the protection of his interests, it is generally required that

⁵ *Graham v. Bleakie*, 2 Daly 55; *Horner v. Zimmerman*, 45 Ill. 14; *Burford v. Rosenfeld*, 37 Texas 42; *Torrums v. Hicks*, 32 Mich. 307; *Markel v. Evans*, 47 Ind. 326; *Miller v. Sharp*, 49 Cal. 233; but see *Brindernagle v. German Ref. Church*, 1 Barb. Ch. 15. A failure to attach the seal of the court to an order of sale cannot collaterally be raised, to effect the sale in foreclosure. *Hager v. Astorg*, 145 Cal. 548, 79 Pac. Rep. 68. The doctrine of *bona fide* purchasers, is held, in Arkansas, not to apply to a purchaser at a mortgage foreclosure. *Cooper v. Ryan* (Ark. 1904), 83 S. W. Rep. 328. Mortgagees and beneficiaries in trust deeds are always regarded as *bona fide* purchasers. *Gilbert v. Lawrence* (W. Va. 1904), 49 S. E. Rep. 155; *Walker v. Walker* (Iowa 1905), 102 N. W. Rep. 435.

⁶ *Brainard v. Cooper*, 10 N. Y. 359; *Goodman v. White*, 26 Conn. 322; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 150; *Kendall v. Treadwell*, 14 How. Pr. 165; *Farrell v. Parlier*, 50 Ill. 274; *Osborne v. Tunis*, 25 N. J. L. 633; *Swift v. Edson*, 5 Conn. 531.

⁷ Mass. Gen. Stat., Ch. 96, Secs. 10, 1 B, 14; *Fifield v. Sperry*, 20 N. H. 338.

the infant be represented in the suit by a guardian *ad litem*.⁸ So also is the decree binding upon married women, if their husbands are joined with them as parties to the suit. And the failure of the husband to defend will not constitute a ground for setting aside the decree; at least, where the foreclosure is by a sale of the premises.⁹ But the decree only transfers whatever interest is claimed by or through the mortgagor. It vests that interest in the mortgagee or purchaser, but cannot bar the interests held by persons who are not privies to the mortgagor. The decree, therefore, does not affect any paramount title which is held or claimed by such persons, even though they have been made parties to the suit.¹⁰ Nor does the decree determine the priorities of the junior mortgagees and their relative claims to a share in the surplus of the proceeds of sale.¹¹ Where, however, the foreclosed

⁸ If it be a strict foreclosure, the infant would be bound by the decree, if he does not show some defect in the foreclosure proceeding within a reasonable time after his arrival at majority. 2 Cruise Dig. 199; *Mills v. Dennis*, 3 Johns. Ch. 367. But the infant is bound by a sale under the decree, if he has been properly made a party to the action notwithstanding the irregularity. *Mills v. Dennis*, *supra*; 2 Washburn on Real Prop. 259. Irregularities in the appointment of a guardian, *ad litem*, will not effect the title of a purchaser at foreclosure sale, in New York. *Bannister v. Demuth*, 178 N. Y. 630, 71 N. E. Rep. 1128.

⁹ *Mallack v. Galton*, 3 P. Wms. 352; *Mooney v. Maas*, 22 Iowa 380; *Mavrick v. Grier*, 3 Nev. 52. But in the States where married women hold their property independent of their husbands, it seems unnecessary to make the husband a party. *Somerset, etc., Assn. v. Camman*, 11 N. J. Eq. 382; *Thornton v. Pigg*, 24 Mo. 249. And the same rule now prevails in Massachusetts for a different reason. *Davis v. Wetherell*, 13 Allen 62; *Newhall v. Sav. Bk.*, 101 Mass. 430.

¹⁰ *Concord, etc., Ins. Co. v. Woodbury*, 45 Me. 447; *Eagle F. Ins. Co. v. Lent*, 6 Paige Ch. 635; *Grattan v. Wiggins*, 23 Cal. 32; *Brundage v. Missionary Society*, 60 Barb. 205; *Kinsley v. Scott*, 58 Vt. 470; *Weil v. Uzsett*, 92 N. C. 515; *Bozarth v. Sanders*, 113 Ill. 181; *Ord v. Bartlett*, 83 Cal. 428. A purchaser in foreclosure only takes such title as the mortgagor had. *Duncan v. Asphalt Co.* (Ky. 1904), 83 S. W. Rep. 124.

¹¹ *Burchell v. Osborne*, 119 N. Y. 486. The purchaser at foreclosure

mortgage covers only one undivided interest in a joint-estate, the plaintiff may secure by the same judgment a partition of the joint-estate.¹² This statement of the effect of the decree in foreclosure is true in all technical suits for foreclosure; but where, as in Maine and Massachusetts, the suit for foreclosure is in the nature of an action at law for the recovery of possession, if the person in possession holds under a superior title, it would be necessary, or at least proper, to assert such title. But this is really not an exception to the rule above cited, since wherever the mortgagee may maintain the action of ejectment the question of a paramount title might be raised by the party in possession, if he is not the mortgagor.¹³

§ 276. *The effect of foreclosure upon the debt.*—If the suit be for strict foreclosure, all actions on the surplus of the debt remaining unsatisfied are barred as long as the foreclosure is upheld;¹⁴ but if the mortgagee—in the case that the value of the property is not sufficient to satisfy the entire debt—wishes to pursue his remedy for the unsatisfied balance, it will re-open the foreclosure, and the property will or may be sold under judicial decree, in order to ascertain its actual value, and the amount of the judgment to be entered up against the debtor.¹⁵ Where the decree directs a sale of the premises, the proceeds of sale are applied to the liquidation of the debt, and if they are not sufficient to pay

sale, under a first mortgage, cuts off a lease given by the mortgagor subsequent thereto. *Strong v. Smith* (N. J. Ch. 1905), 60 Atl. Rep. 66.

¹² *Lyon v. Powell*, 78 Ala. 351.

¹³ *Hunt v. Hunt*, 17 Pick. 118; *Johnson v. Phillips*, 13 Gray, 198; *Churchill v. Loring*, 19 Pick. 465; *Wheelright v. Freeman*, 12 Metc. 154; *Whittier v. Dow*, 14 Me. 298.

¹⁴ *Griesbaum v. Baum*, 18 Ill. App. 614.

¹⁵ *Lovell v. Leland*, 3 Vt. 581; *Osborne v. Tunis*, 25 N. J. L. 633; *Spencer v. Harford*, 4 Wend. 381; *Morgan v. Plumb*, 9 Wend. 287; *Andrews v. Scotton*, 2 Bland, 666; *Edgerton v. Young*, 43 Ill. 470; *Porter v. Pillsbury*, 36 Me. 278; *Patten v. Pearsen*, 57 Me. 434; *Leland v. Loring*, 10 Metc. 122; *Lansing v. Goelet*, 9 Cow. 346.

the whole debt, the mortgagee has his remedies for the balance, which are the ordinary actions at law for the recovery of a debt. It is usual, however, for the court of equity, in rendering a decree in foreclosure for the sale of the mortgaged premises, to give judgment for the unpaid surplus against the mortgagor and others who may be jointly liable with him.¹⁶ And the court may grant this judgment for the unsatisfied surplus, although the complaint or bill in foreclosure contains no such prayer.¹⁷ The remedies of the mortgagee are twofold: first, against the property mortgaged, and secondly, on the personal liability of the mortgagor. These remedies are independent of each other, and although there can be but one payment of the debt, the prosecution of one of these remedies does not bar the right to pursue the other, and they may be employed simultaneously in separate proceedings.¹⁸ But in some of the States—notably New York

¹⁶ *Dunkley v. Van Buren*, 3 Johns. Ch. 330; *Deare v. Carr*, 3 N. J. Eq. 513; *Pierce v. Potter*, 7 Watts, 475; *Andrews v. Scotten*, 2 Bland 666; *Hale v. Rider*, 5 Cush. 231; *Jones v. Conde*, 6 Johns. Ch. 77; *Payne v. Harrell*, 40 Miss. 498; *Stark v. Mercer*, 3 How. (Miss.) 377; *Marston v. Marston*, 45 Me. 412; *Drayton v. Marshall*, Rice Eq. 386; *Shepherd v. Pepper*, 133 U. S. 626; *Weir v. Field* (Miss.), 7 So. Rep. 355; *Hilton v. Otoe Co. Bank*, 29 Fed. Rep. 202; *Shields v. Riopelle*, 63 Mich. 458; *Ohio Central R. R. Co. v. Central Trust Co.*, 133 U. S. 83. There are statutory provisions, for rendering a judgment for any unsatisfied balance in the foreclosure suit, in Arkansas, California, Indiana, Michigan, Minnesota, New York, Missouri, Texas and Iowa. See *Washburn on Real Prop.* 261-269, note; *Estes v. Fry*, 166 Mo. 70, 65 S. W. Rep. 746.

¹⁷ *Watkins v. Vrooman*, 51 Hun 175.

¹⁸ *Booth v. Booth*, 2 Atk. 343; *Hale v. Rider*, 5 Cush. 231; *Jones v. Conde*, 6 Johns. Ch. 77; *Burnell v. Martin*, 2 Dougl. 417; *Atty.-Gen. v. Winstanley*, 5 Bligh. 130; *Hughes v. Edwards*, 9 Wheat. 487; *McCall v. Lenox*, 9 Serg. & R. 302; *Gilman v. Ill. & Miss. Tel. Co.*, 91 U. S. 603; *Riblett v. Davis*, 24 Ohio St. 114; *Slaughter v. Foust*, 4 Blackf. 379; *Payne v. Hanel*, 40 Miss. 498; *Baum v. Tomkin*, 110 Pa. St. 569; *Shepherd v. Pepper*, 133 U. S. 626; *Blinne v. Kromer*, 14 Okla. 366, 79 Pac. Rep. 215; *Ridgley v. Abbott Min. Co.* (Cal. 1905), 79 Pac. Rep. 833; *Daniels v. Mutual Ben. Ins. Co.* (Neb. 1905), 102 N. W. Rep. 458; *Stumpf v. Hallahan*, 91 N. Y. S. 1062, 101 App. Div. 383; *Twigg v. James* (Wash. 1905), 79 Pac. Rep. 959.

—judgment will not be rendered in an action at law on the debt, while a suit for foreclosure is pending, without leave of the court in which such suit is filed.¹⁹ This rule of practice, no doubt, rests upon the ground that the entry of judgment in the proceeding at law would be useless, since in the foreclosure suit, judgment will be given for any balance remaining unsatisfied.

§ 277. **Mortgages with power of sale.**—In order to avoid the burdensome and expensive proceedings for foreclosure, the idea was conceived of giving to the mortgagee the power to sell the mortgaged premises upon the breach of the condition, and apply the proceeds of sale to the liquidation of the mortgage-debt. It was at first doubted whether such a power was valid, when granted either in the mortgage or in a separate instrument. It was considered as a contemporaneous agreement, which, in its exercise, curtailed the mortgagor's right to redeem, and, therefore, was void. But the power of sale is now generally held to be good, since it does not abridge or take away the ordinary remedies for foreclosure, and is not in theory a means of foreclosing the mortgagor's equity of redemption.²⁰ It is a power coupled with an in-

¹⁹ *Williamson v. Champlin*, 8 Paige Ch. 70; *Suydam v. Bartle*, 9 Paige Ch. 294; 3 Rev. St. N. Y. (1875) 198; *Mutual L. Ins. Co. v. Smith*, 54 N. Y. Super. Ct. 400; *Schultz v. Meade*, 8 N. Y. S. 663; *U. S. Life Ins. Co. v. Poillon*, 7 N. Y. S. 834. In Michigan, Iowa and Indiana the same statute rules prevail. *Mich. Comp. Laws* (1871), 1549; *Code of Iowa* (1873), Sec. 3220; 2 *Ind. Rev. Stat.* (1876), 259; *Shields v. Riopelle*, 63 Mich. 458. In Minnesota no suit at law on the debt may be instituted until the foreclosure suit is ended. *Johnson v. Lewis*, 13 Minn. 364. See also, to the same effect, *Anderson v. Pligam*, 30 S. C. 499. The purchaser of the mortgaged land, at foreclosure sale, is not bound to comply with his bid, where the description in the sale notice is too indefinite to pass a good title. *Jackson v. Binnicker*, 106 Mo. App. 721, 80 S. W. Rep. 682.

²⁰ *Wilson v. Troup*, 7 Johns. Ch. 25; *Smith v. Provin*, 4 Allen 518; *Kinsley v. Ames*, 2 Metc. 29; *Calloway v. People's Bk.*, 54 Ga. 441; *Longworth v. Butler*, 3 Gilm. 32; *Wing v. Cooper*, 37 Vt. 184; *Mann v. Best*, 62 Mo. 491; *Clark v. Condit*, 18 N. J. Eq. 358; *Hyman v. Dev-*

terest, and is, therefore, irrevocable by the mortgagor. It operates as the appointment of a use, which under the Statute of Uses, becomes executed into a legal estate in the purchaser, and has all the characteristics that are met with in ordinary powers of appointment under that statute.²¹ It is not determined by the death of either party, as is the case with common-law powers of attorney;²² it descends to the mortgagee's heirs at his death,²³ and passes to the assignee *eraux*, 63 N. C. 624; *Bradley v. Chester Valley R. R.*, 36 Pa. St. 141; *Mitchell v. Bogan*, 11 Rich. L. 686; *Crowning v. Cox*, 1 Rand. 306; *Plum v. Studebaker*, 89 Mo. 162.

²¹ *Wilson v. Troup*, 2 Cow. 236. The difficulty of the courts at first, in determining the validity of a sale under the power, is, no doubt, traceable to a failure to apply to that case the doctrine of powers of appointment under the Statute of Uses. The ordinary mortgage is, in form and effect, a deed of bargain and sale, and the grant of a power of sale therein may be construed as the limitation of a use. See *post*, Chapter XVI. on Powers. But in most of the States, where mortgages with power of sale are in common use, they are expressly authorized by statute, and there is no need of this construction in order to establish their validity.

²² *Ohnsburg v. Turner*, 87 Mo. 127; *Benneson v. Savage*, 130 Ill. 352.

²³ When it is stated in the text that the power of sale passes to the heirs of the mortgagee, reference is only had to those States where the mortgage itself descends to the heir. But in most of the States the power of sale descends with the mortgage to the personal representatives, and may be exercised by them, although the power is expressly limited to the "heirs and assigns." *Demarest v. Wynkoop*, 3 Johns. Ch. 125; *Berry v. Skinner*, 30 Md. 573; *Harnickle v. Wells*, 50 Ala. 198. In Missouri and Illinois, and perhaps in other States, upon the death of the mortgagee the sheriff may be directed to execute the power, or a new trustee can be appointed upon the application of any one interested therein. *Hickman v. Dill*, 32 Mo. App. 509. The power of sale vested in a trustee in a trust deed is a power coupled with an interest, and hence is not revoked by the death of the grantor. The power of substitution of a new trustee granted in a trust deed to the beneficiary is a power coupled with an interest, and hence is not revoked by the death of the grantor. So held in *Frank v. Colonial & U. S. Mortg. Co. Limited*, 38 So. Rep. 340 (Miss. May 1, 1905), citing *Jones on Mortgages* (6 ed.), Sec. 1792, 97 Ga. 566, 25 S. E. Rep. 485. See also, *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. Rep. 1078; *Kelsay v. Bank*, 166 Mo. 157, 65 S. W. Rep. 1007; *Curtis v. Moore*, 162 Mo. 442, 63 S. W. Rep. 80.

of the mortgage, except where only a part of the mortgage-debt is assigned. The power is indivisible, and, therefore, in a partial assignment, remains in the mortgagee, who must exercise it for the benefit of both parties.²⁴ If the donee of the power is a corporation, the power may be exercised by its duly authorized agent.²⁵ The power of the sale need not be limited to the estate of the mortgagee. While the mortgage may only cover a life estate, the power might authorize a sale of the fee.²⁶ And the power of sale would be valid as a security, although no estate in the mortgaged property be given to the creditor. The power of sale would in that case be a naked power.²⁷

§ 278. Character of the mortgagee in relation to the power.

— As donee of the power, the mortgagee assumes the character of trustee for himself and the mortgagor, and all other parties having interests in the mortgaged premises. In this capacity he is under the ordinary obligations of a trustee, and bound in his actions by the same rules of duty.²⁸ In

²⁴ *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Wilson v. Traup*, 2 Cow. 236; *Jencks v. Alexander*, 11 Paige Ch. 619; *Berger v. Bennett*, 1 Caine's Cas. 1; *Slee v. Manhattan Co.*, 1 Paige Ch. 48; *Harnickell v. Orndoff*, 35 Md. 341; *Pickett v. Jones*, 63 Mo. 195; *Strother v. Law*, 54 Ill. 413; *Bush v. Sherman*, 80 Ill. 160; *Solberg v. Wright*, 33 Minn. 224; *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; *Sanford v. Kane*, 24 Ill. App. 504; reversed 127 Ill. 591. But see *Dameron v. Eskridge*, 104 N. C. 621. And this is also true where the assignment of the debt works an assignment of the mortgage. Such an assignee may exercise the power in those States where such a transaction is looked upon as a legal assignment. See cases *supra*. And the assignee may exercise the power, although the assignment has not been recorded. *Montague v. Dawes*, 12 Allen 397; *s. c.* 14 Allen 373. But it has been held in Missouri, that the power must be expressly limited to the mortgagee and assigns, in order that the assignee may exercise the power. *Dolbear v. Worduff*, 84 Mo. 619; *Axman v. Smith*, 156 Mo. 286, 57 S. W. Rep. 105.

²⁵ *Chilton v. Brooks*, 71 Md. 445.

²⁶ *Sedgwick v. Laffin*, 10 Allen 430; *Torrey v. Cook*, 116 Mass. 165.

²⁷ *Neidig v. Eifer*, 18 Abb. Pr. 353; *Parshall v. Eggart*, 52 Barb. 367; *Holmes v. Hall*, 8 Mich. 66; *Bousey v. Amec*, 8 Pick. 236.

²⁸ *Kelsay v. Farmers' & Traders' Bank*, 166 Mo. 157, 65 S. W. Rep.

the execution of the power he must exercise the most scrupulous care to render the sale of the premises as beneficial as possible to all parties concerned. And he will be liable in damages for any loss to such parties resulting from his negligence in the conduct of the sale.²⁹ In most of the States where mortgages with power of sale are in common use, the execution of the power is regulated by local statutes. But in the absence of statutory regulations, sales under the power are governed by the same rules as apply to the sale of other trust property.³⁰ A failure to observe the statutory require-

1007; *Axman v. Smith*, 156 Mo. 286, 57 S. W. Rep. 105. The trustee in a deed of trust occupies the same relation as the mortgagee, *i. e.*, he is agent for both debtor and creditor. *Axman v. Smith*, *supra*.

²⁹ *Tomlin v. Luce*, 43 Ch. Div. 191.

³⁰ *Howard v. Ames*, 3 Metc. 311; *Robertson v. Norris*, 1 Giff. 424; *Jencks v. Alexander*, 11 Paige Ch. 624; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Leet v. McMaster*, 51 Barb. 236; *Montague v. Dawes*, 14 Allen 369. Mere inadequacy of price will not vitiate the sale, but if the property has been so grossly sacrificed that the purchaser may be presumed to know of it, the sale will be avoided. *Vail v. Jacobs*, 62 Me. 130; *King v. Bronson*, 122 Mass. 122; *Horsev. v. Hough*, 38 Md. 130; *Landrum v. Union Bk. of Mo.*, 63 Mo. 48; *Hoodless v. Reid*, 112 Ill. 105; *Maxwell v. Newton*, 65 Wis. 261; *Gross v. Janesok*, 10 N. Y. S. 541; *Chilton v. Brooks*, 71 Md. 445; *Condon v. Maynard*, 71 Md. 601. And any fraudulent mismanagement or deception practiced upon the mortgagor will avoid the sale, if the purchaser participates in it, or is cognizant of it. *Banta v. Maxwell*, 12 How. Pr. 479; *Lee v. McMasters*, 51 Barb. 236; *Bush v. Sherman*, 80 Ill. 160; *Hurd v. Case*, 32 Ill. 45; *Jackson v. Crafts*, 18 Johns. 110; *Mann v. Best*, 62 Mo. 491. Notice of the sale to the parties interested in mortgaged premises is not necessary to validity of sale in absence of a statutory requirement. *Carver v. Brady*, 104 N. C. 219. The action to set aside a sale under a power is an equitable proceeding to redeem the property. A bill to set aside the sale, without offering to redeem, will not be entertained. *Candee v. Burke*, 1 Hun 546; *Vroom v. Ditmas*, 7 Cow. 13; *Robinson v. Ryan*, 25 N. Y. 320; *Schwartz v. Sears*, Walk. (Mich.) 170. But the bill must be filed within a reasonable time after the discovery of the fraud or other equitable claim. Acquiescence is treated as a waiver of all irregularities in the sale. *Hamilton v. Lubukee*, 51 Ill. 415; *Bush v. Sherman*, 80 Ill. 160; *Hoffman v. Harrington*, 33 Mich. 392; *Landrum v. Union Bk. of Mo.*, 63 Mo. 48; *Alexander v. Hill*, 88 Ala. 487. In sales by a trustee, under deed of trust, as the power of sale is a per-

ments, or the terms of the power, will invalidate the deed of conveyance made in pursuance of the sale, even in the hands of a purchaser without actual notice.³¹ There must be a substantial compliance with such regulations, in order to pass a good title to the purchaser, the burden of proof being cast upon the purchaser unless the recitals show a compliance with the requirements of the law.³² The sale will, however, under

sonal trust, the trustee must be present and supervise the sale and act with impartiality to protect the rights of both debtor and creditor. *Kelso v. Farmers' Bank*, 166 Mo. 157, 65 S. W. Rep. 1007.

³¹ The provisions of a mortgage, in regard to notice of sale, on default, must be complied with or the sale will be void. *Ford v. Nesbit* (Ark. 1904), 79 S. W. Rep. 793; *Bausman v. Kelly*, 38 Minn. 197, 8 Am. Rep. 661, 36 N. W. Rep. 333; *Welsh v. Cooley*, 44 Minn. 446, 46 N. W. Rep. 908.

³² *Smith v. Prodin*, 4 Allen 518; *Roarty v. Mitchell*, 7 Gray 243; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 141; *John v. Bumpstead*, 17 Barb. 100; *Root v. Wheeler*, 12 Abb. Pr. 294; *Gibson v. Jones*, 5 Leigh, 370; *Ormsby v. Tarascon*, 3 Litt. 404. *Tyler v. Herring* (Miss.), 6 So. Rep. 740; *Pierce v. Grunley* (Mich.) 43 N. W. Rep. 932. Among others, the following circumstances have been deemed sufficient to set aside the sale: Neglect to give the required notice to the parties interested. *Low v. Purdy*, 2 Lans. 422; *King v. Duntz*, 11 Barb. 191; *Randall v. Hazleton*, 12 Allen, 422; *Green v. Cross*, 45 N. H. 594; *Drinan v. Nichols*, 115 Mass. 353; *Carpenter v. Black Hawk, etc., Co.*, 65 N. Y. 43; *Rutherford v. Williams*, 42 Mo. 18; *Hoodlers v. Ried*, 112 Ill. 105; *Clark v. Simmons*, 150 Mass. 357. An insufficient publication of notice. *Lawrence v. Farmers' Loan, etc., Co.* 13 N. Y. 642; *Elliott v. Wood*, 45 N. Y. 71; *Gibson v. Jones*, 5 Leigh, 370; *Bush v. Sherman*, 80 Ill. 160; *Hubbell v. Sibley*, 50 N. Y. 468; *Calloway v. People's Bank*, 54 Ga. 441; *Dickerson v. Small*, 64 Md. 395; *Morse v. Byam*, 55 Mich. 594; *Bacon v. Kennedy*, 56 Mich. 329; *Magnasson v. Williams*, 111 Ill. 450; *Lester v. Citizens Sav. Bank (R. I.)*, 20 Atl. Rep. 231; *Williamson v. Stone*, 27 Ill. App. 214, 128 Ill. 129. It is not usually necessary to sell the property in parcels, and unless it is essentially advantageous to the mortgagor, a failure to do so will not vitiate the sale. *Rowley v. Brown*, 4 Binn. 61; *Chesley v. Chesley*, 49 Mo. 540; *s. c.* 54 Mo. 347; *Sumrall v. Chaffin*, 48 Mo. 402; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Shannan v. Hay*, 106 Ind. 589; *Willard v. Finnegan*, 42 Minn. 476; *Holmes v. Turner's Falls Lumber Co.*, 150 Mass. 535; see statutes in New York, and several other States to the same effect. A sale on credit, when that is not expressly authorized,

such circumstances, operate as an equitable assignment of the mortgage and pass to the purchaser, whatever title the mortgagee, as such, has in the land.³³ And whether the purchaser claims title as assignee of the mortgage or not, the subsequent exercise of the power of sale in foreclosure is in no wise affected by the illegal exercise of the power.³⁴

§ 279. **Purchase by mortgagee at his own sale.**— Since the mortgagee as donee of the power is a trustee for all parties concerned, he will not be permitted to purchase at his own sale, directly or indirectly, unless he is authorized to do so by statute or by the terms of the mortgage. And such a purchase may be avoided at the instance of the mortgagor, even though the consideration be fair and adequate.³⁵ The pur-

is invalid. *Olcut v. Bynum*, 17 Wall. 44; *Mead v. McLaughlin*, 42 Mo. 198; *Arnold v. Green*, 15 R. I. 348; see 2 Jones on Mort., Secs. 1868, 1869. But he may give credit for what is coming to him, although not authorized. *Strother v. Law*, 54 Ill. 413. A sale is absolutely void only where there is a complete failure to comply with an essential requirement (*Bigler v. Waller*, 14 Wall. 297); and only voidable at the election of the parties, when the exercise of a discretion as to the manner of compliance is irregular or unwise. *Ingle v. Culbertson*, 43 Iowa 265. And to avoid the sale in the hands of a purchaser for value, notice of the irregularity must be brought to him. *Mann v. Best*, 62 Mo. 461; *Sternberg v. Dominick*, 14 Johns. 435; *Montague v. Dawes*, 12 Allen, 397; *Hoit v. Russel*, 56 N. H. 559; *Hamilton v. Lubukee*, 51 Ill. 415; *Jackson v. Henry*, 10 Johns. 185. The mere fact that land is sold in bulk, instead of in parcels, will not vitiate the mortgage sale, in Missouri. *Benton Land Co. v. Zeitler*, 182 Mo. 251, 81 S. W. Rep. 193. See, also, *Anglo-California Bank v. Cerf*, 142 Cal. 303, 75 Pac. Rep. 902; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. Rep. 218; *Sowle v. Champion*, 16 Ind. 165; *Nesbit v. Hanway*, 87 Ind. 400; *Brumbaugh v. Shoemaker*, 51 Iowa, 148, 50 N. W. Rep. 493; *Dickert v. Weise*, 2 Utah, 350.

³³ *Sawyers v. Baker*, 77 Ala. 461.

³⁴ *Ohnsburg v. Turner*, 87 Mo. 127.

³⁵ *Downes v. Grazebrook*, 3 Meriv. 207; *Davone v. Fanning*, 5 Johns. Ch. 257; *Jackson v. Walsh*, 14 Johns. 415; *Elliott v. Wood*, 45 N. Y. 71; *Patten v. Pearson*, 57 Me. 435; *Jennison v. Hapgood*, 7 Pick. 1; *Howard v. Ames*, 3 Metc. 308; *Dyer v. Shurtlieff*, 112 Mass. 165, 17 Am. Rep. 77; *Hall v. Bliss*, 118 Mass. 560, 19 Am. Rep. 475; *Waters*

chase by the mortgagee without express authority is, however, only voidable at the election of the mortgagor and his privies. And they cannot invalidate the sale, if the property in the meantime has passed into the hands of an innocent purchaser.³⁰

§ 280. **Extinguishment of the power.**—The power is extinguished by any acts, which will discharge the mortgage, such as payment or tender of payment, and the exercise of the power afterwards will not vest a good title in any pur-

v. Groom, 11 Clark & F. 684; *Michaud v. Girod*, 4 How. 553; *Scott v. Freeland*, 7 Smed. & M. 418; *Roberts v. Fleming*, 53 Ill. 196; *Parmenter v. Walker*, 9 R. I. 225; *Whitehead v. Hellen*, 76 N. C. 99; *Benham v. Rowe*, 2 Cal. 387; *Chilton v. Brooks*, 71 Md. 601; *Bohn v. Davis*, 75 Tex. 24; *Nichols v. Otto* (Ill.), 23 N. E. Rep. 411. Statutory provisions, authorizing the mortgagee to purchase at his own sale, are to be found in New York, Michigan, Wisconsin, Minnesota, Maryland. 2 Washburn on Real Prop. 74; 2 Jones on Mort., Sec. 1740. It is not necessary to show fraud or unfair dealing in order to avoid purchase by the mortgagee. *Rutherford v. Williams*, 42 Mo. 18; *Thornton v. Irwin*, 43 Mo. 153; *Blockley v. Fowler*, 21 Cal. 326. *Contra*, *Richards v. Holmes*, 18 How. 143; *Howard v. Davis*, 6 Texas, 174; *Hamilton v. Lubukeg*, 51 Ill. 420. When the sale is made under a judicial decree, or by a public officer, when that is permitted, there is no restriction upon the right of the mortgagee to purchase. *Richards v. Holmes*, 18 How. 143; *Maxwell v. Newton*, 65 Wis. 261. *Contra*, *Saines v. Allen*, 58 Mo. 537. The common law rule that a mortgagee could not purchase at the foreclosure sale, is not generally enforced at the present day. *Hamilton v. Rhodes* (Ark. 1904), 83 S. W. Rep. 351; *N. Y. Merc. Co. v. Thurmond*, 186 Mo. 410, 85 S. W. Rep. 333; *Farm Land Co. v. St. Raynor* (Neb. 1905), 102 N. W. Rep. 610; *Mutual L. & B. Co. v. Hiss*, 100 Ga. 111; *Ellenbarger v. Griffin*, 55 Ark. 268; *Knox v. Armstead*, 87 Ala. 511, 13 Amer. St. Rep. 65.

³⁰ *Dexter v. Shepard*, 117 Mass. 480; *Burns v. Thayer*, 115 Mass. 89; *Robinson v. Cullom*, 41 Ala. 693; *Rutherford v. Williams*, 42 Mo. 18; *McCall v. Mash* (Ala.), 7 So. Rep. 770. And the right to avoid the sale is extinguished by ratification of the mortgagor, or his acquiescence therein for an unreasonably long time. *Dobson v. Racey*, 8 N. Y. 216; *Patton v. Pearson*, 60 Me. 223; *Learned v. Foster*, 117 Mass. 365; *Bergen v. Bennett*, 1 Caine's Cas. 19; *Munn v. Burgess*, 70 Ill. 604; *Medsker v. Swaney*, 45 Mo. 273; *Craddock v. Am. Freehold, etc., Co.*, 88 Ala. 281. The doctrine of *bona fide* purchaser does not apply to

chaser,³⁷ unless the mortgagor by his own acts is estopped from denying the validity of the sale. Thus, for example, if the mortgagor is present at the sale and makes no protest, and gives no notice of his rights to the bystanders, he will be precluded under the doctrine of estoppel from setting aside the sale as against an innocent purchaser.³⁸ The power is, however, unaffected by the institution of an action for foreclosure, as long as the foreclosure has not been effected.³⁹

§ 281. **Application of the purchase money.**—The mortgagee, on receiving the proceeds of sale, must apply it first to the expenses of the sale, and then to the satisfaction of the mortgage-debt. And if there is a surplus remaining, he holds it in trust for the junior incumbrancers, and lastly, the mortgagor. Such surplus has in equity all the qualities of real estate, and, if the mortgagor has died, will be distributed among the widow and heirs, instead of going to his personal representatives.⁴⁰ On the other hand, if the purchase-money

a purchaser at a foreclosure of a mortgage sale. *Cooper v. Ryan* (Ark. 1904), 83 S. W. Rep. 328.

³⁷ *Cameron v. Irwin*, 5 Hill, 272; *Charter v. Stevens*, 3 Denio, 33; *Burnet v. Dennister*, 5 Johns. Ch. 35; *Warner v. Blakeman*, 36 Barb. 501; 2 *Jones on Mort.*, Secs. 886-893. Tender after condition broken does not at common law extinguish the power. *Cranston v. Crane*, 97 Mass. 459; *Montague v. Dawes*, 12 Allen 397. But in most of the States, payment has the same effect after as well as before condition broken. *Jenkins v. Jones*, *supra*; *Cameron v. Irwin*, *supra*; *Flower v. Elwood*, 66 Ill. 438; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Whelom v. Reilly*, 61 Mo. 565; see 2 *Jones on Mort.* Sec. 893; and *ante*, Sec. 247. But as long as the mortgage remains unsatisfied on the records, a sale after payment would be upheld in favor of a purchaser for value and without notice; *Elliott v. Wood*, 53 Barb. 285; *Brown v. Cherry*, 65 Barb. 635; *Warner v. Blakeman*, 56 Barb. 501.

³⁸ *Cromwell v. Bank of Pittsburg*, 2 Wall. Jr. 569; *Smith v. Newton*, 38 Ill. 230.

³⁹ *Jenkins v. International Bank*, 111 Ill. 462.

⁴⁰ *Buttrick v. Wentworth*, 6 Allen, 79; *Andrews v. Fisa*, 101 Mass. 422; *Dunning v. Dean Nat. Bank*, 61 N. Y. 497; 19 Am. Rep. 293; *Sweezy v. Thayer*, 1 Duer, 286; *Hawley v. Bradford*, 9 Paige, 200; *Pickett v. Buckner*, 45 Miss. 226; *Hinchman v. Stiles*, 9 N. J. Eq.

fell short of a settlement of the mortgage debt, the mortgagee may recover the balance of the debt in an action on the personal obligation.⁴¹

§ 282. **Deeds of trust.**—Somewhat similar in effect to mortgages with power of sale are deeds of trust, in which the property is conveyed to a trustee in trust to secure the creditor in his claim, and to sell the property for the satisfaction of the debt, if it is not paid at maturity. This conveyance is in the nature of a mortgage, and is very often used to secure an issue of railroad bonds, so as to avoid the necessity of giving a mortgage to each bond. But it is also very generally used in some of the Western States in the place of an ordinary mortgage, in order to obviate the difficulty of securing a valid sale of the premises, which is so often experi-

454; *Shaw v. Hoodley*, 8 Blackf. 165; *Reid v. Mullins*, 43 Mo. 306. In Vermont and Michigan, the surplus is held to be personalty, and vests in the personal representatives instead of the widow and heirs. *Varnum v. Meserve*, 8 Allen, 158; *Smith v. Smith*, 13 Mich. 258. The surplus is distributed among the claimants according to the priority of their respective interests, and their rights in case of a dispute may be settled by a suit against the mortgagee for the recovery of their alleged share in the surplus. *Bevier v. Schoonmaker*, 29 How. Pr. 411; *Cope v. Wheeler*, 41 N. Y. 303; *Stoever v. Stoever*, 9 Serg. & R. 434; *Matthews v. Duryea*, 45 Barb. 69; *Reynolds v. Hennessey*, 15 R. I. 215. Or the mortgagee may file a bill of interpleader, and compel the adverse claimants to settle their disputes. *Bleeker v. Graham*, 2 Edw. Ch. 647; *The People v. Ulster Com. Pleas*, 18 Wend. 628; *Bailey v. Merritt*, 7 Minn. 159. But without the consent of the mortgagor the mortgagee has no power to appropriate the money to any debt of the mortgagor which is not secured by the mortgage. *Johnson v. Thomas*, 77 Ala. 367. In Missouri, the surplus would go to the administrator of the mortgagor. *Curtis v. Moore*, 162 Mo. 442, 63 S. W. Rep. 80.

⁴¹*Shepherd v. May*, 115 U. S. 505. See, generally, as to disposition of surplus proceeds, after sale, *Berner v. State Bank*, 125 Iowa, 438, 101 N. W. Rep. 156; *Guenther v. Wisdom* (Ky. 1905), 84 S. W. Rep. 771; *New York Store Merc. Co v. Thurmond*, 186 Mo. 410, 85 S. W. Rep. 333. The doctrine of the text is not applicable to preferential expenses and charges, pending foreclosure, in the case of mortgages by railroads and other carriers. *Van Frank v. St. Louis & Cape Girardeau R. Co.*, 89 Mo. App. 489.

enced when the mortgagee exercises the power of sale. It is the conveyance of a legal estate in trust to secure the debt and its satisfaction by sale upon the breach of the condition.⁴² It is to be distinguished from an assignment for the benefit of creditors and does not come within the operation of laws which prohibit preferential assignments.⁴³ It has been held that the mere payment of the debt will not revest title in the grantor.⁴⁴ But the payment or tender of payment will render the trust inoperative so far as the subsequent exercise of the power is concerned.⁴⁵ The grantor by such a conveyance divests himself of his entire legal estate in possession, and has nothing left, against which execution may issue. But he has a reversionary interest, which in equity may be reached by a creditor's bill, and which is also capable of alienation.⁴⁶ If the trustee dies or refuses to execute the trust, the court will appoint another to take his place; and in some of the States, by statute, it is provided that, upon the death, inability or refusal of the trustee to serve, the sheriff will be

⁴² *Devin v. Hendershott*, 32 Iowa, 194; *Sherwood v. Saxton*, 63 Mo. 78; *Richard v. Holmes*, 18 How. 147; *Woodruff v. Robb*, 19 Ohio 122; *Chappell v. Allen*, 38 Mo. 213. See *Heard v. Baird*, 40 Miss. 799; *Lenox v. Reed*, 12 Kan. 233; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223; *Plum v. Studebaker*, 39 Mo. 162. But see 2 Am. Law. Reg. (N. S.) 655.

⁴³ *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223.

⁴⁴ *Heard v. Baird*, 40 Miss. 796. But the weight of authority is in favor of holding that a reconveyance is not necessary, although a satisfaction on the records may be required. *Crosby v. Huston*, 1 Texas, 239; *Ingle v. Culbertson*, 43 Iowa, 265; *McGregor v. Hall*, 3 St. & P. 397; *Woodruff v. Robb*, 19 Ohio, 122; *Smith v. Doe*, 26 Miss. 291.

⁴⁵ *Thornton v. Boyden*, 31 Ill. 210; *Heard v. Baird*, 40 Miss. 796. The trustee, under a deed of trust, is vested with a power, coupled with an interest which survives the death of the grantor. *Frank v. Colonial & N. S. Mort. Co.* (Miss. 1905), 38 So. Rep. 340. *Jones Mort.* (6ed.) Sec. 1792; *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. Rep. 1078; *Kelsay v. Bank*, 166 Mo. 157, 65 S. W. Rep. 1007.

⁴⁶ *Pettit v. Johnson*, 15 Ark. 55; *Turner v. Watkins*, 31 Ark. 429; *McIntyre v. Agric. Bank*, 1 Freem. Ch. 105; *Heard v. Baird*, 40 Miss. 796; *Tyler v. Herring* (Miss.), 7 So. Rep. 840; 2 *Jones on Mort.*, Sec. 1769.

authorized to execute the trust. Or the deed may itself provide for a substitution of trustees.⁴⁷ But without express authority the trustee can in no case delegate his power to sell.⁴⁸ But the court may, if they deem it wise, compel the trustee to execute the trust instead of appointing another.⁴⁹ If there are two or more trustees named as joint donees of the power, the sale will be valid, in the absence of direct proof of fraud or unfairness, although it is conducted in the absence of one of them.⁵⁰ This class of deeds of trust is governed by the same equitable rules, which are applied to ordinary trusts, unless there are statutory provisions intended to supersede them.

§ 283. Contribution to redeem — General statement.— When one of two or more persons jointly liable on a debt pays

⁴⁷ *Lake v. Brown*, 116 Ill. 83.

⁴⁸ *Holden v. Stickney*, 2 McArthur, 141; *Farmers' Loan, etc., Co. v. Hughes*, 11 Hun 130; *McKnight v. Winner*, 38 Mo. 132; *Whittlesey v. Hughes*, 39 Mo. 13. If there are two or more trustees, upon the death of one, the survivors may execute the power. *Peter v. Beverley*, 10 Pet. 565; *Franklin v. Osgood*, 14 Johns. 527; *Hannah v. Carrington*, 18 Ark. 104. The trustee is agent for both debtor and creditor. *Axman v. Smith*, 156 Mo. 286, 57 S. W. Rep. 105. The trustee must be personally present at sales under the power. *Kelsay v. Bank*, 166 Mo. 157, 65 S. W. Rep. 1007.

⁴⁹ *Leffler v. Armstrong*, 4 Iowa, 482; *Sargent v. Howe*, 21 Ill. 148; *Drane v. Gunter*, 19 Ala. 731; *Bradley v. Chester Val. R. R.*, 36 Pa. St. 141. Sales under the power are watched and closely scrutinized by the courts, and a court of equity will at any time, at the instance of one interested in the property, direct, restrain or enforce the exercise of the power. *Goode v. Comfort*, 39 Mo. 325; *Youngman v. Elmira, etc., R. R.*, 65 Pa. St. 278; *Newman v. Jackson*, 12 Wheat. 572; *Brown v. Bartee*, 10 Smed. & M. 275; *Kock v. Briggs*, 14 Cal. 256; *Reece v. Allen*. 5 Gilm. 236.

⁵⁰ *Smith v. Black*, 115 U. S. 308. On the death of a trustee, if the trust then devolves on the court, it appoints, not a substituted trustee, but a representative of the court, to execute the trust. *In re Guental*, 90 N. Y. S. 138, 97 App. Div. 530. A trustee has no power to appoint his successor, unless this power is expressly conferred. *Whitehead v. Whitehead* (Ala. 1904), 37 So. Rep. 929; *Wilson v. Towle*, 36 N. H. 129.

the whole debt, he has the right to call upon the others for contribution towards such payment in proportion to their several interests in the debt. This liability for contribution is an incident to all contractual obligations, and the same rules of construction apply, whatever may be the nature or origin of the debt. In the present discussion the liability for contribution arises out of the joint obligation of several persons to answer for the mortgage-debt, either in their person or with their interests in the mortgaged premises. It has been explained that when a person is entitled to redeem, and is interested only in a part of the premises, he must pay the entire debt, and as against the others jointly interested with him, he becomes subrogated to the mortgagee, and is equitable assignee of the mortgage, even though the mortgage has been satisfied on the records. He can then, in turn, foreclose the mortgage against them if they refuse to pay their *pro rata* share of the debt. This liability constitutes the right to contribution, as applied to mortgages. It is not a personal liability resting upon the persons interested in the mortgaged premises; their interests are alone liable. Nor can they be compelled to contribute; they have the right to refuse and to surrender their interests to forfeiture under foreclosure.⁵¹ This liability of their interests depends upon the equality or inequality of their respective equities in regard to the mortgage and the debt, and must, therefore, vary according to the relation of the parties between whom the question arises. But whatever may be the relation of

⁵¹ *Cheeseborough v. Millard*, 1 Johns. Ch. 409; *Stevens v. Cooper*, *Id.* 425; *Lawrence v. Cornell*, 4 Johns. Ch. 542; *Salem v. Edgerly*, 33 N. H. 46; *Chase v. Woodbury*, 6 Cush. 143; *Gibson v. Crehore*, 5 Pick. 146; *Briscoe v. Power*, 47 Ill. 449; *Wilkes v. Vaughan* (Ark. 1904), 83 S. W. Rep. 913; *Barrett v. Armstrong* (W. Va. 1904), 48 S. E. Rep. 140; *Blair v. Blair*, 90 N. Y. S. 190, 97 App. Div. 507. Contribution will not lie unless the payment was made by a joint debtor, as such. If one joint debtor buys the mortgaged property and assumes the mortgage debt, as a part of the consideration, an action for contribution will not lie. *Weidemeyer v. Landon*, 66 Mo. App. 520.

these parties to each other, the mortgagee cannot be compelled to observe the equality or inequality of their equities in the enforcement. He can proceed against any one of them, against whom he has a claim for the satisfaction of the mortgage, whether his equity was inferior or superior.⁵²

§ 284. *Mortgagor v. his assignees.*— Since the mortgagor is personally liable to pay the debt, as a general rule he would have no right to call upon his assignees to contribute, nor could his heirs or devisees claim such a right.⁵³ But if the purchaser assumed the mortgagor's liability as a part of the consideration of the conveyance, should the mortgagor be afterwards compelled by the mortgagee to pay the debt, the mortgagor would be subrogated to the rights of the mortgagee under the mortgage, and could enforce it against such purchaser.⁵⁴ Where there is no agreement on the part of the purchaser to pay the debt, if the mortgage is foreclosed, the purchaser can claim from the mortgagor exoneration for the full amount lost by foreclosure.⁵⁵ On the other hand, if the purchaser of the mortgagor's estate has assumed, in whole or in part, the payment of the mortgage-debt, he cannot claim contribution of the mortgagor, as long as he is not forced to pay more than he has agreed to pay.⁵⁶

⁵² *Palmer v. Snell*, 111 Ill. 161.

⁵³ *Harbert's Case*, 3 Rep. 11; *Chase v. Woodbury*, 6 Cush. 143; *Allen v. Clark*, 17 Pick. 47; *Beard v. Fitzgerald*, 108 Mass. 134; *Clowes v. Dickinson*, 5 Johns. Ch. 235; *Lock v. Fulford*, 52 Ill. 166; 2 *Jones on Mort.*, Sec. 1090.

⁵⁴ *Cox v. Wheeler*, 7 Paige Ch. 257; *Halsey v. Reed*, 9 Paige Ch. 446; *Kinnear v. Lowell*, 34 Me. 299; *Sweet v. Sherman*, 109 Mass. 231; *Lily v. Palmer*, 51 Ill. 333; *Krueger v. Ferry*, 41 N. J. Eq. 432; *Miller v. Fasler*, 42 Minn. 366; *Miller v. Eisele*, 42 Minn. 368; *Gerdine v. Menage*, 41 Minn. 417.

⁵⁵ *Davis v. Winn*, 2 Allen 111; *Downer v. Fox*, 20 Vt. 388; *Young v. Williams*, 17 Conn. 393; *Burnett v. Denniston*, 5 Johns. Ch. 35; *McLean v. Towle*, 3 Sandf. Ch. 119; *Gunst v. Pelham*, 14 Tex. 586.

⁵⁶ *Moore v. Shurtleff*, 128 Ill. 370; *Gunst v. Pelham*, 14 Tex. 586. In a purchase of the mortgagor's equity, if the purchaser assumes the

§ 285. Contribution between the assignees of the mortgagor — Effect of release of one of them.— If the mortgaged property consists of two or more parcels of land, and they are *simultaneously* conveyed by the mortgagor to different persons, and one of the parcels is sold under foreclosure of the mortgage, the assignee or grantee of that parcel has the right to recover from the assignees of the other parcels their *pro rata* share of the debt; the debt being divided among them in proportion to the value of their respective parcels.⁵⁷ But where the assignments have been made *successively*, or at different times, the courts have delivered contrary opinions in respect to their liability for contribution. In most of the States the rule prevails that their liability for contribution to each other is in the inverse order of alienation; in other words, that the equity of the prior purchaser or assignee is superior to that of the subsequent purchaser. So, if the prior purchaser is called upon to redeem, or his lot or parcel is foreclosed, he becomes an equitable assignee of the mortgage, and may enforce it against the subsequent purchasers of the other parcels, who, in order to redeem, must contribute to the full value of their estates in the inverse order of their alienation, the last being required to exhaust his entire

mortgage debt, as a part of the consideration, he is generally held to be the principal debtor thenceforth and the mortgagor becomes his surety. *Nelson v. Brown*, 140 Mo. 580; *Pratt v. Conway*, 148 Mo. 291; *Wagman v. Jones*, 58 Mo. App. 313. As to effect, upon the mortgagor, as to the statutes of limitations, of payments subsequently made by his assignee, see *Reagan v. Williams*, 185 Mo. 620, 84 S. W. Rep. 959. See also *ante*, Sec. 253 and note.

⁵⁷ *Chase v. Woodbury*, 6 Cush. 143; *Bailey v. Myrick*, 50 Me. 171; *Aiken v. Gale*, 37 N. H. 501; *Stevens v. Cooper*, 1 Johns. Ch. 425; *Briscoe v. Power*, 47 Ill. 448. The following late cases discuss and establish the legal status and relation of successive grantees, who assume the mortgage debt, *Stough v. Badger Lumber Co.* (Kan. 1905), 79 Pac. Rep. 737; *Grey v. Freeman* (Tex. 1905), 84 S. W. Rep. 1105; *Ray v. Lobdell*, 213 Ill. 389, 72 N. E. Rep. 1076; *Reagan v. Williams*, 185 Mo. 620, 84 S. W. Rep. 959; *Germania Ins. Co. v. Casey*, 90 N. Y. S. 418, 98 App. Div. 88; *Merriam v. Schmidt*, 211 Ill. 263, 71 N. E. Rep. 986; *Santee v. Keefe* (Iowa. 1903), 102 N. W. Rep. 803.

interest in the mortgaged property before there can be any right of contribution against a prior purchaser. If, therefore, the last parcel conveyed is sufficient to satisfy the debt, the prior purchaser takes his estate free from any liability for contribution. The inequality of their equities rests upon the doctrine that inasmuch as, after the first assignment, the estate remaining in the mortgagor became the primary fund for the satisfaction of the debt, the second and other subsequent purchasers took, in respect to their relative liabilities under the mortgage, only such equities as the mortgagor had at the time of the successive conveyances to them.⁵⁸ In a few of the States it is held that the equities are equal between assignees of the mortgagor, whether the alienations are simultaneous or successive, and this opinion finds strong support in Judge Story.⁵⁹ But it is believed that the preponderance of authority is in favor of the former theory, and it may be accepted as the prevailing rule in this country. This question of priority is, however, always subject to the agreement of the parties.⁶⁰ But if the mortgagee should release one of the assigned lots from the lien of the mortgage without the consent of the other assignees and after the assignment of the other lots to them, it would discharge

⁵⁸ *Cushing v. Ayer*, 25 Me. 383; *Shepherd v. Adams*, 32 Me. 64; *Brown v. Simons*, 44 N. H. 475; *Lyman v. Lyman*, 32 Vt. 79; *Bradley v. George*, 2 Allen, 392; *Gill v. Lyon*, 1 Johns. Ch. 447; *Jumel v. Jumel*, 7 Paige Ch. 591; *Patty v. Pease*, 8 Paige Ch. 277; *Nailer v. Stanley*, 10 Serg. & R. 450; *Henkle v. Allstadt*, 4 Gratt. 284; *Jones v. Myrick*, 8 Gratt. 179; *Stoney v. Shultz*, 1 Hill Ch. (S. C.) 500; *Norton v. Lewis*, 3 S. C. 25; *Mobile Dock, etc., Co. v. Kuder*, 35 Ala. 717; *Niles v. Harmon*, 80 Ill. 396; *Beard v. Fitzgerald*, 105 Mass. 134; *Mason v. Payne*, Walk. (Mich.) 459; *McCullom v. Turpie*, 32 Ind. 146; *Mahagan v. Meade*, 63 N. H. 570; *Moore v. Shurtleff*, 128 Ill. 370; *Deavitt v. Judevine*, 60 Vt. 695; *Case Threshing Machine Co. v. Mitchell* (Mich.), 42 N. W. Rep. 151, 74 Mich. 679.

⁵⁹ *Green v. Ramage*, 18 Ohio, 428; *Stanley v. Stocks*, 1 Dev. Eq. 314; *Barney v. Myers*, 28 Iowa, 1; *Jobe v. O'Brien*, 2 Humph. 34; *Dickey v. Thompson*, 8 B. Mon. 312; *Story's Eq. Jur.*, Sec. 1233 b, and note. *Huff v. Farwell*, 67 Iowa 298.

⁶⁰ *Vogel v. Shurtleff*, 28 Ill. App. 516.

the other lots from liability under the mortgage, on the ground that the rights of these other assignees had been injuriously affected by the consequent loss of their claim against the assignee who had been released for contribution or exonerations. But if the release was made before the assignment of the other lots, the release would have no effect on the lien of the mortgage over the other lots.⁶¹ So, also, any agreement between the mortgagor and his assignees, in respect to the partition of the mortgage liability between them, will have no effect on the mortgage in the hands of the holder of the mortgage, unless he has assented to such partition.⁶²

§ 286. Contribution between the surety and the mortgagor.—Where the surety, because of his personal liability, pays the mortgage debt, such payment will operate as an assignment of the mortgage to him, and he can enforce the mortgage to its full value against the mortgagor, his heirs, and even his assignees for value. He is only secondarily liable, the mortgagor, and with him the mortgaged premises, being treated as the primary fund out of which the debt is to be satisfied, and until they have been exhausted the surety can claim complete exoneration.⁶³ The widow who releases the dower right in the mortgaged lands is so far considered a surety that she can make claim of exoneration against the

⁶¹ *Libbey v. Tufts* (N. Y.), 24 N. E. Rep. 12; *Groesback v. Mattison*, 43 Minn. 547.

⁶² *DeHaven v. Musselman* (Ind.), 24 N. E. Rep. 171; *Groesbach v. Mattison*, 43 Minn. 547. Where it is a part of the consideration of the purchase by a grantee that he will pay the debt, the mortgagee can sue him direct to enforce payment thereof, in Illinois. *Merriam v. Schmidt*, 211 Ill. 263, 71 N. E. Rep. 986.

⁶³ *Cheesebrough v. Milliard*, 1 Johns. Ch. 409; *Hayes v. Ward*, 4 Johns. Ch. 123; *Ottman v. Moak*, 3 Sandf. Ch. 431; *Root v. Bancroft*, 10 Metc. 48; *Mathews v. Aiken*, 1 Comst. 595; *Bk. of Albion v. Burns*, 45 N. Y. 170; *Burton v. Wheeler*, 7 Ired. Eq. 217; *Bk. of S. C. v. Campbell*, 2 Rich. Eq. 179; *Billings v. Sprague*, 49 Ill. 511; *McHenry v. Cooper*, 27 Iowa, 137; *Canaday v. Boliver*, 25 S. C. 547.

estate of the deceased husband, and compel the enforcement of a chattel mortgage given for the same debt, in her own behalf.⁶⁴ The same rule applies where the one debt is secured by two mortgages on separate pieces of property, one of which only is given by the primary debtor, the other mortgage is in the nature of a collateral security, and the primary debtor's mortgage must exonerate the owners of the other mortgaged lands.⁶⁵ But if the surety be also the mortgagor and the other co-debtor the principal, and the latter pays the debt, he will not be subrogated to the rights of the mortgagee. He is the principal, and can claim contribution or exoneration of no one.⁶⁶

§ 287. **Between heirs, widow, and devisees of the mortgagor.** — If the mortgagor dies, and the mortgaged premises descend to his widow and heirs, or are devised by will to several parties, their equities being equal, if one of them redeems, the mortgage will be assigned to him, and he may foreclose the same against the others unless they contribute their *pro rata* share towards redemption. They are all volunteers, whether they be heirs or devisees, and it is likely — if a part of the mortgaged premises were devised and a part descended to the heirs — there would be a right in favor of the devisee to contribution from the heir, and *vice versa*.⁶⁷

⁶⁴ *Gore v. Townsend*, 105 N. D. 228. Where payment of a mortgage is necessary, to protect the homestead of the widow, she is entitled to contribution from the heirs, and equity will give her a lien on the interest of the heirs for their share of the mortgage debt. *Dinsmoore v. Rowse*, 211 Ill. 317, 71 N. E. Rep. 1003. But see as to payment by the heir of a second mortgagee, of a first mortgage, with reference to his right to proceed against the owner of the equity of redemption, who has not agreed to pay the first mortgage. *Brethauer v. Schorer*, 77 Conn. 575, 60 Atl. Rep. 125.

⁶⁵ *Canaday v. Boliver*, 25 S. C. 507.

⁶⁶ *Crafts v. Crafts*, 13 Gray, 362; *Killborn v. Robins*, 8 Allen, 471; *Cherry v. Monroe*, 2 Barb. Ch. 618; *Morris Admr. v. Davis*, 83 Va. 297; *Germania Ins. Co. v. Casey*, 90 N. Y. S. 418, 98 App. Div. 88; *Reagan v. Williams*, 185 Mo. 620, 84 S. W. Rep. 959.

⁶⁷ *Carll v. Butman*, 8 Me. 102; *Gibson v. Crehore*, 5 Pick. 146;

§ 288. **Between the mortgaged property and the mortgagor's personal estate.**—Upon the death of the mortgagor, leaving the mortgage unsatisfied, a claim for contribution or rather exoneration sometimes exists against the mortgagor's personal estate in favor of the real estate covered by the mortgage. The claim is founded upon the doctrine that the burden was imposed upon the real estate for the benefit of the personal estate, and as between the heirs and next of kin the latter should bear the loss.⁶⁸ Only the widow, heirs and devisees can claim this right of exoneration. Purchasers from the heirs, and voluntary purchasers from the mortgagor, cannot; nor can the heir or devisee exercise the right if they have parted with the equity of redemption, notwithstanding by the terms of their conveyance they are bound to see to the payment of the mortgage.⁶⁹ This claim is more clearly conceded, where the same debt was secured also by a mortgage of the personalty.⁷⁰ It can be enforced only against the personal representatives and residuary legatees. If, therefore, the personal estate has been bequeathed to others in the shape of general or specific legacies, the right to exoneration is

Houghton v. Hapgood, 13 Pick. 158; *Swaine v. Perine*, 5 Johns. Ch. 490; *Foster v. Hilliard*, 1 Story, 77; *Jones v. Sheward*, 2 Dev. & B. Eq. 179; *Merritt v. Hosmer*, 11 Gray, 296; *Bell v. Mayor of N. Y.*, 10 Paige Ch. 49; *Drew v. Rust*, 36 N. H. 343; *Eaton v. Simonds*, 14 Pick. 98; *Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. Rep. 1003.

⁶⁸ *Cope v. Cope*, 2 Salk. 449; *Patton v. Page*, 4 Hen. & M. 449; *Henagan v. Harlee*, 10 Rich. Eq. 285; *Trustees, etc., v. Dickson*, 1 Freem. Ch. 494. But this is not the case, where the mortgage was executed by a prior owner, and the ancestor purchased the property subject to the mortgage. The heir or devisee must, in such a case, pay the mortgage. *Tweddle v. Tweedle*, 2 Bro. Ch. 101; *Cumberland v. Codrington*, *supra*; *Brethauer v. Schorer*, 77 Conn. 575, 60 Atl. Rep. 125.

⁶⁹ *Goodburn v. Stevens*, 1 Md. Ch. 42; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Cumberland v. Codrington*, 3 Johns. Ch. 229; *Lockhardt v. Hardy*, 9 Beav. 379; *Haven v. Foster*, 9 Pick. 112; *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419; *Claws v. Dickenson*, 5 Johns. Ch. (N. Y.) 235; 3 Amer. & Eng. Dec. in Eq. 206.

⁷⁰ *Gore v. Townsend*, 105 N. C. 228.

lost.⁷¹ Nor can the right be exercised if the estate of the mortgagor is insolvent; and whether the estate is insolvent or not, it cannot be enforced against property which has been levied upon, nor will the right of exoneration in any case take precedence to liens held by creditors upon the personal property.⁷² In New York there will be no such claim for exoneration, unless the mortgagor has by will expressly made the payment of the debt a charge upon the personalty.⁷³

§ 289. Special agreements affecting the rights of contribution and exoneration.—If, in any case where the right of contribution or exoneration exists by law, the parties to the mortgage agree that one or more parcels covered by the mortgage should be released from the incumbrance, such agreement will be enforced between the parties and their subsequent assignees. But in no case will it be permitted to affect or alter the equities of parties who had previously become interested in the mortgaged property.⁷⁴ And if the mortgagee releases one part of the mortgaged premises, after the mortgagor had assigned another part, the mortgagee can only enforce the mortgage against the assignee to an amount determined by the proportion which the value of the entire mortgaged premises bears to the value of such assigned parcel.⁷⁵

§ 290. Marshalling of assets between successive mortgagees.—When there are two mortgages upon one parcel of land,

⁷¹ *Cope v. Cope*, 2 Salk. 449; *Mansell's Estate*, 1 Pars. Eq. Cas. 367; *Gibson v. McCormick*, 10 Gill & J. 65; *Torr's Estate*, 2 Rawle, 250.

⁷² *Gibson v. Crehore*, 3 Pick. 475; *Church v. Savage*, 7 Cush. 440.

⁷³ *Moseley v. Marshall*, 27 Barb. 42; *Rapalye v. Rapalye*, *ib.* 610; *Wright v. Holbrook*, 32 N. Y. 587.

⁷⁴ *Welsh v. Beers*, 8 Allen, 151; *Bryant v. Damon*, 6 Gray, 564; *Cheesebrough v. Milliard*, 1 Johns. Ch. 425.

⁷⁵ *Stevens v. Cooper*, 1 Johns. 425; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Parkham v. Welsh*, 19 Pick. 231; *Inglehart v. Crane*, 42 Ill. 261; *Taylor v. Short*, 27 Iowa 361, 1 Am. Rep. 280.

and the first mortgage covers another parcel which is not included in the second, if the parcel included in both mortgages is not sufficient to satisfy both debts, equity gives the junior mortgagee the right to call upon the senior mortgagee to exhaust the parcel not covered by both mortgages, before he forecloses against the other parcel. But equity will not compel the first mortgagee to satisfy himself in that manner, if it would be detrimental to his interests or inconvenient to him. In such a case, however, the court will direct him to assign his mortgage to the junior mortgagee, who may then foreclose against the parcel not covered by his own mortgage.⁷⁶ An exception to this rule of marshalling of assets between two mortgages is however recognized in favor of a wife who joins in the execution of one mortgage for the purpose and with the intention of relinquishing her homestead, and reserves her homestead in the execution of the second mortgage. The second mortgagee cannot, on the principle set forth above, claim the right of satisfying his claim against the homestead.⁷⁷ Not only is this the case, but the first mortgagee can be required to exhaust his lien on the mortgaged property, which is not covered by the homestead claim, before he is permitted to enforce such lien against the homestead estate.⁷⁸

⁷⁶ *Laney v. Athol*, 2 Atk. 446; *Evertson v. Booth*, 19 Johns. Ch. 486; *Cheesebrough v. Milliard*, 1 Johns. Ch. 412; *Warren v. Warren*, 30 Vt. 530; *Reilly v. Mayor*, 12 N. J. Eq. 55; *Baine v. Williams*, 10 Smed. & M. 113; *Ingelhart v. Crane*, 42 Ill. 261; *Swigert v. Bk. of Ky.*, 17 B. Mon. 285; *Miami Ex. v. U. S. Bank*, *Wright (Ohio)* 249; *Conrad v. Harrison*, 3 Leigh, 532; *Bk. of S. C. v. Mitchell*, *Rice Eq.* 389; *Marr v. Lewis*, 31 Ark. 203, 25 Am. Rep. 553. So, if a mortgagee, has a superior lien to that of a judgment creditor, he will be compelled to resort first to the fund on which he alone has a lien. *Hall v. Stevenson*, 19 Oregon, 153; *Cheesebrough v. Milliard*, 1 Johns. Ch. (N. Y.) 409. And the converse of this rule is also enforced, in favor of the mortgagee, if a judgment creditor has other security. *Robison's App.* 117 Pa. 628; *Bank v. North*, 4 Johns. Ch. (N. Y.) 370.

⁷⁷ *Mitchleson v. Smith (Neb.)*, 44 N. W. Rep. 871; *Horton v. Kelly*, 40 Minn. 193; *McCreery v. Schaffer*, 26 Neb. 173.

⁷⁸ *Horton v. Kelly*, 40 Minn. 193; *McCreery v. Schaffer*, 26 Neb.

173. The doctrine of marshalling only applies between creditors. And between debtor and creditor the right does not exist. A mortgagor cannot deprive the mortgagee of his right to proceed either on the debt, or against the land. *Rogers v. Myers*, 68 Ill. 92. And if the mortgage covers both homestead and other property, the mortgagor cannot compel the mortgagee to resort first to the other security, to save the homestead. *Plain v. Roth*, 107 Ill. 588. See, generally, for late cases, on marshalling assets, between mortgagees and others. 2 Amer. & Eng. Dec. in Eq. 429.

PART II.

EXPECTANT, EXECUTORY AND EQUITABLE INTERESTS.

CHAPTER XII. REVERSIONS.

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CHAPTER XII.

" REVERSION."

SECTION 291. Definition.

292. Reversion — Assignable and devisable.

293. Reversion — Descendible to whom.

294. Dower and curtesy in reversions.

295. Rights and powers of the reversioner.

§ 291. Definition.— A reversion is that estate which remains to an owner of land after he has conveyed away a particular estate. It is a vested estate of future enjoyment, the possession of which is postponed until the determination of the estate granted. There is always a reversion as long as the entire fee has not been exhausted. Thus, after any number of successive estates for life or for years, there is still a reversion left in the grantor. So also is there a reversion after an estate-tail, although there was none after the fee conditional at common law, which the statute "*de donis*" converted into an estate-tail.¹ But where one grants a base or determinable fee, since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him. That is, he has no future vested estate in fee, but only what is called a naked *possibility of reverter*, which is incapable of alienation or devise, although it descends to his heirs.² But

¹ 2 Washburn on Real Prop. 737, 738; 2 Cruise Dig. 335.

² 2 Cruise Dig. 335; 2 Washburn on Real Prop. 739; *Ayres v. Falkland*, 1 Ld. Raym. 326; *Cook v. Bisbee*, 18 Pick. 529; *The State v. Brown*, 27 N. J. L. 20. Carving out a *part* of the estate held by the grantor gives rise to the terms "particular" estate, as applied to that granted, and the right reserved to have the rest of the estate "*revert*," on the termination of the "particular" estate denominates this latter estate the "reversion." Williams Real Prop. 241; 2 Bl. Com. 165; 1 Tiffany Real Prop. Sec. 113, p. 270.

where the particular estate is an estate upon limitation and more particularly where it is limited by the life of a person, or by a contingent event, which may cause it to last during some life, the estate will not be such a determinable or qualified fee as does not admit of a reversion, although the estate be granted to A. and his heirs. Thus, a limitation to A. and his heirs during the widowhood of B. or the residence of C. in Rome, would be a life-estate, and there would be a reversion left in the grantor instead of a possibility of reverter.³ A grant to A. and his heirs, as long as a tree stands, would likewise leave a reversion in the grantor.⁴ But a grant to A. and his heirs until B. returns from Rome would be a fee upon limitation, and since it is doubtful if the contingency will happen, and if it does not, the estate becomes an absolute fee in the grantee, the grantor has only a possibility of reverter, and not a reversion.⁵ And a reversion arises where there is a particular estate created by operation of law, as in the case of dower or curtesy.⁶ Not only is there a reversion in the case of an owner of the fee parting with a portion of it, but it exists, whatever may be

³ 1 Prest. Est. 442; *The State v. Brown*, 27 N. J. L. 20; *McKelway v. Seymour*, 29 N. J. L. 329.

⁴ 1 Prest. Est. 440; 1 Washburn on Real Prop. 90; *Com. v. Hackett*, 102 Pa. St. 505.

⁵ 1 Washburn on Real Prop. 90; 1 Prest. Est. 441.

⁶ It is so far a reversion that if the reversioner should die during the life-time of the tenant in dower or curtesy, the wife or husband, respectively, of the reversioner would have no dower or curtesy in such lands. *Dos de dote peti non debet*. *Cook v. Hammond*, 4 Mason, 485; *Geer v. Hamblin*, 1 Me. 54; *Dunham v. Osborn*, 1 Paige Ch. 634; *Reynolds v. Reynolds*, 5 Paige Ch. 161; *Safford v. Safford*, 7 Paige Ch. 259; Co. Lit. 31 a; 4 Kent's Com. 65; 2 Washburn on Real Prop. 740. But if the widow of the ancestor has not had her dower set out, when the widow of an heir demands an assignment, the latter widow may have her dower set out in all the property, subject, however, to be subsequently defeated *pro tanto* by the assignment of the dower to the senior widow. 1 Cruise Dig. 164; *Hitchens v. Hitchens*, 2 Vern. 405; *Greer v. Hamblin*, *supra*; *Elwood v. Klock*, 13 Barb. 50; *Robinson v. Miller*, 2 B. Mon. 288.

the estate, whether in tail, for life, or for years, out of which a less estate has been carved.⁷

§ 292. Reversion assignable and devisable.—The reversion may be assigned or devised as freely as an estate in possession—subject, of course, to the prior particular estate. It cannot be conveyed by the common-law conveyance of feoffment, since the reversioner could not deliver actual seisin. But it may be transferred by grant in the nature of a release, or by any of the deeds operating under the Statute of Uses.⁸ But the statement that a reversion cannot be conveyed by feoffment, is correct only when the particular estate already granted is a freehold. If the particular estate is less than a freehold, as an estate for years, the actual seisin is in the reversioner, and he may make a conveyance of his estate by feoffment.⁹ At common law it was necessary to obtain the consent of the tenant of the particular estate for the effective transfer of the reversion. This was called the attornment, a mutual obligation upon tenants and reversioner which pre-

⁷ 2 Washburn on Real Prop. 739; 2 Cruise Dig. 335, 336. Where land is deeded, upon condition that it shall be used for a specific purpose, or revert to the grantor, upon the failure to so use it, it reverts to the grantor. *Green's Admr. v. Irvine* (Ky. 1902), 66 S. W. Rep. 278. A deed conditioned upon the support and maintenance of the grantor, during life, is a conditional deed, on breach of which, the land reverts to the grantor, in Missouri. *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. Rep. 656. A deed conditioned for the support of the grantor unless apt words of reverter are used, on breach of the condition, conveys the fee. *Studdard v. Wells*, 120 Mo. 25, 25 S. W. Rep. 201. For reverter of land acquired by condemnation, on abandonment, see, *Remey v. Iowa Cent. Co.*, 89 N. W. Rep. 218. But where the legal effect of the condemnation is to vest the absolute title to the land in the company, no reverter, on abandonment, results. *Wood v. Mobile Co.*, 107 Fed. Rep. 846, 47 C. C. A. 9. For reversions in grants for eleemosynary or religious purposes, where grant provides for reverter on failure to use land for such purposes, see, *Gen. Ass. Presby. Ch. v. Alexander*, 46 S. W. Rep. 503; *Green v. O'Connor* (R. I.), 19 L. R. A. 262; *Wills v. Davidson*, 54 N. J. Eq. 659, 35 L. R. A. 113.

⁸ 2 Washburn on Real Prop. 738.

⁹ Co. Lit. 48 b; *Williams on Real Prop.* 242.

vailed under the feudal system. But it was abolished by statute in the reign of Queen Anne.¹⁰ But a reversion cannot be granted to commence in the future, any more than an estate in possession, except by way of a future use.¹¹ The reversion might be carved up into two or more estates, but each estate must be so assigned that it shall take effect in possession immediately after the determination of the preceding estate.

§ 293. Reversion descendible to whom.—Under the common-law maxim of descent, *seisina facit stipitem non jus*, the reversion can only descend to the heirs of the person who was last *seised* in fact. If a person grants a life estate or other freehold estate less than a fee, his heirs could inherit the reversion, but if they should in turn die before the determination of the particular estate of freehold, only those who can trace their descent as heir from the grantor could inherit from such heirs.¹² If, however, the reversion is assigned or devised, or is sold under levy of execution, such purchaser

¹⁰ 2 Washburn on Real Prop. 738; Williams on Real Prop. 247. This statute is generally recognized as in force in the United States. See *Burden v. Thayer*, 13 Metc. 78; *Coker v. Pearsall*, 6 Ala. 542.

¹¹ 2 Washburn on Real Prop. 738; 1 Prest. Est. 89; 2 Cruise Dig. 336; *Jones v. Roe*, 3 T. R. 93. A conveyance of a tract of land to one, for life, with remainder to grantor's heirs, leaves an absolute power of disposition in the grantor, as to the reversion, since he is the first reversioner, in order of time. *Akers v. Clark*, 184 Ill. 136, 56 N. E. Rep. 296. An execution sale of property, while in possession of the grantee, who was to use the land for a specific purpose, with reversion to the grantor on failure to so use it, does not divest the reversion, in Arkansas. *Pettitt v. Norman Institute*, 67 Ark. 430, 55 S. W. Rep. 485. A mortgage by a lessor on his reversionary interest in the demised premises, imposes no limitation on his rights. *Bradley & Co. v. Peabody Coal Co.*, 99 Ill. App. 427. A lessee purchasing a mortgage of the fee, can hold possession, as against a reversioner, until payment of his mortgage, as he is considered a mortgagee in possession, in New York. *Barson v. Mulligan*, 73 N. Y. S. 262, 66 App. Div. 486.

¹² 2 Washburn on Real Prop. 740, 741; 4 Kent's Com. 385; Williams on Real Prop. 100, 101; 3 Cruise Dig. 142; *Cook v. Hammond*, 4 Mason, 467; *Miller v. Miller*, 10 Metc. 393.

or devisee would constitute a new stock of descent, and his heirs would take the reversion as if it had been an estate in possession.¹³ The above rule only applies where the particular estate is a freehold. If it be a term of years—as will be more fully explained in treating of remainders—the tenant holds the possession as a *quasi-bailee* of the reversioner, the latter is deemed to be actually seised; and so also would be his heirs before the expiration of the estate for years.¹⁴ But this common-law doctrine has been abrogated in most, if not all, the States of this country, so that it possesses at present but little practical importance.¹⁵

§ 294. Dower and curtesy in reversions and remainders.—

The wife or husband of the reversioner will not have, respectively, dower or curtesy in the reversion unless the particular estate is less than a freehold, or unless it determines during the life-time of the reversioner. The vesting of these estates requires actual seisin in the husband or wife, and, as has been shown in the previous paragraph, the reversioner is not actually seised when the particular estate is a freehold.¹⁶

¹³ 1 Washburn on Real Prop. 741; Williamson Real Prop. 100, 101; 4 Kent's Com. 386. But see, *Pettitt v. Norman* Inst., 67 Ark. 430, 55 S. W. Rep. 485.

¹⁴ Co. Lit. 15 a; 2 Washburn on Real Prop. 741.

¹⁵ 2 Washburn on Real Prop. 741. See *post*, Chapter on *Title by Devise*.

¹⁶ 2 Washburn on Real Prop. 741; 2 Cruise Dig. 338; 4 Kent's Com. 39; *Brooks v. Everett*, 13 Allen, 458; *Robinson v. Codman*, 1 Sumn. 130; *Dunham v. Osborn*, 1 Paige Ch. 634; *Durando v. Durando*, 23 N. Y. 331; *Shoemaker v. Walker*, 2 Serg. & R. 556; *Arnold v. Arnold*, 8 B. Mon. 202. And if the husband sells his reversion during the continuance of the prior freehold estate, the wife loses all possibility of acquiring the dower right by the determination of the particular estate. *Gardner v. Greene*, 5 R. I. 104; *Apple v. Apple*, 1 Head, 348. As to remainders. *Watson v. Watson*, 150 Mass. 84. Under the New York statute, dower will not attach to a contingent remainder, expectant upon a life estate. *Ward v. Ward*, 131 Fed. Rep. 946; *Jackson v. Walters*, 83 N. Y. S. 696, 86 App. Div. 470. The statute of limitations would not begin to run against heirs of a married woman,

§ 295. **Rights and powers of the reversioner.**—It may be generally stated, that the reversioner has all the powers and rights which the tenant of an estate in remainder would have. He can maintain his action for waste against strangers as well as against the tenant of the particular estate, and has a right to receive rents accruing from such tenant; and so will his assignee, if the rent is not reserved or granted away to another.¹⁷ The same doctrine of merger applies, if the particular estate and the reversion become united in the same person. And if the tenant of the particular estate is disseised, it will have no more effect upon the reversion than it would have upon a remainder. For any further explanation of the rights and powers of reversioners, reference may be had to the chapter on Remainders. The subject is there presented in detail as to remainder-men, and as the rights and powers of remainder-men and reversioners are identical, it requires but one statement of them.¹⁸

in favor of a grantee of the husband, under a deed to his estate, until the death of the husband and the consequent end of his estate by curtesy. *Wilson v. Frost*, 186 Mo. 311, 85 S. W. Rep. 375. See, also, *Dickinson v. Bank*, 111 Ill. App. 183; *Ousler v. Robinson* (Ark. 1904), 80 S. W. Rep. 227. In Illinois, dower will not attach to a remainder, unless the particular estate terminates during coverture. *Kirkpatrick v. Kirkpatrick*, 107 Ill. 144, 64 N. E. Rep. 267. A vested fee-simple estate in remainder is such "property belonging to the wife," as to give her husband, on her death without issue, a life estate, as tenant by curtesy, under the Maryland statute. *Snyder v. Jones*, 99 Md. 693, 59 Atl. Rep. 118.

¹⁷ Co. Lit. 143 a; 2 Washburn on Real Prop. 742-744; *Jesser v. Gifford*, 4 Burr. 2141; *Simpson v. Bowden*, 33 Me. 549; *Livingston v. Haywood*, 11 Johns. 429; *Burden v. Thayer*, 3 Metc. 76; *Wood v. Griffin*, 46 N. H. 239; *Ripka v. Sergeant*, 7 Watts & S. 9. See *ante*, Secs. 137, 148, 149.

¹⁸ See *post*, chap. XIII. Apart from the difference in the manner, in which the remainder and the reversion are created, Mr. Williams says: "A remainder chiefly differs from a reversion in this,—that between the owner of the particular estate and the owner of the remainder (called the remainder-man) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other."

Williams on Real Prop. 250. Until actual entry for breach of a condition, the grantee of an estate upon condition holds the legal title as against the reversioner. *Little Falls Water Power Co. v. Mahan*, 69 Minn. 253, 72 N. W. Rep. 69; *Donnelly v. Eastes*, 94 Wis. 390, 69 N. W. Rep. 157. The remedy for the enforcement of the grantor's right, to recover possession, on breach of a condition subsequent, in a deed, is at law and not in equity. *Mourat v. Seattle and C. R. Co.*, 16 Wash. 84, 47 Pac. Rep. 233. A reversioner, entitled to re-enter on breach of a condition subsequent, cannot re-enter after a conveyance of his interest. *Lewis v. Lewis*, 76 Conn. 586, 57 Atl. Rep. 735. The owner of the reversion is entitled to rents only from the death of the life tenant and the burden is on him to show the termination of the life estate, in a suit for rents due him. *McKee v. Dail* (Tenn.), 1 Tenn. Ch. 689. For cause of action for damages for injury to the reversion, from acts amounting to waste, see *Palmer v. Young*, 108 Ill. App. 252; *Champ Spring Co. v. Roth Tool Co.* (Mo. 1903), 77 S. W. Rep. 344. Injury must be to inheritance to give reversioner right to sue. *Watson v. Harrigan*, 112 Wis. 278, 87 N. W. Rep. 1079.

CHAPTER XIII.

REMAINDERS.

- SECTION I. *Of remainders in general and herein of vested remainders.*
II. *Contingent remainders.*
III. *Estates within the rule in Shelley's Case.*

SECTION I.

OF REMAINDERS IN GENERAL AND HEREIN OF VESTED REMAINDERS.

- SECTION 296. Nature and definition of remainders.
297. Kinds of remainders.
298. Successive remainders.
299. Disposition of a vested remainder.
300. Relation of tenant and remainder-man.
301. Vested and contingent remainders further distinguished
— Uncertainty of enjoyment.
302. Same — Remainder to a class.
303. Same — After the happening of the contingency.
304. Cross remainders.

§ 296. Nature and definition of remainders.— It will have been already observed from the preceding pages, that at common law the only mode of transferring freehold estates in possession was by a ceremony known as *livery of seisin*, and that there could be but one actual seisin, which always accompanied the freehold estate in possession.¹ The livery of seisin being a manual delivery of possession, and the title passing *in præsenti* by virtue of such delivery, it is but a natural consequence that, according to the common law, no freehold estate can be created to commence *in futuro*, conveying

¹ See *ante*, Sec. 24.

a present title to the same. We have seen, though, in the preceding chapter on Reversions, that an estate in possession less than a fee may be granted, leaving a reversion in the grantor, which he could subsequently assign by deed of grant.² The difficulty experienced at common law in creating future estates lay in the fact, that they had no mode of conveyance which did not operate by transmutation of possession. It was necessary that immediate possession should accompany the creation or transfer of the title.³ In fact, livery of seisin was nothing more than the delivery of the possession of a freehold. If, therefore, a particular estate in possession had already been granted, or was conveyed at the same time with the future estate, the obstacle in the way of creating the latter was removed. If the particular estate was granted by a prior deed, the future estate was a reversion in the grantor which could afterward be conveyed by grant. But if it was granted at the same time as the future estate, and by the same deed, the future estate was called a remainder. A remainder is, therefore, a future estate in lands, which is preceded and supported by a particular estate in possession, which takes effect in possession immediately upon the determination of the prior estate, and which is created at the same time and by the same conveyance.⁴ It follows, therefore, from this definition, that a remainder can only be acquired by purchase; it never vests by descent.⁵ Nor can a remainder be supported by an

² See *ante*, Sec. 292.

³ See *post*, Secs. 535, 536, 357; 2 Washburn on Real Prop. 536, 538, 539; Co. Lit. 217 a.

⁴ 2 Washburn on Real Prop. 539; 2 Bla. Com. 163; Co. Lit. 143. See also *Doe v. Considine*, 6 Wall. 474; *Brown v. Lawrence*, 3 Cush. 390; *Booth v. Terrell*, 16 Ga. 20.

⁵ *Dennett v. Dennett*, 40 N. H. 504; see *Langdon v. Strong*, 2 Vt. 254. In the same manner, there must be a conveyance of the prior particular estate. A man cannot grant a remainder, reserving to himself a prior estate for life. The grant, if it took effect at all, would create in the grantee a springing use and not a remainder. *Bissell v. Grant*, 35 Conn. 297. See also *post*, Chap. on Springing Uses, Chapter XIV.

estate which is created by operation of law. The future estate, which vests in the heirs upon the determination of the widow's dower, or the husband's curtesy, is not a technical remainder, but a reversion.⁶ If the future estate does not take effect in possession immediately upon the expiration of the prior or particular estate (the prior estate is called *particular*, derived from the latin *particula*, part or parcel), it is not a remainder, and if it cannot take effect as an assigned reversion, a future use or an executory devise—which will be explained hereafter.⁷—it will be void, and the conveyance will fail.⁸ But the refusal of a devisee to accept a particular estate will not defeat that devise of the remainderman. The remainderman would in such a case take from the death of the testator, the devise of the particular estate being treated as having lapsed. Nor will the disaffirmance by an infant tenant for life have any effect upon the validity of the remainder. But if the particular estate is void, through some quality annexed to the estate in its inception as, by entry of the grantor for condition broken, the remainder will also fail, if it cannot then take effect in possession.⁹

⁶ Greer v. Hamblin, 1 Me. 54; Cook v. Hammond, 4 Mason 485, Reynolds v. Reynolds, 5 Paige, 167; Safford v. Safford, 7 Paige Ch. 259; Robinson v. Miller, 2 B. Mon. 288; Elwood v. Klock, 13 Barb. 50; Hitchens v. Hitchens, 2 Vern. 405; 1 Cruise Dig. 164; 4 Kent's Com. 65, Co. Lit. 31 a. See *ante*, Sec. 291.

⁷ See *post*, Secs. on Contingent, Springing and Shifting Uses in Chapter XIV.

⁸ 2 Washburn on Real Prop. 540; 1 Prest. Est. 217; Williams on Real Prop. 249-251; Wilkes v. Lion, 2 Cow. 333. A remainder cannot exist without a particular estate to support it and if the particular estate expires before the remainderman is qualified to take possession, the remainder expires with it. Accordingly, a remainder limited to the grandchildren of testator or their issue, with a cross remainder to testator's son and his issue, is defeated by the death of all the remaindermen and their issue, prior to the determination of the particular estate, and it is held, in Iowa, that the title to the land would revert to the heirs of the testator. Archer v. Jacobs, 125 Iowa 467, 101 N. W. Rep. 195.

⁹ 2 Washburn on Real Prop. 555; Co. Lit. 298 a; Thompson v. Leach,

§ 297. *Kinds of remainders.*—Remainders are divided into two classes, *vested* and *contingent*. A vested remainder is a present vested right to the future enjoyment of the land. In a vested remainder only the possession is postponed. It is, therefore, a *vested* and *executory* estate.¹⁰ A contingent remainder is one in which both the title and the possession are postponed. The vesting of the title depends upon the happening of an uncertain event which may not happen at all, or at a time subsequent to the determination of the particular estate. The possession depends upon the vesting of the title, and as the estate must take effect in possession immediately upon the expiration of the particular estate, it will fail if the contingency does not occur before that event.¹¹ And at

2 Salk. 576; Prescott v. Prescott, 7 Metc. 141; Macknet v. Macknet, 24 N. J. Eq. 277; Lawrence v. Hebbard, 2 Bradf. 250; Goodall v. McLean, 2 Bradf. 306; Yeaton v. Roberts, 28 N. H. 459; Augustus v. Seabolt, 3 Metc. 161; Archer v. Jacobs, 125 Iowa 467, 101 N. W. Rep. 195. But the statement in the text, that the entry of the grantor, for the breach of a condition annexed to the particular estate, would defeat the remainder, applies only to common-law remainders. A limitation to take effect upon the breach of a condition may be valid as an executory devise or as a shifting use. See *ante*, Sec. 211, and *post*, Secs. 313, 391, 392.

¹⁰ Croxall v. Sherard, 5 Wall. 288; Doe v. Considine, 6 Wall. 474; Brown v. Lawrence, 3 Cush. 390; Blanchard v. Blanchard, 1 Allen 227; Hill v. Baron, 106 Mass. 578; Leslie v. Marshall, 31 Barb. 564; Moore v. Lyons, 25 Wend. 119; Gourley v. Woodbury, 42 Vt. 395. Mr. Preston's definition is: "It is the present capacity of taking effect in possession, if the possession were fallen." 1 Prest. Est. 70.

¹¹ 2 Washburn on Real Prop. 542; Doe v. Morgan, 3 T. R. 764; Purefoy v. Rogers, 2 Lev. 39; Hawley v. James, 5 Paige Ch. 466; Moore v. Lyons, 25 Wend. 144; Williamson v. Field, 2 Sandf. Ch. 553; Price v. Sisson, 13 N. J. L. 176; Archer v. Jacobs, 125 Iowa 467, 101 N. W. Rep. 195. There have been various tests suggested for determining, whether in a given case a future estate is a vested or contingent remainder, and the more common one is that given by Mr. Fearne, viz.: "The present capacity of taking effect in possession, if the possession were to become vacant, . . . distinguishes a vested remainder from one that is contingent." Fearne Cont. Rem. 216; 2 Cruise Dig. 200. This was a reliable test, if it was understood that it mattered not in what way or by what means the prior particular estate is determined, whether by for-

common law a remainder to a child *en ventre sa mere* would be defeated if it was not born before the termination of the particular estate. This rule, however, has now in most of the States been changed by statute, and an unborn child after conception is considered as sufficiently a living being, in order to take an estate.¹² A contingent remainder is both contingent and executory. As long as there is some one in being who can take and hold the actual seisin, no violation of the common-law rule, which requires an ascertained tenant of the *præcipe*, will be committed, whether the title to the remainder vests immediately or whether its vesting is postponed to some future time.¹³ In this way is the validity of a contingent

feiture, merger, or disseisin, or by the natural termination of the estate. But since at the present day, in most of the States, the defeat of the prior estate in any other way, except by this natural termination, will not avoid the contingent remainder depending upon it, this test is no longer reliable and another must be found. The following is suggested as a reliable test, viz., the present capacity to convey an absolute title to the remainder. This test would, however, give rise to a qualification, where the remainder is to a class, and some of the class are not yet *in esse*. The remainder, so far as those *in esse* are concerned, is held to be vested (see *post*, Sec. 302), while such remaindermen could not convey an absolute title, thus excluding the after-born members of the class from their right in the remainder, although they can convey an absolute title to *their own* interest in it. In New York, Michigan, Wisconsin, Minnesota, California, Dakota, it is provided by statute that no contingent remainder shall fail if the contingency does not occur before the termination of the particular estate, and that such remainder shall take effect in possession after the termination of the prior estate, whenever the contingency happens. This practically abolishes the distinction between contingent remainders and executory devises.

¹² *Reeve v. Long*, 1 Salk, 227; 4 Kent's Com. 249. Statutes, changing the common law in this respect, are to be found in Arkansas, California, Georgia, Maryland, Massachusetts, Missouri, New York, Ohio, Virginia and Wisconsin. 2 Washburn on Real Prop. 595; *Crissfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Cowles v. Cowles* (Conn.), 13 Atl. Rep. 414.

¹³ If the estate, limited by way of a remainder, is an equitable estate, instead of a legal estate, no failure of the remainder would result from a termination of the particular estate, before the happening of the contingency, for the seisin would, in contemplation of law, be in the trustee and would not be effected by the particular estate. *Fearne Con. Rem.* 303; 1 Tiffany, Real Prop., Sec. 123, p. 293.

remainder explained. The contingency may be the birth of the person who is to take, as well as any other uncertainty. But for the support of a contingent remainder the particular estate must be a freehold; while in the case of a vested remainder the particular estate may be only a term of years. The reason for this difference lies in the fact that the tenant for years has only a chattel interest, the possession of which he acquires as a *quasi-bailee* of the tenant in reversion. He does not take, and cannot hold, the actual seisin in his own right. If the remainder is contingent there is no definitely ascertained person who can take the legal seisin, which, together with the actual possession of the tenant for years, as his bailee, will constitute the complete and lawful seisin to the land.¹⁴ An apparent exception to this rule requiring the particular estate to be a freehold, is met with in limitations like the following: An estate is given to A. for eighty years, if he shall so long live, with a contingent remainder at his death. This has been held to be a good contingent remainder, since it is so extremely unlikely that A. will live out the term that it may be considered as practically an estate for life. No particular number of years is required to support this kind of limitation, and it is apprehended that the required number would vary in each case according to the chances of life of the tenant of the particular estate, a greater number being required if the tenant of the particular estate is a young person than if he is old.¹⁵ Any particular estate

¹⁴ Co. Lit. 143 a; Fearné Cont. Rem. 285; 2 Washburn on Real Prop. 538, 543; Williams on Real Prop. 252; Doe v. Considine, 6 Wall. 474; Brodie v. Stephens, 2 Johns. 289; Corbet v. Stone, T. Raym. 151; 2 Bla. Com. 171. In New York, Michigan, Wisconsin, and Minnesota, it is provided by statute that a contingent remainder may be limited to take effect at the termination of an estate for years. 2 Washburn on Real Prop. 594, 595. And in very many of the States terms for years of long duration are now declared by statute to have all the properties of a freehold estate. 1 Washburn on Real Prop. 463. And see, as to remainders in equitable estates, where the seisin is in a trustee, *supra*.

¹⁵ 2 Cruise Dig. 243; 2 Washburn on Real Prop. 585; Napper v. Sanders, Hutt. 118; Lethieullier v. Tracy, Amb. 204; s. o. 3 Atk. 774; Doe

for years is sufficient if the contingent remainder is not a freehold. In that case the seisin is still in the grantor.¹⁶ But the particular estate must in no case be less than an estate for years. A tenancy at will, at sufferance, or from year to year, will not support a remainder; such estates are too uncertain as to their duration.

§ 298. **Successive remainders.**—As long as the entire fee is not granted away, there may be any number of estates limited in remainder, following one after another, provided they are so granted that one will vest in possession immediately upon the termination of the preceding remainder. If any time be allowed to elapse between their vesting in possession, the estates cannot take effect as remainders. Thus the conveyance may be to A. for life or for years, to B. for life or years, to C., and so on indefinitely, provided no one is given the fee in remainder.¹⁷ As soon, however, as the fee is assigned—there being nothing in the nature of an estate left in the grantor—he can create no more remainders. It is, therefore, a cardinal rule that no remainder can be limited after a fee; or, in other words, where there is no reversion there can be no remainder.¹⁸ Such a limitation could, however, take effect as an executory devise, if it appeared in a will.¹⁹ But if the first devisee has an absolute power of disposal, and the limitation over is to operate only upon what is left at his death, the limitation cannot take effect either as a contingent remainder or as an

v. Ford, 2 E. & B. 970; *Weale v. Lower*, Pollexf. 67; *Fearne Cont. Rem.* 20-22; 1 Prest. Est. 81.

¹⁶ 2 Cruise Dig. 244; *Fearne Cont. Rem.* 285; *Corbet v. Stone*, T. Raym. 151; 2 Washburn on Real Prop. 585, 586.

¹⁷ 2 Washburn on Real Prop. 555.

¹⁸ 1 Eq. Cas. Abr. 185; 2 Cruise Dig. 203; *Atty.-Gen. v. Hall*, Fitzg. 314; *McLean v. McDonald*, 2 Barb. 534; *Jackson v. Delancy*, 13 Johns. 557; *Bowman v. Lobe*, 14 Rich. Eq. 271.

¹⁹ *Doe v. Glover*, 1 C. B. 448; *Nitingale v. Burrell*, 15 Pick. 104, 111; *Andrews v. Roye*, 12 Rich. 544; *Marks v. Marks*, 10 Mod. 423; *Purefoy v. Rogers*, 2 Wms. Saund. 388 a, note; *Hatfield v. Sueden*, 42 Barb. 65; *a. c.* 54 N. Y. 285; *Brightman v. Brightman*, 100 Mass. 238.

executory devise.²⁰ A careful analysis of these cases will, however, reveal the fact that in most of them the first limitation has been enlarged into a fee, under the operation of the rule in the law of powers (see *post*, chapter XVI, on Powers), that an unlimited power of disposal annexed to a devise general of the estate without words of limitation, will enlarge the estate devised into a fee, or an estate in fee is expressly given, and in either case the limitation over is precatory instead of being mandatory. Where the prior limitation is expressly for life, or the limitation over is explicit and mandatory, not in the nature of a request, that the devisee *in presenti* shall leave what he has not disposed of to the persons, it will not only be a good limitation over, but, if the prior limitation is an estate for life or any other estate less than a fee, it will be a vested remainder.²¹ There must be a

²⁰ *Ide v. Ide*, 5 Mass. 500; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Smith v. Bell*, 6 Pet. 68; *Sears v. Russell*, 8 Gray 100; *Burbank v. Whitney*, 24 Pick. 146; *Hale v. Marsh*, 100 Mass. 468; *Jackson v. Bull*, 10 Johns. 19; *Jackson v. Robins*, 15 Johns. 169; *s. c.* 16 Johns. 568; *McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525; *Newland v. Newland*, 1 Jones L. 463; *McRee's Admrs. v. Means*, 34 Ala. 349; *Doe v. Stevenson*, 1 C. B. 448; *Bourn v. Gibbs*, 1 Russ. & M. 615; *Rona v. Meier*, 47 Iowa 607, 29 Am. Rep. 493; *Outland v. Bowen* (Ind.), 17 N. E. Rep. 281; *Giles v. Auslow*, 128 Ill. 187; *O'Boyle v. Thomas*, 116 Ind. 243; *McClellan v. Larcher*, 45 N. J. Eq. 17; *Griswold v. Warner*, 51 Hun 12; *Leggett v. Firth*, 53 Hun 152; *Rodenfels v. Schumann*, 45 N. J. Eq. 383. The statement in the text was followed by the Supreme Court of Missouri, in an able opinion by Ch. Jus. Gantt, after a review of the leading cases cited above, in *Cornwall v. Wulff*, 148 Mo. 559, *et sub.* See also, 4 Kent's Com. (12 ed.) 270; *Brown v. Rogers*, 125 Mo. 398; *Van Horne v. Campbell*, 100 N. Y. 287; *Foster v. Smith*, 156 Mass. 379; *Fisher v. Wister*, 154 Pa. St. 65; *Wolfer v. Humner*, 144 Ill. 554; *Howard v. Canersi*, 109 U. S. 725; 2 Redfield Wills 278. But see, for criticism of *Cornwall v. Wulff*, *supra*, in separate opinion of Marshall, J., *Walton v. Drumtra*, 152 Mo. 489.

²¹ *Gibbins v. Shepard*, 125 Mass. 541; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Mandlebaum v. McDonnell*, 29 Mich. 78, 18 Am. Rep. 61; *Joslin v. Rhoades*, 150 Mass. 301; *Mitchell v. Knapp*, 54 Hun 500; *Peckham v. Lego*, 57 Conn. 553; *Von Axte v. Fisher*, 117 N. Y. 401; *Wells v. Leeley*, 47 Hun 109; *Stevens v. Fowler* (N. J.), 19 Atl. Rep.

power to dispose in any case, in order that the estate of tenant for life may be enlarged into a fee. The tenant cannot claim a fee, because the will provides that "all of the estate remaining" at her death, shall go to her children. The tenant nevertheless takes only a life estate.²² The remainder has under such circumstances been held to be contingent.²³ In many of the States a remainder can now be limited to take effect after a fee or in abridgment of the preceding estate. It is also true, that no remainder can be limited after a fee, even though the fee be base or qualified, as in the case of a fee upon condition. There is left in the grantor after such an estate only a *possibility of reverter*, which cannot be assigned, either as a reversion or as a remainder.²⁴ But if the precedent estate is an estate upon limitation terminating upon the happening of a contingency, which must happen, the grantor is held to have a reversion, and not a mere possibility, and hence a remainder can be limited to take effect after such an estate.²⁵ And so, also, where a remainder is given to trustees and their heirs, since the duration of the trustee's estate is always limited by the requirements and necessities of the trust, if the performance of the trust does not require a

777; *Park's Admr. v. Am. Home Missionary Soc.* (Vt.), 20 Atl. Rep. 107; *Crozier v. Bray*, 120 N. Y. 366; *Miller's Admr. v. Potterfield* (Va.), 11 S. E. Rep. 486; *Pritchard v. Walker*, 22 Ill. App. 286; *s. c.* 121 Ill. 221; *Sanborn*, 62 N. H. 631; *Lewis v. Pitman* (Mo.), 14 S. W. Rep. 52; *Glover v. Reid* (Mich.), 45 N. W. Rep. 91; *Jenkins v. Compton* (Ind.), 23 N. E. Rep. 1091; *Cashman's Estate*, 28 Ill. App. 346; *Kibler v. Huver*, 10 N. Y. S. 375; *Hood v. Haden*, 82 Va. 588; *Mumo v. Collins*, 95 Mo. 33; *Thomas v. Wolford*, 49 Hun 145; *Walker v. Pitchard*, 121 Ill. 221; *Harbison v. James*, 90 Mo. 411; *Spencer v. Strait*, 38 Hun 228.

²² *Cresap v. Cresap*, 34 W. Va. 310; *Stone v. Littlefield* (Mass.), 24 N. E. Rep. 592. See *Walton v. Drumtra*, 152 Mo. 504, and dissenting opinion of Marshall, J., in *Cornwall v. Wulff*, 148 Mo. 559.

²³ *Simpson v. French*, 6 Dem. Sm. (N. Y.) 108.

²⁴ 2 Washburn on Real Prop. 540, 541; *Doe v. Selby*, 2 B. & C. 930; *Willion v. Burkley*, Plowd. 235; *Seymour's Case*, 10 Rep. 97; *Wimple v. Fonda*, 2 Johns. 288; *Buist v. Dawes*, 4 Strobb. Eq. 37.

²⁵ *Com. v. Hackett*, 102 Pa. St. 505. See *ante*, Sec. 291.

fee, and the estate is therefore determinable, a remainder may be limited to take effect after the determination of the trust-estate. This constitutes an exception to the general rule, and is only applicable to remainders in trust.²⁶ Estates are sometimes created to take effect after, or in derogation of the preceding estate in fee, but they are not common law remainders. At common law such estates are impossible; they are called conditional limitations, and operate under the Statute of Uses as a shifting use, or under the Statute of Wills as an executory devise.²⁷ So also was it impossible to create a remainder after a fee conditional at common law. But wherever that estate has been converted into a fee tail, a remainder is possible, as has been explained in the chapter on Reversions.²⁸

after granting a fee tail there is a reversion left in the grantor

§ 299. *Disposition of a vested remainder.*—A vested remainder is capable of alienation by any mode of conveyance which does not require livery of seisin, and even with livery, where the particular estate is not a freehold, and the consent of the tenant to entry upon the land for that purpose is obtained. It may be devised, or assigned in whole or carved up into a number of smaller estates, and may be conveyed upon

²⁶ *Lethieullier v. Tracy*, 3 Atk. 774. A vested remainder which is to take effect on the termination of a trust estate, under the Connecticut statute passes to a trustee in bankruptcy, under Bank Law, July, 1898. *Loomer v. Loomer*, 76 Conn. 522, 57 Atl. Rep. 167. See *post*, Sec. IV, Chapter XIV.

²⁷ 2 Washburn on Real Prop. 544, 545; 1 Prest. Est. 91; *Cogan v. Cogan*, Cro. Eliz. 360; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray 149; *Horton v. Sledge*, 29 Ala. 495. See *post*, Chapter XIV, Sec. III, and Chapter XV.

²⁸ 2 Washburn on Real Prop. 546; *Wilkes v. Lion*, 2 Cow. 393; *Hall v. Priest*, 6 Gray 18. The remainder after an estate tail was liable to be defeated by the common recovery, instituted by the tenant in tail for the purpose of cutting off the entail. *Williams on Real Prop.* 253; 1 Spence Eq. Jur. 144; 2 Prest. Est. 460; *Page v. Hayward*, 2 Salk. 570. The remainder after an estate tail has this further peculiarity, that the estate tail will not merge in it if the two should come together in the tenant in tail. *Wiscot's Case*, 2 Rep. 61; *Roe v. Baldwere*, 5 T. R. 110; *Poole v. Morris*, 29 Ga. 374.

trusts, or made to vest upon some future contingency, provided no estate is thereby made to commence *in futuro*, without a preceding estate to support it.²⁹ If the remainder-man dies without having disposed of his estate, the remainder will descend to his heirs, in the same manner as an estate in possession.³⁰

§ 300. *Relation of tenant and remainder-man.*—It is said that there is no tenure existing between the remainder-man and the tenant of the particular estate. But while that may be true as a general rule, a life tenant cannot set up against the remainder-man any superior title which he may have acquired by purchase. A release to the life tenant enures to the

²⁹ 2 Washburn on Real Prop. 553; 1 Prest. Est. 75; *Pearce v. Savage*, 45 Me. 101; *Blanchard v. Brooks*, 12 Pick. 47; *Fearne Cont. Rem.* 216; *Williams on Real Prop.* 252; *Bunting v. Speck*, 41 Kan. 424; *Swett v. Thompson*, 149 Mass. 302; *Loreng v. Carnes*, 148 Mass. 223. In Alabama, New York, Michigan, Wisconsin, Minnesota, Indiana, Iowa, Mississippi, Missouri, Texas, Virginia, Kentucky, Illinois, a legal estate may be created by deed to commence in the future, without a preceding estate to support it. 2 Washburn on Real Prop. 592, 593. In those States, therefore, a future estate may be disposed of in such a manner, that it is to vest in the purchaser at some future day, and in the meanwhile remain vested in the original remainder-man. Independently of statute, an estate of freehold may be created to commence in the future, without being supported by a preceding estate, but the future estate in that case would be a springing use and not a legal estate until the Statute of Uses executed it. See *post*, Secs. 355, 543. A vested remainder passes to a trustee in bankruptcy, under an adjudication under the Federal law of 1898. *In re Haslett*, 116 Fed. Rep. 680; *In re Mosier*, 112 Fed. Rep. 138. A vested remainder is the subject of an execution sale for debts, in Kentucky. *Roach v. Dance*, 80 S. W. Rep. 1097. There can be no partition between life tenant and remainder-men, in Virginia. *Turner v. Barraud*, 46 S. E. Rep. 318; *Stansberry v. Inglehart*, 9 Mackey 134. See also, *Smith v. Runnell*, 97 Iowa 55, 65 N. W. Rep. 1002; *Love v. Blauw*, 61 Kan. 496, 59 Pac. Rep. 1059, 48 L. R. A. 257; *Seiders v. Giles*, 141 Pa. St. 93, 21 Atl. Rep. 514.

³⁰ *King v. Scoggin*, 92 N. C. 99; *Van Camp v. Fowler*, 59 Hun 311; *Lepps v. Lee* (Ky.), 16 S. W. Rep. 346. It is not essential that the remainder-man take actual possession of the property, on the death of the life tenant, in order to complete his title to the property. *Morrison v. Fletcher* (Ky. 1905), 84 S. W. Rep. 584.

remainder-man.³¹ The tenant can have no claim on the latter for any improvements made by him. If the improvement is not of such a nature as to give him the right of removal under the law of fixtures, it becomes a part of the soil, and passes with it to the remainder-man upon the termination of the particular estate.³² The tenant cannot do anything to defeat a vested remainder; a disseisin of the tenant affects the remainder in no manner. Nor can the possession of the tenant be deemed adverse to the remainder-man, either for the purpose of preventing the latter from conveying his interest, or with a view to defeat it under the Statute of Limitations, unless the possession be continued after the termination of the particular estate. The Statute of Limitations does not begin to run, until the remainder takes effect in possession.³³ And if the tenant or a stranger commits waste upon the land, or does any injury to the inheritance, the remainder-

³¹ Co. Litt., Secs. 452, 453, 67 b; *Allen v. DeGroodt*, 98 Mo. 159; *Whitney v. Slater*, 36 Minn. 103; *Stewart v. Matheny* (Miss.), 5 So. Rep. 387; *Pruett v. Hallen*, 73 Ala. 369.

³² 2 Washburn on Real Prop. 554; *Elwes v. Mawe*, 3 East 38; *s. c.* 2 Smith's Ld. Cas. 212; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Ford v. Cobb*, 29 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Elam v. Parkhill*, 60 Texas 581; see *ante*, Sec. 16. Nor can the tenant of the particular estate enter into any agreement in respect to the property, which will bind the remainder-man. *Hill v. Roderick*, 4 Watts & S. 221.

³³ 2 Washburn on Real Prop. 555; see *Grout v. Townsend*, 2 Hill 554; *Crawley v. Blackman*, 81 Ga. 775; *Doherty v. Matsell*, 54 N. Y. Super. Ct. 17, 119 N. Y. 646, 23 N. E. Rep. 994. A right of action for the recovery of land by a remainder-man does not generally accrue, until the death of the life tenant, as no estate is vested until that event. *Turner v. Hause*, 199 Ill. 464, 65 N. E. Rep. 445. But see, under Mo. statute, *Utter v. Sidman*, 170 Mo. 284, 70 S. W. Rep. 702. The statute of limitations does not begin to run against a remainder-man, until the termination of the particular estate. *Joyner v. Futrell*, 136 N. C. 301, 48 S. E. Rep. 649; *Woodrief v. Wester*, 136 N. C. 162, 48 S. E. Rep. 578; *Collins v. Lumber Co.* (Ark. 1905), 84 S. W. Rep. 1044; *Thomas v. Black*, 113 Mo. 66; *Kesterson v. Bailey*, 80 S. W. Rep. 97; *Charleston Ry. Co. v. Reynolds*, 69 S. C. 481, 48 S. E. Rep. 476; *Graham v. Stafford*, 171 Mo. 692, 72 S. W. Rep. 507.

man has his own action for damages against the wrong-doer.³⁴ Upon the termination of the particular estate, the property passes to the remainder-man with all its appurtenances, and if the building had been destroyed by fire during the continuance of the particular tenancy, the insurance money would go with the land to the remainder-man.³⁵

³⁴ *Chase v. Hazelton*, 7 N. H. 176; *Van Deusen v. Young*, 29 N. Y. 9; *Brown v. Bridges*, 30 Iowa 145. But no one, whose reversionary interest is a contingent remainder or an executory devise, can maintain a legal action of waste against the tenant of the particular estate, although his interest in the estate may be protected by injunction from destruction by the waste of the particular tenant. *Hunt v. Hall*, 37 Me. 363. And, unless changed by statute, the remainder-man can maintain the technical action of waste, only when he has the immediate estate in remainder. If there is an immediate estate in remainder between him and the tenant of the particular estate, he could only maintain an action on the case in the nature of waste. *Williams v. Bolton*, 3 P. Wms. 298; Co. Lit. 218 b, n. 122; 1 Washburn on Real Prop. 154. But the distinction between *trespass* and *case* has been abolished in many of the States, and certainly in all the States which have adopted the code of New York. And for acts of waste by strangers, the tenant of the particular estate may be held liable to the remainder-man or reversioner, if the waste results through his negligence in protecting the estate from the trespasses of strangers. Co. Lit. 54 a; *Attersol v. Stevens*, 1 Taunt. 198; *Fay v. Brewer*, 3 Pick. 203; *Wood v. Griffin*, 46 N. H. 237; *Cook v. Champlain Trans. Co.*, 1 Denio 91; *Austin v. Hudson R. R. Co.*, 25 N. Y. 341. A life tenant who is bound to discharge a mortgage on the entire estate to protect his interest, is entitled to be subrogated to the extent of the debt chargeable to the remainder, as against the remainder-man. *Wilder's Exec. v. Wilder* (Vt. 1903), 53 Atl. Rep. 1072. Where a life tenant persistently refuses and fails to pay taxes upon the property, the remainder-man is entitled to a receiver to collect so much of the rent as may be necessary to pay the taxes. *Sage v. Gloversville*, 60 N. Y. S. 791, 43 App. Div. 254. Although the life tenant should pay taxes accruing during his life, if the taxes are unpaid, the remainder-man will take the estate charged with the lien of such taxes, on his death, in Kentucky. *Joyes v. Louisville*, 82 S. W. Rep. 432; *Morrison v. Fletcher*, 84 S. W. Rep. 548. A purchase of the life estate at a tax sale, by remainder-men, is upheld, in Iowa, as against other remainder-men. *Crawford v. Meis*, 123 Iowa 610, 99 N. W. Rep. 186, 66 L. R. A. 154.

³⁵ *Clyburn v. Reynolds* (S. C.), 9 S. E. Rep. 973.

§ 301. Vested and contingent remainders further distinguished — Uncertainty of enjoyment. — No uncertainty of enjoyment will render the remainder contingent. The contingent or vested character of the remainder is only determined by the uncertainty, which attends the vesting of the right to the estate.³⁶ But sometimes it is difficult to determine whether the contingency refers to the enjoyment or to the vesting of the title. Thus, in a devise to A. and B. for eight years, remainder to the testator's executors until H. B. arrives at twenty-one years, and when he should come of age, then that he should enjoy the same to him and his heirs forever. H. B. died during minority. It was held that only the enjoyment was postponed to his arrival at majority, and that the remainder was vested and descended to his heirs.³⁷

³⁶ "The present capacity of taking effect in possession, if the possession were now to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." *Fearne Cont. Rem.* 216. See also, 4 *Kent's Com.* 202; *Croxall v. Shererd*, 5 *Wall.* 288; *Pearce v. Savage*, 45 *Me.* 101; *Brown v. Lawrence*, 3 *Cush.* 390; *Williamson v. Field*, 2 *Sandf. Ch.* 533; *Allen v. Mayfield*, 20 *Ind.* 293; *Marshall v. King*, 24 *Miss.* 90; *In re Jennings*, 1 *N. Y. S.* 565.

³⁷ *Boraston's Case*, 3 *Rep.* 19; *Manning's Case*, 8 *Rep.* 187 b; *Goodtitle v. Whiteby*, 1 *Burr.* 233; *Tomlinson v. Dighton*, 1 *P. Wms.* 17; *Doe v. Lea*, 3 *T. R.* 41. See also, *Doe v. Moore*, 14 *East* 601; *Furness v. Fox*, 1 *Cush.* 134; *Blanchard v. Blanchard*, 1 *Allen* 223; *Manice v. Manice*, 43 *N. Y.* 380; *Kemp v. Bradford*, 61 *Md.* 330; *Jobnes v. Beers*, 57 *Conn.* 295; *Hoover v. Hocver*, 116 *Ind.* 498; *Wedekind v. Hallenberg* (Ky.), 10 *S. W. Rep.* 368; *Goebel v. Wolf*, 113 *N. Y.* 405; *Wills v. Wills*, 85 *Ky.* 486; *Dowling v. Reber*, 65 *Miss.* 259; *Shadden v. Hembree*, 17 *Ore.* 14; *Legwin v. McRee*, 79 *Ga.* 430; *Dorr v. Lovering*, 147 *Mass.* 530; *Goerlitz v. Malawesta*, 56 *Hun* 120; *Siddons v. Cockrell* (Ill.), 23 *N. E. Rep.* 586; *Hamon v. Dyer* (Ky.), 12 *S. W. Rep.* 774; *Pond v. Allen*, 15 *R. I.* 171; *Myers v. Adler*, 6 *Mackey* 515; *Chaw v. Keller*, 100 *Mo.* 362; *Kingman v. Harmon* (Ill.), 23 *N. E. Rep.* 430; *Schwartz's Appeal*, 119 *Pa. St.* 337; *Williams v. Williams*, 73 *Cal.* 99; *Davidson v. Bates*, 111 *Ind.* 391; *Davidson v. Hutchins* (Ind.), 4 *N. E. Rep.* 106; *Rhodes v. Shaw*, 43 *N. J. Eq.* 430; *Craig v. Ambrose* (Ga.), 4 *S. E. Rep.* 1; *Weatherhead v. Stoddard*, 58 *Vt.* 623; *Kouvalinka v. Geilbel*, 40 *N. J. Eq.* 443. Where a life estate is granted to a woman and remainder to

Not only will the mere uncertainty of enjoyment not make the remainder contingent, but the remainder will be a good vested one, although it may be absolutely impossible for the remainder-man ever to enjoy the possession of it. Thus a grant to A. for one thousand years, remainder to B. for life; B. is sure to die before the natural expiration of A.'s estate, but the remainder, nevertheless, is good, although it ends with B.'s death. And if the remainder to B. were in fee, although he would be able to enjoy it, he could convey it to others or devise it, and if he died without making a disposition of it, it would descend to his heirs.³⁸ So, also would this be the case where the grant was to A. for life, remainder to B. during the life of A. B. could only enjoy his remainder in the event that A.'s estate was destroyed by forfeiture, escheat or merger, and it may not be defeated at all. Nevertheless, B.'s estate is a vested remainder. But wherever the title vests only upon the happening of a future contingency, whatever generally may be that contingency—whether it be the birth of the remainder-man or some collateral event—the remainder

her children, such children as are living at the time of the grant take a vested remainder. *In re Haslett*, 116 Fed. Rep. 680. Under the Missouri statute, converting all estates tail into life estates, all conveyances or devises to a grantee and the heirs of his body, passes a remainder to such heirs, with life estate to the grantee. *Tindall v. Tindall*, 167 Mo. 218, 66 S. W. Rep. 1092; *Utter v. Sidman*, 170 Mo. 284, 70 S. W. Rep. 702. A conveyance to a grantee for life, remainder to his heirs, vests the title in a grandchild of such grantee, although both parent and grandchild died before the grantee, as the remainder was vested on birth of the grandchild and would vest in his father, on his death, in Michigan, under statute of that State. *Porter v. Osmon*, 98 N. W. Rep. 859. A grant to the heirs of a life tenant, and, on failure of such, to the heirs of a living third person, creates a vested remainder in the heirs of such life tenant, with a contingent remainder to the heirs of such third person, in Minnesota. *Minnesota Deb. Co. v. Dean*, 85 Minn. 473, 89 N. W. Rep. 848.

³⁸ 2 Washburn on Real Prop. 547; Williams on Real Prop. 252; Fearné Cont. Rem. 216; *Parkhurst v. Smith*, Wiles 338; *Williamson v. Field*, 2 Sandf. 533; *Manderson v. Lukens*, 23 Pa. St. 31; *Kemp v. Bradford*, 61 Md. 330; *Kennard v. Kennard*, 63 N. H. 303.

is contingent, and there is no present vested right. And it has been held by the New Hampshire courts that a grant to A. for life, remainder after his death to B., would make the remainder to B. contingent, since by the terms of the conveyance B. was only to take the estate after the death of A., and A.'s estate may be defeated before its natural termination by forfeiture, or merger into the inheritance.³⁹ But this view is generally rejected by the authorities, which hold that an express and explicit reference to such a contingency is necessary to make the remainder contingent.⁴⁰ And the same

³⁹ *Hall v. Nute*, 38 N. H. 422; *Hayes v. Tabor*, 41 N. H. 521; *Willet's Admr. v. Rutter's Admr.*, 84 Ky. 317; *Whittaker v. Whittaker*, 40 N. J. Eq. 33. In *Hall v. Nute*, the devise was to Esther Tuttle, "to hold as long as she lives a natural life; also the land which I have given to Esther Tuttle as long as she lives, after her decease I give and bequeath the same to my son, William Tuttle, as long as he lives a natural life, and no longer; and after his decease, I give and bequeath the same to his heirs and assigns." The court say: "William Tuttle, under the devise, could not take the estate limited to him in remainder until the death of Esther Tuttle. If her estate were destroyed during life, by forfeiture, or by surrender and merger in the inheritance, the remainder limited to William Tuttle could never vest in possession, though he might survive his mother, because there would be no particular estate to support the remainder." The court rest their opinion on the authority of *Doe v. Holmes*, 2 W. Bl. 777, in which the devise was "to J. S. for the term of his natural life, and after his decease to the heirs male and female of J. S." This was to be a contingent remainder. But it is readily observed by the reader that the contingency arose from the uncertainty of the remainder-men, being described as the heirs of a living person. In *White's Trustee v. White* (Ky.), 7 S. W. Rep. 26, the remainder was held to be contingent, where it was granted to the children of life tenant surviving her and to the representatives of such as may be dead. See also, to same effect, *Overman v. Simo*, 96 N. C. 451; *Larmour v. Rich* (Md.), 18 Atl. Rep. 702; *Shanks v. Mills*, 25 S. C. 356; *Roundtree v. Roundtree*, 26 S. C. 450; *Kinnan v. Card*, 4 Denio (N. Y.) 156; *Byrnes v. Labagh*, 38 Hun 523. But see, *contra*, *Boykin v. Boykin*, 21 S. C. 513.

⁴⁰ 4 Kent's Com. 202; *Carter v. Hunt*, 40 Barb. 89; *Williamson v. Field*, 2 Sandf. Ch. 533; *Moore v. Lyons*, 25 Wend. 144; *De Vaughn v. McLeroy*, 82 Ga. 687; *Mercantile Bank v. Ballard*, 83 Ky. 431; *Mitchell v. Knapp*, 54 Hun 500; *Brewer v. Cox* (Md.), 18 Atl. Rep. 146; *Delany v. Middleton* (Md.) 19 Atl. Rep. 146; *Pond v. Allen*, 15 R. I. 171;

ruling has been adopted by a case in New Hampshire.⁴¹ Wherever there is a doubt as to whether a remainder is vested or contingent, the courts always incline to construe it a vested estate.⁴² Thus, in a devise to A. for life, remainder to the surviving children of J. S., there being a doubt whether the surviving refers to the death of the testator, or of A., and

Hudgens v. Wilkins, 77 Ga. 555; *Legwin v. McRee* (Ga.), 4 S. E. Rep. 863; *Elkins v. Carsey* (Tenn.), 3 S. W. Rep. 828; *Chasey v. Gowdry*, 43 N. J. Eq. 95; *Railey v. Milam* (Ky.), 5 S. W. Rep. 367; *McDaniel v. Allen*, 64 Miss. 417; *Curtis v. Fowler* (Mich.), 33 N. W. Rep. 804; *Harris v. Carpenter*, 109 Ind. 640; *Gibbens v. Gibbens*, 140 Mass. 102; *Olmstead v. Dunn*, 72 Ga. 850; *Fussey v. White*, 113 Ill. 637. The presumption is always in favor of the remainder being vested, and especially in devises, the remainder will not be held to be contingent, unless it is the apparent intention of the testator that the remainder shall be contingent. If there is an express declaration that the remainder-man shall take the estate at the natural termination of the particular estate, and at no other time, the remainder will be necessarily contingent. See *Sinton v. Boyd*, 19 Ohio St. 57, 2 Am. Rep. 469; *In re Paton* (N. Y.), 18 N. E. Rep. 625; *Hawley v. Peavey*, 128 Ill. 430; *Appeal of Com. Title Ins. Co.*, 126 Pa. St. 223; *Mercantile Trust, etc., Co., v. Brown* (Md.), 17 Atl. Rep. 937; *Willett's Admr.* 84 Ky. 317; *Bates v. Gillett* (Ill.), 24 N. E. Rep. 611; *Robinson v. Female Orphan Asylum*, 123 U. S. 702; *Ferguson v. Thomasson* (Ky.), 9 S. W. Rep. 714; *Allsmiller v. Freutchenicht* (Ky.), 5 S. W. Rep. 746; *Reichard's Appeal*, 116 Pa. St. 232; *Crane's Appeal*, 106 Pa. St. 232; *Holmes' Appeal*, 116 Pa. St. 232; *Kurst v. Paton*, 4 Denio (N. Y.) 180; *Teets v. Weise*, 47 N. J. L. 154. But it is so extremely unlikely that the testator, in a will like the New Hampshire case, could have contemplated the possible forfeiture or merger of the peculiar estates, and have intended that the remainder-man should not take in such an event, that such a construction would be maintained only upon the strongest proof that such was the intention of the testator. See *Porter v. Osmon*, 98 N. W. Rep. 859; *Minnesota Deb. Co. v. Dean*, 85 Minn. 473, 89 N. W. Rep. 848.

⁴¹ *Crosby v. Crosby*, 64 N. H. 77.

⁴² *Doe v. Perryn*, 3 T. R. 484; *Doe v. Prigg*, 8 B. & C. 231; *Duffield v. Duffield*, 1 Dow. & C. 311; *Croxall v. Shererd*, 5 Wall. 287; *Fay v. Sylvester*, 2 Gray 171; *Doe v. Provoost*, 4 Johns. 61; *Moore v. Lyons*, 25 Wend. 119; *Wills v. Wills* (Ky.), 3 S. W. Rep. 900; *Scofield v. Olcott*, 120 Ill. 362; *Anthony v. Anthony*, 55 Conn. 256. But see *Ewing v. Winters* (W. Va.), 11 S. E. Rep. 718; *Atmore v. Walker*, 46 Fed. Rep. 429.

the latter construction would make the remainder contingent, the court held that it referred to the death of the testator, and that, therefore, the remainder was vested.⁴³ And very often a remainder will be construed to be a vested estate upon condition subsequent, liable to be divested by the happening of a contingency rather than to declare it a contingent remainder. For example, a devise was made to E. & J. for their lives successively, and after the death of the longest liver of them to A. B., if he lived to attain the age of twenty-one years, but if he died before that age, then over to C. B. It was held that the remainder to A. B. was vested, but was liable to be defeated by the death of A. B. during his minority.⁴⁴ The same favor towards the construction of a remainder as vested is displayed in the case where an estate in remainder is limited to take effect in default of the exercise of a power of appoint-

⁴³ *Doe v. Prigg*, 8 B. & C. 231; *Smither v. Willock*, 9 Ves. 233; *Eldridge v. Eldridge*, 9 Cush. 516; *Moore v. Lyons*, 25 Wend. 119; *Harris v. Carpenter*, 109 Ind. 540; *Hoover v. Hoover*, 116 Ind. 498; *Bunting v. Speck*, 41 Kan. 424; *King v. Trick* (Pa.), 19 Atl. Rep. 951; *Lombard v. Willis* (Mass.), 16 N. E. Rep. 737; *Stone v. Lewis' Admr.* (Va.), 5 S. E. Rep. 282; *Vason v. Estes*, 77 Ga. 352. But see *contra*, *Roundtree v. Roundtree*, 26 S. C. 450.

⁴⁴ *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313; *Doe v. Nowell*, 1 M. & S. 327; *Johnson v. Valentine*, 4 Sandf. 36; *Maurice v. Maurice*, 43 N. Y. 380; *Ross v. Drake*, 37 Pa. St. 373; *Bentley v. Long*, 1 Strobb. Eq. 43; *Phillips v. Phillips*, 19 Ga. 261; *In re Batione's Estate*, 136 Pa. St. 307; *Hills v. Barnard*, 152 Mass. 67; *Camp v. Cronkright*, 59 Hun 488; *Lepps v. Lee* (Ky.), 16 S. W. Rep. 346; *Havens v. Seashore Law Co.* (N. J.), 20 Atl. Rep. 497; *Kilgore v. Kilgore*, 127 Ind. 276; *Dodd v. Winship*, 144 Mass. 461; *Gardner v. Hooper*, 3 Gray 398; *Dorling v. Blanchard*, 109 Mass. 176; *McArthur v. Scott*, 113 U. S. 340; *Lenz v. Prescott*, 144 Mass. 505; *Security Co. v. Hardenburgh*, 53 Conn. 169; *Withers v. Sims*, 80 Va. 651; *Re Cogswell*, 4 Denio (N. Y.) 248; *Mead v. Maben*, 14 N. Y. 732. See *contra*, *Sinton v. Boyd*, 19 Ohio St. 51, 2 Am. Rep. 369. See *Goldtree v. Thompson*, 79 Cal. 613; *Hudgens v. Wilkins*, 77 Ga. 555; *Crossman's Exr.*, 1 N. Y. S. 103; *Silvers v. Canary*, 114 Ind. 129; *Schwartz's Appeal*, 119 Pa. St. 337; *Churchman's Appeal* (Pa.), 12 Atl. Rep. 600; *Strauss v. Rost*, 67 Ind. 465; *Chamberlain v. Young's Exr.* (Ky.), 5 S. W. Rep. 380; *In re Jobson*, 44 Ch. D. 154; *Wood v. Mason* (R. I.), 20 Atl. Rep. 264.

ment. Such a remainder has been held to be a vested remainder, liable to be defeated by the exercise of the power.⁴⁵

§ 302. Same — Remainder to a class.— The general rule is that a remainder is contingent, if the persons who are to take are not *in esse*, or are not definitely ascertained. But where the remainder is limited to a class, some of whom are not *in esse*, the remainder has repeatedly been held to be vested—liable, however, to open and let in those who are afterwards born during the continuance of the particular estate. It is questionable whether a simple limitation in remainder to a class, as to children, will open to let in after-born children, if there are some *in esse* who can take. And the after-born children are in fact excluded from participation in the remainder, unless the intention of the testator or grantor is shown by the context to be otherwise.⁴⁶ But if there is any circumstance connected with the grant or devise which indicates such an intention on the part of the donor, it can and will have that effect. Thus, in a devise to A. for life, and at her death to her children, the remainder would be vested in the children who are *in esse* at the testator's death, and it will open and let in the children born afterwards during the life of A., or during the continuance of her estate.⁴⁷ But while remainders to children are generally held

⁴⁵ *Sandford v. Blake*, 45 N. J. Eq. 247; *De Vaughn v. McLeroy*, 82 Ga. 687; *Phillips v. Wood* (R. I.), 15 Atl. Rep. 88; *Mutual Life Ins. Co. v. Shipman*, 109 N. Y. 19; *Grosvenor v. Bowen*, 15 R. I. 549; *Welsh v. Woodbury*, 144 Mass. 542; *Scofield v. Olcott*, 120 Ill. 362; *Walker v. Pritchard*, 121 Ill. 221; *Harbison v. James*, 90 Mo. 411; *Re McClyment*, 16 Abb. N. C. 262; *Hardy v. Clarkson*, 87 Mo. 171.

⁴⁶ *Parker v. Glover*, 42 N. J. Eq. 559. Where a remainder is granted to take effect only on the death of the life tenant, then to go to the remainder-men named, as a class, the vesting of the remainder cannot be accelerated by a release of the life tenant, since it is impossible to determine who would take the remainder, on her death. *Rogers v. Trust Co.*, 55 Atl. Rep. 679.

⁴⁷ *Doe v. Prigg*, 8 B. & C. 231; *Dod v. Perryn*, 3 T. R. 484; *Viner v. Francis*, 2 Cox 190; *Doe v. Considine*, 6 Wall. 475; *Dingley v. Ding-*

to be vested as to those in being only liable to open and let in after-born children, this is not always the case. If the remainder is limited to children living at the death of the life tenant, the remainder is contingent until the death of the life tenant. This is so, although it may be provided that in the event of the prior death of any of the children, the share of such child or children should vest in his or their issue. The issue would in that case take as purchasers, and not as heirs, unaffected by any attempted conveyance of the remainder by the deceased parent.⁴⁸ Those who are *in esse* do not take an absolute vested estate. They cannot bar the rights of those who are unborn by any conveyance they may make. Their estate is vested, but is liable to be defeated *pro tanto* by the subsequent birth of the other. And so strictly are the rights of the unborn guarded, that a sale by the guardian of the children already born under a decree of court was held not to affect the title of the after-born children.⁴⁹

§ 303. Same — After the happening of the contingency.—

But whatever distinction may exist between a vested and a contingent remainder at their creation, they cease to be distinguishable when the uncertain event which rendered the remainder contingent has happened. After that, the contingent

ley, 5 Mass. 535; Ballard v. Ballard, 18 Pick. 41; Moore v. Weaver, 16 Gray 307; Worcester v. Worcester, 101 Mass. 132; Yeaton v. Roberts, 28 N. H. 466; Doe v. Provoost, 4 Johns. 61; Jenkins v. Freyer, 4 Paige Ch. 47. See Millicamp v. Millicamp, 28 S. C. 125; Gourdin v. Deas (S. C.), 4 S. E. Rep. 64; Surdam v. Cornell, 116 N. Y. 305; Loring v. Carnes, 148 Mass. 223; Peckham v. Lego, 57 Ct. 553; Dulany v. Middleton (Ind.), 19 Atl. Rep. 146; Farnam v. Farnam, 53 Conn. 261; Conger v. Lowe (Ind.), 24 N. E. Rep. 889; Goodrich v. Pierce, 83 Ga. 781; Toole v. Perry (Ga.), 7 S. E. Rep. 118; Cowles v. Cowles (Conn.), 13 Atl. Rep. 414; Stockbridge v. Stockbridge, 145 Mass. 517; Irvin v. Clark, 98 N. C. 437; Ballentine v. Wood, 42 N. J. Eq. 552.

⁴⁸ Acker v. Osborne, 45 N. J. Eq. 377; Dwight v. Eastman, 62 Vt. 398; but see Jones v. Beers, 57 Conn. 295; Kansas City Land Co. v. Hill, 3 Pickle 589; Rogers v. Trust Co., 55 Atl. Rep. 679.

⁴⁹ Adams v. Ross, 30 N. J. 513; Graham v. Houghtalin, 30 N. J. L. 558.

remainder is vested, and has all the characteristics which it would have had, if it had been vested *ab initio*. But the vesting of a contingent remainder must take place at or before the termination of the particular estate; if it occurs afterwards, the remainder fails, and the estate reverts to the grantor or the testator's heirs, as the case may be.⁵⁰

§ 304. **Cross-remainders.**—Where particular estates are given to two or more in different parcels of land, or in the same land in undivided shares, and the remainders of all the estates are made to vest in the survivor or survivors, the future estates are called cross-remainders. To explain by example, an estate for life is given in undivided shares to A. and B., remainder to the survivor and his heirs; or to A. and B. in tail, remainder of A.'s estate, upon failure of issue, to B., in fee, and remainder of B.'s estate, upon failure of issue, to A.⁵¹ In some cases, as in the first example, the limitations resemble a joint-tenancy in point of effect, the doctrine of survivorship being practically present. But in the case of cross-remainders, the remainders are not destroyed by a partition, nor is it necessary that they should have present in them the four unities of time, title, estate and possession, so essential in the creation of a joint-tenancy. Although it is usually the case, yet it is not necessary that the particular estates should be undivided shares in the same land; and if they are, that they should be equal shares. These estates, with their remainders, may be interests in altogether different parcels of land. Cross-remainders may be limited by deed or by

⁵⁰ 1 Prest. Est. 484; 2 Washburn on Real Prop. 556; Doe v. Perryn, 3 T. R. 484; Doe v. Considine, 6 Wall. 475; Wendell v. Crandall, 1 Comst. 491; Rogers v. Trust Co., 55 Atl. Rep. 679.

⁵¹ 2 Washburn on Real Prop. 556, 557; 4 Cruise Dig. 298; 1 Prest. Est. 94; Co. Lit. 195 b, Butler's note 1; 4 Kent's Com. 201; Rockwell v. Swift (Conn.), 20 Atl. Rep. 200; Dowling v. Raber (Miss.), 3 So. Rep. 654; Gorham v. Betts (Ky.), 5 S. W. Rep. 465; Rowland v. Rowland, 93 N. C. 214; Simpson v. Cherry (S. C.), 12 S. E. Rep. 886; Dana v. Murray, 122 N. Y. 604.

will, and in a will they need not be by express limitation; they may arise by implication. But in a deed, in conformity with the general rule of construction of deeds, they can only be created by express terms.⁵² They may be vested or contingent, and may be made to vest at any time, provided the contingency is not to happen after the termination of the particular estate.⁵³ They may be limited between two or any greater number of persons;⁵⁴ and they should be so created that upon the vesting of a remainder it should carry, not only the original estate of the tenant of the particular estate, but also all other remainders which may have vested in him and been transmitted to him from the others, whose particular estates had previously terminated.⁵⁵ In fact, this is the most reliable test by which to determine the existence of cross-remainders, viz.: whether the entire estate, with all its limitations, passes from one to another, at the termination of the particular estate and death of each, until the whole estate vests in the heirs of the survivor.⁵⁶ But if the grantor or testator does not manifest an intention that the transfer of one co-tenant's share to the survivor shall carry whatever interests may have become vested in him through the previous death of some other co-tenant, that will not be the result of his death. Upon his death his original share of the estate will

⁵² Co. Lit. 195 b, note 82; *Watson v. Foxon*, 2 East 36; *Doe v. Worsley*, 1 East 416; *Cole v. Livingston*, 1 Vent. 224; *Cook v. Gerrard*, 1 Wms. Saund. 186 n; *Hall v. Priest*, 6 Gray 18; *Fenley v. Johnson*, 21 Md. 117.

⁵³ But this is subject to the qualification to be hereafter stated and explained (see *post*, Sec. 312) that a contingent remainder must not be too remote. The same rule applies to cross-remainders. *Seaward v. Willock*, 5 East 206; *Wood v. Griffin*, 46 N. H. 235.

⁵⁴ It was once doubted that cross-remainders could be limited to more than two. *Gilbert v. Witty*, Cro. Jac. 656; *Twisdin v. Lock*, Ambl. 665; *Wright v. Holford*, Cowp. 31. But it has now been definitely settled that there can be more than two cross remainder-men. *Doe v. Webb*, 1 Taunt. 233; *Watson v. Foxon*, 2 East 36; *Doe v. Worsley*, 1 East 416; *Hall v. Priest*, 6 Gray 18; *Fenby v. Johnson*, 21 Md. 117.

⁵⁵ 2 Washburn on Real Prop. 557; Co. Lit. 195 b, note 82.

⁵⁶ *Doe v. Webb*, 1 Taunt. 233; *Fenby v. Johnson*, 21 Md. 117.

go to the survivor, but the share which came to him in remainder on the death of some other co-tenant will pass to his heirs at law as an ordinary estate of inheritance.⁵⁷

⁵⁷ *McGee v. Hall*, 26 S. C. 179. See *Reynolds v. Crispin* (Pa.), 11 Atl. Rep. 236.

SECTION II.

CONTINGENT REMAINDERS.

SECTION 305. Nature and origin of contingent remainders

- 306. Classes of contingent remainders.
- 307. Alienation of contingent remainders.
- 308. Vested remainder after a contingent.
- 309. Same — Such limitations in wills.
- 310. Alternate remainders in fee.
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- 314. How contingent remainders may be defeated.
- 315. Same — 1. By disseisin of particular tenant.
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- 317. Same — 3. By feoffment.
- 318. Same — 4. By entry for condition broken.
- 319. Trustees to preserve.
- 320. Actions by remainder-men.

§ 305. Nature and origin of contingent remainders.— It has been contended, with much show of reason, that the ancient common law did not admit of the creation of any but vested remainders. And until the reign of Henry VI no case appears upon record, in which they have been held to be valid limitations.⁵⁸ In that reign it was held that in the conveyance to A. for life, remainder to the heirs of J. S., the remainder was a good limitation, which remained contingent

⁵⁸ 2 Washburn on Real Prop. 560; Williams on Real Prop. 263. The earlier authorities, on the contrary, are rather opposed to such a conclusion. Williams on Real Prop. 264. Mr. Williams says that the reader should be informed that the assertion is grounded only on the writer's researches. The general opinion appears to be in favor of the antiquity of contingent remainders (p. 263, note d), citing 3d Rep. of Real Prop. Comm'rs 23.

until the death of J. S., and was defeated if he did not die during the life-time of A. The heirs of J. S. would take the estate in fee at the death of A., as if they had been heirs of A.⁵⁹ It was also involved in doubt, in early times, what became of the fee while the remainder continued to be contingent. Until the contingency happened, the contingent remainder was deemed a mere possibility—a chance of getting an estate, rather than the estate itself. It was considered an executory interest, the title to which only vested when the contingency happened. Some of the older authorities held that the title to the fee remained, to use their quaint expressions, *in nubibus*, *in gremio legis*, etc. In other words, the title is kept in abeyance while the remainder is contingent.⁶⁰ But the modern authorities are inclined to hold that it remains in the grantor, and that he is not divested of the title in remainder until the contingency arrives.⁶¹ In conformity with the older view of the nature of a contingent remainder, it was formerly held that it was not capable of alienation, nor could it be devised.⁶² But it is now definitely settled that, although the contingent remainder can only be considered as a possibility, or, at best, only an estate in expectancy,⁶³ yet there is a sufficient present right to it upon the happening of the contingency, as to be capable of alienation and devise. The conveyance of a contingent remainder will operate as an estoppel or as an assignment in equity, unless such remainders

⁵⁹ 2 Washburn on Real Prop. 560, 561; 2 Bla. Com. 169-171; Williams on Real Prop. 264. An estate which is limited to take effect either to a dubious and uncertain person, or on a dubious or uncertain event, is contingent and since a contingent remainder is only the chance of having an estate, it cannot be said to be an "estate" in land. Taylor v. Adams, 93 Mo. App. 277.

⁶⁰ Williams on Real Prop. 266; Co. Lit. 342 a; 1 Prest. Est. 251; 2 Prest. Abst. 100-107.

⁶¹ Williams on Real Prop. 266; Co. Lit. 191 a, Butler's note 78; Fearne Cont. Rem. 361; Waters v. Bishop, 122 Ind. 161. But see 4 Kent's Com. 259.

⁶² 2 Washburn on Real Prop. 562; Williams on Real Prop. 268.

⁶³ 2 Washburn on Real Prop. 560; 1 Prest. Est. 75.

are made alienable by statute. It is still the rule of law, in the absence of a statute, that there can be no legal conveyance of a contingent remainder.⁶⁴ But it was always possible for a contingent remainder-man to release to one in possession. The contingent remainder also descends to the heirs of the remainder-man upon his death before the contingency, provided the contingency does not arise from the uncertainty of the person who is to take the remainder.⁶⁵ Where the remainder-man is uncertain, no grant or devise can be made before the happening of the contingency which will have any effect, either in law or equity.⁶⁶

⁶⁴ 1 Prest. Est. 76; 2 Cruise Dig. 333; Fearné Cont. Rem. 551; Robertson v. Wilson, 38 N. H. 48; Loring v. Eliot, 16 Gray 574; Knight v. Paxton, 124 U. S. 552; Doe v. Oliver, 10 B. & C. 181; Roe v. Dawson, 3 Ld. Cas. Eq. 651; Roe v. Jones, 1 H. Bl. 33; Roe v. Griffiths, 1 W. Bl. 606. This matter is now regulated by statute in New Jersey and other States. Wilkinson v. Sherman, 45 N. J. Eq. 413; Morse v. Proper, 82 Ga. 13; Taylor v. Stewart, 45 N. J. 352; Griffin v. Shepard, 40 Hun 355. This common law rule, against the alienation of remainders, contingent, has been abolished, in England, by 8 & 9 Vict., Ch. 106, Sec. 6, making all future and contingent interests in real estate alienable. Irrespective of a definite statute upon the subject, it is held, in Missouri, that the right of alienation exists. In Goodman v. Simmons (113 Mo. 130) the Supreme Court held: "This rule of the common law seems inconsistent with the *general scope* of our statutes regulating the disposal of real estate, and not in harmony with the genius and spirit of our institutions, which brooks no restraint upon the power of the citizen to alienate any of his property. The spirit and genius of the feudal system and the common law were exactly the reverse. And we do not think this now almost obsolete common-law rule ought to obtain in this State."

⁶⁵ 1 Prest. Est. 76-89; 4 Kent's Com. 262; Williams Real Prop. 277; Roe v. Griffiths, 1 W. Bl. 606; Lampet's Case, 10 Rep. 48 a; Marks v. Marks, 1 Strange 132. See Van Camp v. Fowler, 59 Hun 311.

⁶⁶ 2 Washburn on Real Prop. 562. This arose from the practical inability of a conveyance, when it is not ascertained who is the remainder-man. But if a certain individual made a conveyance of the land by a warranty deed, and he subsequently became the vested remainder-man, his deed would certainly operate by way of an estoppel to bar him of any claim to the remainder, as against his grantee. Walton v. Follansbee, 131 Ill. 147; Stewart v. Neely (Pa.), 20 Atl. Rep. 1002.

§ 306. **Classes of contingent remainders.**—Contingent remainders may be divided into two classes, the distinguishing element being the character of the event, upon the happening of which is made to depend the vesting of the remainder. The first class, according to this classification, would include all those remainders which are contingent, because the persons who are to take are not ascertained, or are not in being. Such would be remainders to the heirs of a living person or to an unborn child. In the first case the remainder is contingent, because *nemo est hæres viventis*; the heirs cannot be ascertained until the death of the ancestor, and the remainder will become vested only upon the death of that person. In the second case, the remainder is contingent until the child is born.⁶⁷ If the remainder is to a class, as to children, it will vest in the first child born, subject to be opened upon the birth of a second to let it in, and so on. If the particular estate terminated after the birth of the first, the remainder would vest completely in that child, free from the claims of any child born thereafter.⁶⁸ The second class would include all those remainders which are made to vest upon the happening of a collateral event, and may be subdivided into those cases, where the event is sure to happen, but it is uncertain whether it will happen during the continuance of the particular estate, and those, in which it is doubtful whether the collateral

⁶⁷ The first class, according to this classification, corresponds to Mr. Fearne's fourth class. Fearne Cont. Rem. 9; Richardson v. Wheatland, 7 Metc. 169; Moore v. Weaver, 16 Gray 307; Loring v. Eliot, *ib.* 572. See Harrison v. Jones, 82 Ga. 599; Preston v. Brant, 96 Mo. 552; Wallace v. Minor (Va.), 10 S. E. Rep. 423; Taylor v. Adams, 93 Mo. App. 277. A purchaser of a grantee of a life estate cannot complain because the court has failed to adjudge that the possibility of issue was not extinct in such grantee. Utter v. Sidman, 170 Mo. 284, 70 S. W. Rep. 702.

⁶⁸ Doe v. Considine, 6 Wall. 477; Carver v. Jackson, 4 Pet. 90; Olney v. Hull, 21 Pick. 311; Worcester v. Worcester, 101 Mass. 132; Jennings v. Freyer, 4 Paige Ch. 47; Coursey v. Davis, 46 Pa. St. 25; Adams v. Ross, 30 N. J. L. 513; Swinton v. Legare, 2 McCord Ch. 257. See *ante*, Sec. 302.

Contingent remainders { Remainderman uncertain
 Contingency uncertain
 1) Time uncertain
 2) To be decided "

event will happen at all. Thus in a grant to A. for life, remainder to B. after the death of C., C. is sure to die, but it remains doubtful whether he will die during the life-time of A., which is necessary for the vesting of the remainder. An example of the second subdivision would be a remainder to B. upon C.'s return from Rome; C.'s return from Rome is uncertain; he may die there, in which event the contingent remainder will never vest and will fail.⁶⁹ To these may be added a third class, in which the event is not collateral, but the happening of which is contingent, and not only causes the remainder to vest, but also constitutes the natural termination of the particular estate. For example, an estate to A. until B. returns from Rome, then over to C.; since B. may never return the remainder is contingent. In such cases the remainder vests only at the time when it is to take effect in possession.⁷⁰ This division into classes has been criticised by different authorities, and has been declared to involve a useless complication of details,⁷¹ and it may be that the only natural and necessary division is that given by Blackstone, into two, viz.: where the person who is to take is dubious, and where the event is uncertain.⁷² But the presentation of the minuter subdivisions at least exhibits the various possible forms of contingent remainders and the different contingencies upon which they may be made to depend, and for that reason the above classification is useful, if not necessary.

§ 307. Alienation of contingent remainders.—The rule of the common law, which prevented the alienation of a contingent remainder, was changed in England, by statute (8 & 9

⁶⁹ Mr. Fearne divides these cases into two classes, and they constitute his second and third classes. Fearne Cont. Rem. 8; Washburn on Real Prop. 564, 565.

⁷⁰ 2 Washburn on Real Prop. 563. This is Mr. Fearne's first class. Fearne Cont. Rem. 5.

⁷¹ 4 Kent's Com. 208.

⁷² 2 Bla. Com. 169.

Vict., Chap. 106, Sec. 6), providing that, “. . . A contingent, an executory and a future interest and a possibility, coupled with an interest in any tenements or hereditaments, of any tenure, . . . whether immediate or future and whether vested or contingent, . . . may be disposed of by deed.” And by statute in New York, Michigan, Minnesota and Wisconsin, similar provisions have been adopted, making all expectant estates alienable, in the same manner as estates in possession.⁷³ A contingent remainder is not an *estate* in land and hence is not within statutes providing for the conveyance of any *estate* in lands, since it is only the chance of having an estate;⁷⁴ but it is such an *interest* in lands as to come within statutes authorizing the conveyance of any interest in lands⁷⁵ and even in some States where no express statutory provision can be found, changing the rule of the common law, on account of the inconsistency of such rule with the general scope of the law regulating the disposal of real estate and the spirit of American institutions, which brooks no restraint upon the power of the citizen to alienate his property, the owner of a contingent remainder is held to have the right of disposition⁷⁶ and the rule of the common law, against the alienation of such remainders, is discarded, as a “relic of the ancient feudal system.”⁷⁷ In many States the

⁷³ 2 Washburn on Real Prop, Sec. 5, p. 267; *In re Jackson's deed*, 4 Keys (N. Y.) 569, Finch's Sel. Cas. Real Prop. 899.

⁷⁴ *Godman v. Simmons*, 113 Mo. p. 131; *Lackland v. Nevins*, 3 Mo. App. 335. A contingent remainder is held to be a proper subject of alienation, in the following cases: *Archer v. Jacobs*, 125 Iowa 467, 101 N. W. Rep. 195; *Dixon v. Bentley* (N. J. Ch. 1905), 59 Atl. Rep. 1036.

⁷⁵ *Ante. idem.*

⁷⁶ “We are pre-eminently a trading people; our lands are our greatest stock in trade and the whole tendency of our laws is to encourage, not to restrain their alienation. The spirit and genius of the feudal system and the common law were exactly the reverse. And we do not think this now almost obsolete common law rule ought to obtain in this State.” *Godman v. Simmons*, 113 Mo. 131; *Lackland v. Nevins*, *supra*; *Rogers v. Graham*, 146 Mo. 352.

⁷⁷ *Williams*, on Real Prop. 257. A contingent remainder is the sub-

involuntary alienation of such interests is now provided for by statute and sales or partition of contingent remainders are authorized by the courts, to the same extent as similar dispositions of vested remainders.⁷⁸

§ 308. **Vested remainder after a contingent.**—Because the first of two or more remainders is contingent, it does not necessarily follow that the others must be contingent also. The ulterior remainders are contingent only when the contingency is made to apply to the vesting of the whole series of limitations. But they may be so limited that the contin-

ject of alienation in Iowa and Missouri. *McDonald v. Bank*, 123 Iowa 413, 98 N. W. Rep. 1025; *Hayes v. McReynolds*, 144 Mo. 348. But see *contra*, *Smith's Admr. v. Smith* (Ky. 1904), 79 S. W. Rep. 223. And when the grant is an abuse of fiduciary relation, see, *In re Phillipp's Est.*, 205 Pa. 511, 55 Atl. Rep. 212. It is held, under the Virginia statute, that a deed of general assignment, for benefit of creditors, passes the grantor's interest in property held as a contingent remainder. *Wilson v. Langhorne*, 102 Va. 631, 47 S. E. Rep. 871. A contingent remainderman is held capable of making a valid mortgage on his interest, in Kentucky. *Davis v. Wilson*, 74 S. W. Rep. 696.

⁷⁸ The Pennsylvania Act of April, 1853, providing for the sale of a decedent's estate, so as to divest a contingent remainder, is a valid exercise of legislative power and an order of sale of the Orphans Court, made thereunder, divests the contingent remainder. *In re Smith's Est.*, 207 Pa. 604, 57 Atl. Rep. 37. The mere fact that the owner of a contingent remainder is an infant, will not prevent an order of sale for such interest, under the New York statute. *In re Asch*, 78 N. Y. S. 561, 75 App. Div. 486. A contingent remainder is the subject of partition by decree of court, in Missouri. *Reinders v. Koppleman*, 68 Mo. 501; *Preston v. Brandt*, 96 Mo. 552; *Hayes v. McReynolds*, 144 Mo. 348. See, also, *In re Clement*, (N. J. Ch. 1904), 57 Atl. Rep. 724; *Brillhart v. Mish* (Md. 1904), 58 Atl. Rep. 28; *Springs v. Scott*, 132 N. C. 548, 44 S. E. Rep. 116. A contingent remainder cannot be partitioned in Kentucky or West Virginia. *Berry v. Lewis*, 82 S. W. Rep. 252; *Croston v. Male*, 49 S. E. Rep. 136. A contingent remainder cannot be sold at the suit of creditors of a possible remainderman, in Virginia. *Howbert v. Cowthorn*, 42 S. E. Rep. 683. See, also, *Taylor v. Taylor* (Iowa 1902), 92 N. W. Rep. 71. A contingent remainder is not the subject of execution sale, in Tennessee. *Nichols v. Guthrie*, 109 Tenn. 535, 73 S. W. Rep. 107.

gency refers only to the first remainder, and the others are then vested. The vesting of a contingent remainder in such a case only postpones the enjoyment of the others, and its failure only accelerates their time of enjoyment. Thus, where the limitations are to A. for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, neither A. nor B. had sons at the time. The successive remainders to their sons in tail were contingent, but the remainder to B. not being made to depend upon any contingency—not even the vesting of the remainder to A.'s sons in tail—was vested, notwithstanding the contingency of the preceding remainder.⁷⁹ And if the remainder to A.'s son in tail failed to take effect because A. had no son, the remainder to B. would take effect in possession upon the death of A., the failure of the remainder in tail only having the effect of accelerating the time of enjoyment by B. And if B. had sons before A., the remainder to them in like manner would at once become vested, although the remainder to A.'s sons is still contingent.⁸⁰ There may be a vested remainder after a contingent, even where the contingency refers to a collateral event instead of the birth or uncertainty of the person who is to take, provided the vesting of the subsequent remainder is not made to depend upon the happening of the same contingency. Such was the case in the limitation to A. for life, remainder to B. and C. for eighty years, if D. and E., his wife, so long lived; if E. survived her husband, then to her for life; and after her death to F. in tail, with remainders over in default of issue. The remainder to E. is contingent upon her surviving her husband; but the subsequent remainder to F. in tail, and the remainders over, are vested. If E.'s remainder does not vest, F.'s remainder will take effect

⁷⁹ *Uvedall v. Uvedall*, 1 Rolle Abr. 119; *Lewis v. Waters*, 6 East. 336; *Wright v. Stephens*, 4 B. & Ald. 574; *Sims v. Conger*, 39 Miss. 232.

⁸⁰ *Wright v. Stephens*, 4 B. & Ald. 574; *Bradford v. Foley*, 1 Doug. 63; *Doe v. Brabrant*, 3 Bro. C. C. 393; *Sims v. Conger*, 39 Miss. 232.

in possession at the termination of the remainder to B. and C., the contingency only postponing or accelerating the time for enjoying the subsequent remainders.⁸¹

⁸¹ *Bradford v. Foley*, 1 Doug. 63; *Napper v. Sanders*, Hutt, 117; *Lethieullier v. Tracy*, 3 Atk. 774; *Doe v. Ford*, 2 E. & B. 970; *Fearne Cont. Rem.* 233; 2 Washburn on Real Prop. 572. To the same effect see *Vandewalker v. Rollins*, 63 N. H. 460; *Security Co. v. Hardenburgh*, 53 Conn. 169. Mr. Fearne divides the cases involving these questions into three classes (*Fearne Cont. Rem.* 233); and although it is not necessary to the understanding of the subject, the classification is here given as a fair example of the almost painful refinements of the earlier common-law writers on the law of real property, and it will assist one in learning the subject of remainders, if the trouble is taken to master the distinctions. Mr. Fearne's first class consists of limitations after a preceding estate, which is made to depend upon a contingency which never takes effect. The second class includes all cases of limitation over upon a conditional determination of the preceding estate, and such preceding estate never takes effect. The third class takes in those remainders, which are limited to take effect upon the determination of a preceding estate by a contingency, which never happens, although the preceding estate does take effect. An example of the first class would be a devise to A. for life, and after his decease remainder to the use of his first and other sons by any future wife in tail male; but if A. should marry any woman related to his present wife, the limitation will be void, and the estate shall go to the children of B. A. did not marry a second time, and the question was, did the children of B. take at the death of A. without issue by a second marriage. It was held that the contingency only affected the limitation to A.'s issue, and that the remainder to the children of B. was vested, and therefore took effect, notwithstanding the limitation to A.'s issue by a second marriage failed. *Bradford v. Foley*, 1 Doug. 63. See *Scatterwood v. Edge*, 1 Salk. 230 n; *Doe v. Brabant*, 3 Bro. C. C. 393. The second class may be demonstrated by the following case: A devise to A. for years, remainder to the first and other sons of B., in tail male successively, provided they should take the name of the testator; if they refuse to do so, or they die without issue, then to the first-born son of C. in tail male, with remainders over. B. never had any sons. If the condition, the performance of which had to precede the vesting of the estate in B.'s son, affected the remainder to C.'s son, then the failure of issue in B. would defeat the remainder to C.'s son. But it was held that that was not the case; that the remainder to C.'s son was independent of this contingency, and took effect, whatever became of the remainder to B.'s sons. *Scatterwood v. Edge*, 1

§ 309. Same — Such limitations in wills.— Very little difficulty is experienced in determining whether the contingency affects all of the successive limitations in remainder, when they appear in a deed. But, on account of the frequently inaccurate and untechnical language of testators, such limitations in wills often give considerable trouble in the interpretation and construction of them. And it may be laid down as the universal rule that the determination of these questions depends upon what appears to be the intention of the testator in respect to them, as expressed in his will. If the intention appears to have been to extend the contingency to all the limitations, it will have the effect of making them all contingent; otherwise the subsequent remainder will be vested, whatever may be the strict and literal meaning of the terms used.⁸² Thus a devise was limited to the use of testator's son for life, and, on his decease, remainder to the use of his first and other sons by any future wife in tail male; provided that if the son should marry any woman related to his present wife the uses to the issue of such marriage would be void and the estate go to the use of the children of H. The son did not marry at all. There was no express direction as to how the estate should go if the son died without issue. But it was held upon the construction of the whole will that the intention of the testator was that the children of H. should take, whether the son married the objectionable person, or did not

Salk. 230. The following is an example of the third class: A. devised to his son in tail male, remainder to B. for life, remainder to B.'s sons in tail male, upon condition that he should change his name, and upon his refusal, or the refusal of any of his sons to do so, the estate was to go to D. B. performed the condition, and died without issue. It was held that the performance of the condition by B. defeated the devise over to D., for the latter limitation was intended only to take effect upon the breach of the condition. *Amherst v. Lytton*, 3 Bro. P. C. 486. But see *Luxford v. Cheeke*, 3 Lev. 125. See 2 Washburn on Real Prop. 572-575.

⁸² 2 Washburn on Real Prop. 573, 575; 1 Pres. Est. 88; *Fearne Cont. Rem.* 235; *Luxford v. Cheeke*, 3 Lev. 125; *Doe v. Shippard*, 1 Doug. 75; *Davis v. Norton*, 2 P. Wms. 390.

marry at all.⁸³ The two following cases will show how close and refined the construction can be, and how dependent the construction is upon the apparent intention of the testator. In the one case the devise was to A. for a term of years, remainder to the first and other sons of B. in tail male, provided they each should take the name of the testator; but should they refuse to do so, or should die without issue, then over to C.'s eldest son in tail male, with remainders over. A strict construction of this devise would make the remainder to C.'s eldest son in tail, as well as the other remainders over, contingent upon the refusal of B.'s sons to take the testator's name, and these remainders could only vest upon the happening of this contingency. But the court held that the contingency only referred to the remainders to B.'s sons, and if B. had no son the remainder to C.'s son would take effect just as well as if B. had had a son, and the son had refused to perform the condition annexed to his estate.⁸⁴ In the other case, the devise was to the testator's son in tail male, remainder to B. for life, remainder to B.'s sons in tail male, upon condition that he should change his name, and if he, or any son of his, should refuse so to do, the estate was to go to D. The testator's son died without issue. B. changed his name and then died without issue. It was held that D.'s estate was to vest only in case B. or any of his sons should refuse to perform the condition, and since B. did change his name, the condition was performed, and his death afterwards without issue defeated the estate in D.⁸⁵ This subject has

⁸³ *Bradford v. Foley*, 1 Doug. 63. If life tenants under a legal life estate, take by will, as remaindermen, the two estates coalesce and a merger occurs, in Maryland. *Graham v. Whitridge*, 57 Atl. Rep. 609.

⁸⁴ *Scatterwood v. Edge*, 1 Salk. 230.

⁸⁵ *Amherst v. Lytton*, 3 Bro. P. C. 486. A parallel case to the one cited in the preceding note, in which the court reached a contrary decision, is that of *Luxford v. Cheeke*, 3 Lev. 125. In that case the testator devised to his wife for life; but if she married again, the estate should, upon her marriage, vest in his son H. in tail male, with remainders over. The wife did not marry again, and died. It was held, that from a consideration of the whole will, it was the apparent

received a more full and complete treatment by Mr. Fearne in his work on contingent remainders, but the explanation here given will suffice for all practical purposes.

§ 310. *Alternate remainders in fee.*—Although it is a well established rule that a remainder cannot be limited after a fee, yet estates may be so limited that the remainder in fee shall go to one or the other of two persons upon the happening or not happening of a certain contingency. This is called a *fee with a double aspect*. If the remainder vests in one the other remainder is absolutely void, and the second vests only when the first fails. Thus a devise was made to A. for life, and if he had issue, then to such issue in fee; but if he died without issue, then to B. in fee. If A. died without issue, then the remainder to B. would vest and take effect; but if A. died leaving issue, B.'s remainder would at once be defeated. B.'s remainder is not made to take effect upon the determination of the remainder to A.'s issue. If it had been limited as to take effect in derogation of the remainder to A.'s issue, after it had vested, it would have been void as a remainder, although it would have been held good as an executory devise. But the alternate remainders, in order to be good, must both be contingent. The second is necessarily contingent, and if the first is vested the second could only take effect by defeating or destroying the first, and this would make it a remainder limited after a fee, and therefore void.⁸⁶

intention of the testator that his son H. should take the estate in tail, only in case the testator's wife should marry again, and since she remained a widow, the remainder in tail was defeated.

⁸⁶ *Luddington v. Kime*, 9 Ld. Raym. 203; *Goodwright v. Dunham*, 1 Doug. 265; *Doe v. Shelby*, 2 B. & C. 926; *Doe v. Challis*, 2 Eng. Law & Eq. 215; *Dunwoodie v. Reed*, 3 Serg. & R. 452; *Taylor v. Taylor*, 63 Pa. St. 481; 3 Am. Rep. 565; 2 Washburn on Real Prop. 575-577. In *Luddington v. Kime*, which may be taken as a good example of the rule, the devise was to A. for life, remainder to his male issue in fee simple, remainder over to T. B., if A. should die without male issue. These remainders are alternate, one of which alone can vest, and the vesting of one and the defeat of the other are to take place at the same

§ 311. **Restrictions upon the nature of the contingency—Its legality.**—The contingent event, upon the happening of which the remainder is to vest, must not be illegal, or against good morals (*contra bonos mores*). Thus, if the remainder is limited to a bastard not in being, it would be void. And such would be the case whenever the contingency involved was against public policy. This is only a reiteration of the rule, by which the legality of all conditions to estates is tested.⁸⁷

§ 312. **Same — Remoteness.**—The event must not be too remote, so as to suspend the power of alienation beyond the period allowed by the policy of the law. Lord Coke, and the law writers of his day, laid down the rule that the event must be a *common possibility*, as it was called; and that if a *double possibility*, or a *possibility upon a possibility*, was involved in the contingency, the remainder would be void. A remainder to an unborn son, according to this rule, would be good; but a remainder to A., the unborn son of B., would be void, because it involved a double possibility: *First*, that B. shall have a son; and *secondly*, that his name shall be A. This rule has long since been discarded by the courts as misleading, and not at all consonant with public policy. Such

time, viz.: at the death of A. If the remainder to T. B. had been limited on another contingency, and its vesting was to take place at some other time, or if the limitation to A.'s issue was vested, instead of being contingent, the remainder to T. B. would be a remainder limited after a fee. See some late cases on this subject in Appeal of Reiff, 125 Pa. St. 145; Barker v. Southerland (N. Y.), 6 Dem. Sur. 220; Demill v. Reid (Md.), 17 Atl. Rep. 1014; Beckley v. Leffingwell, 57 Conn. 163; Mercantile Bank v. Ballard, 83 Ky. 481; Webster v. Ellsworth (Mass), 18 N. E. Rep. 369; Pryor v. Castleman (Ky.), 7 S. W. Rep. 892; McCormick v. McElligott, 127 Pa. St. 230; West v. Reynolds, 5 N. Y. Supp. 942; Thackston v. Watson, 84 Ky. 206; Albert v. Albert, 68 Md. 352; Myar v. Snow, 49 Ark. 125; Davis v. Williams, 1 Pickle. 646; Post v. Van Houten, 41 N. J. Eq. 82; Cornwall v. Wueff, 148 Mo. 542.

⁸⁷ 2 Washburn on Real Prop. 580; Williams on Real Prop. 272.

a remainder would now be held good.⁸⁸ It has never received general recognition by the courts, and it was even evaded by the authors of it by the introduction of vital exceptions. For example, Lord Coke tells us that the contingency of two persons, presently married to different persons, marrying each other, is only a common possibility; while the possibility that one shall have a son named A. is double.⁸⁹ But while this rule no longer prevails, it does not follow that a remainder will be good, however remote the contingency may be. Some have held that the rule of perpetuities, which prevails in respect to executory devises and contingent uses, has been applied to contingent remainders. But this statement is misleading, without words of qualification, and it has been held to be fallacious.⁹⁰ On account of the fact that a remainder must take effect before the termination of the preceding life estate, the remainder must take effect if at all within a life in being, it matters not how many contingencies affect its vesting, if the tenant of the preceding life-estate is in being, when the

⁸⁸ 2 Washburn on Real Prop. 580; Williams on Real Prop. 273, 274; Cholmdey's Case, 2 Rep. 51; Cole v. Sewell, 4 Dur. & Warr. 27; s. o. 2 H. L. Cas. 186. In *Routledge v. Dorvil*, 2 Ves. Jr. 357, a remainder was upheld, the vesting of which depended upon four contingencies; that a husband and wife should have a child, that the child should have a child, that the grandchild should be alive at the decease of the survivor of the grandparents, and if it is a grandson, he should attain the age of twenty-one, and if a granddaughter, she should attain that age or marry. In *Col v. Sewell*, *supra*, Lord St. Leonards (Sir E. Sugden) says: "As to the question of remoteness, at this time of day I was very much surprised to hear it pressed upon the court, because it is now perfectly settled that where a limitation is to take effect as a remainder, remoteness is out of the question; for the given limitation is either a vested remainder, and then it matters not whether it ever vests in possession, because the previous estate may subsist for centuries, or for all time, or it is a contingent remainder, and then, by the rule of law, unless the event upon which the contingency depends happens so that the remainder may vest *eo instanti*, the preceding limitation determines, it can never take effect at all."

⁸⁹ Williams on Real Prop. 273; 2 Rep. 51 b; 10 Rep. 50 b.

⁹⁰ Williams on Real Prop. 273; Rawle's note; *Seaves v. Fitzgerald*, 141 Mass. 401; *Farnam v. Farnam*, 53 Conn. 261.

question is raised. Therefore, following the rule of perpetuity, with this explanation of its application to remainders, we find that the only restriction imposed upon the limitation of contingent remainders is that there can be no limitation to the unborn child of an unborn person, where the latter is to take the preceding remainder.⁹¹ In abolishing the rule that there cannot be a double possibility, the courts extracted therefrom its essence, and formulated it in the above rule. A remainder, therefore, may be made to depend upon any number of contingencies, provided the person who is to take is not the unborn child of an unborn person in whom is vested the preceding remainder. Thus, in a remainder to A., an unborn son, for life, remainder to his, A.'s eldest child in fee, the remainder to A.'s unborn child would be void. But in a limitation to A., for life, remainder to the eldest grandchild of B., the remainder would be good, although B. has as yet no child, for the remainder must vest, if at all, during the life of A., and, therefore, not too remote. This does not, of course, prevent the limitation of an estate tail to an unborn child. And when a testator attempts to give a life estate to an unborn person, with remainder in tail to his children, the courts, taking note of the general intent to create an estate tail, will construe the estate to the unborn person to be a fee tail, instead of declaring void the remainder in tail to his children.⁹² But if such a limitation appeared in a deed, this construction could not be upheld, and the remainder would be declared void.⁹³

⁹¹ *Hay v. Coventry*, 3 T. R. 86; *Brudenell v. Elwes*, 4 East 452; *Fearne Cont. Remf.* 562, 565; *Monypenny v. Dering*, 2 De G. M. & G. 145; s. c. 16 M. & W. 428; *Cole v. Sewell*, 2 H. L. Cas. 186; *Coun- den v. Clerke*, Hob. 33 a; *Jackson v. Brown*, 13 Wend. 442.

⁹² *Doe v. Cooper*, 1 East 234; *Den v. Pukey*, 5 T. R. 303; *Monypenny v. Dering*, 16 M. & W. 428; *Humberston v. Humberston*, 1 P. Wms. 332; *Nourse v. Merriam*, 8 Cush. 11; *Allyn v. Mather*, 9 Com. 114; *Jackson v. Brown*, 13 Wend. 437; *Daebler's Appeal*, 64 Pa. St. 15; *Dorr v. Lovering* (Mass), 18 N. E. Rep. 412.

⁹³ 2 Washburn on Real Prop. 582; Williams on Real Prop. 276. Rawle's note.

§ 313. Same—Abridging the particular estate.—A third rule in respect to the contingent event is that it must not abridge the particular estate, so as to defeat it before its natural termination. In other words, a remainder cannot be limited after an estate upon condition, to take effect upon the breach of the condition, even if the estate upon condition is less than a fee. Thus, in a limitation to a widow for life, and if she should marry again, then over, the limitation over would be void if it appears in a deed—unless it was in the nature of a shifting use;—and, if by will, it could only take effect as an executory devise. The limitation, in order to be good as a remainder, should be to the widow as long as she remains a widow, remainder over. That is, the preceding estate must be an estate upon limitation, instead of an estate upon condition.⁹⁴ The only exception to this rule is where the remainder is given to the same person who has the particular estate, or to the survivor or survivors of them. In such a case, the happening of the condition and the consequent vesting of the remainder only defeats the particular estate by causing it to merge in the greater estate, and practically enlarges it, instead of defeating it. Thus, an estate was given to a wife and daughter for their lives and the life of the survivor, and if the daughter had issue, then to the daughter and her heirs forever after the death of the wife; and if the daughter died without issue, then to the wife and her heirs forever. These remainders were held good in accordance

⁹⁴ 2 Washburn on Real Prop. 582, 583; 1 Prest. Est. 91; Fearne Cont. Rem. 262; *Sheffield v. Orrery*, 3 Atk. 282; *Cogan v. Cogan*, Cro. Eliz. 360; *Proprietor's Brattle Eq. Church v. Grant*, 3 Gray, 149; *Green v. Hewitt*, 97 Ill. 113, 13 Am. Rep. 102. In Indiana, Wisconsin and Minnesota, statutes permit the limitation of contingent remainders, which, in vesting, abridge the particular estates which support them. And in New York, all conditional limitations are made legal estates, and a limitation to take effect in derogation of the particular estate is a legal estate, although it is not a contingent remainder. 2 Washburn on Real Prop. 594.

with the above exception.⁹⁵ The limitations after the estate for life to the wife and daughter were alternate remainders, and not conditional limitations.

§ 314. **How contingent remainders may be defeated.**—As a corollary to the rule that the contingent remainder must vest on or before the termination of the particular estate, by whatever means it is determined, it follows that if the particular estate is defeated or destroyed in any manner before its natural period of limitation has run, the contingent remainder will also be defeated, if it has not then become vested. At common law the rule was applied almost without limitation, so that any destruction of the particular estate resulted to defeat the remainder.⁹⁶

§ 315. **Same—1. By disseisin of the particular tenant.**—The mere disseisin of the tenant for life would not defeat the contingent remainder, provided he has not been so far divested of his seisin that he has lost his right of entry, and would be forced to his right of action in order to recover the seisin. In such a case there would be no seisin, whether legal or actual, present in the particular tenant to support the remainder, and it would accordingly be defeated. But as long as he has not lost his right of entry he still retains the legal seisin, although deprived of his actual seisin by the tortious possession of the disseisor.⁹⁷ The common-law distinction between the right of entry and of action, and the law of descent cast, resulting in a loss of the right of entry, has been abolished in most of the States, so that the prevailing rule in

⁹⁵ 2 Washburn on Real Prop. 583, 584; *Goodtitle v. Billington*, 1 Doug. 753. But see *Johnson v. Johnson*, 7 Allen, 197.

⁹⁶ *Doe v. Gatacse*, 5 Bing. N. C. 609; *Archer's Case*, 1 Co. 66 b; *Penhey v. Harrell*, 2 Freem. 213; 2 Bla. Com. 171; 2 Washburn on Real Prop. 589.

⁹⁷ 2 Washburn on Real Prop. 586; 2 Cruise's Dig. 245; *Williams on Real Prop.* 280; *Fearne Cont. Rem.* 286.

this country is that no disseisin of the particular tenant will work a destruction of the contingent remainder.⁹⁸

§ 316. Same — 2. By Merger.— It has already been shown that whenever a particular estate and a remainder become united in one person at the same time, the former is merged in the latter, the whole becoming one estate. The particular estate is effectually destroyed by a merger, and loses its identity altogether.⁹⁹ If, therefore, the particular tenant surrenders to the reversioner or ultimate remainder-man in fee, or if he acquires the reversion without a vested intervening estate, the intervening contingent remainder will be defeated.¹ This will happen, whether the reversion is acquired by descent or by purchase, except in one single case of descent. If the particular estate and contingent remainders are created by a devise, and the reversion descends to the tenant of the particular estate, as the heir of the testator, no merger would result, as it would nullify the expressed intention of the testator to give a contingent remainder to a person other than his heir. But if the particular tenant, in the case of such a devise, subsequently acquires the reversion by purchase, or by descent from the heir of the testator, a merger will result as in any other case, and the contingent remainder will be defeated.² The doctrine of merger has been held in Pennsyl-

⁹⁸ 2 Washburn on Real Prop. 586, note. In Massachusetts, Kentucky, Mississippi, Missouri, Texas, Virginia, New York, Michigan, Minnesota, and Wisconsin, disseisin of the tenant of the particular estate will not defeat the contingent remainder. 2 Washburn on Real Prop. 594. But see, *Archer v. Jacobs*, 125 Iowa 467, 101 N. W. Rep. 195.

⁹⁹ The union of the life estate, vested remainder and reversion in a common grantee, will merge and destroy a contingent remainder, limited to persons who are not and may never be, in being. *Archer v. Jacobs*, 125 Iowa 467, 101 N. W. Rep. 195.

¹ *Penhey v. Harrell*, 2 Freem. 213; *Doe v. Gatacse*, 2 Bing. N. C. 609; *Archer's Case*, 1 Co. 66 b; 2 Washburn on Real Prop. 589. But there will be no merger by the transfer to the tenant in tail of the remainder after the estate tail. *Wiscott's Case*, 2 Rep. 61; *Roe v. Baldwere*, 5 T. R. 110; *Poole v. Morris*, 29 Ga. 374.

² *Fearne Cont. Rem.* 340; 2 Washburn on Real Prop. 589, 590; *Crump*

vania not to apply, where a tenant for life buys the ultimate remainder, or conveys his estate to such remainder-man, where there is an intervening contingent remainder, so as to defeat the contingent remainder.³

§ 317. *Same* — 3. *By feoffment.*— The contingent remainder could also be defeated by the conveyance of the tenant by feoffment. It was the peculiar rule in connection with this mode of conveyance, that if the tenant of a particular estate—for example, the tenant for life—attempted to convey a fee or other greater estate by feoffment, he lost his estate and conveyed nothing to his feoffee.⁴ The particular estate was effectually destroyed, and it would consequently defeat any contingent remainders depending upon it. But this peculiarity prevailed only in the case of feoffment. If the conveyance was in any other form, as by any of the deeds operating under the Statute of Uses, the grantee would take only what estate the tenant had, and the contingent remainder would remain unaffected.⁵

v. Norwood, 7 Taunt. 362; *Doe v. Scudmore*, 2 B. & P. 294; *Plunket v. Holmes*, 1 Lev. 11; *Cresfield v. Storr*, 36 Md. 129. If a life tenant takes by will, as a remainderman, a merger occurs, in *Maryland. Graham v. Whitridge*, 57 Atl. Rep. 609.

³ *Stewart v. Neely*, 139 Pa. St. 309.

⁴ See *post*, Sec. 536. "If it (the feoffment) proposed to convey a fee simple, it created an actual fee simple in the feoffee, by right or by wrong, according as the feoffor was or was not seised in fee." 3 Washburn on Real Prop. 351.

⁵ 2 Washburn on Real Prop. 589; *Thompson v. Leach*, 2 Salk. 576; *Smith v. Clyfford*, 1 T. R. 744; *Dennett v. Dennett*, 40 N. H. 498; 3 Washburn on Real Prop. 352; *Litchfield v. Ferguson*, 141 Mass. 93. It is now provided by statute that feoffment shall not have any tortious operation. 3 Washburn on Real Prop. 351; 4 Kent's Com. 481. There are also general statutory provisions in Massachusetts, Kentucky, Mississippi, Missouri, Texas, Virginia, New York, Michigan, Minnesota, and Wisconsin, which declare that no alienation or other act of the tenant of the particular estate shall defeat the contingent remainder before the happening of the contingency, on which the vesting of the remainder is made to depend. 2 Washburn on Real Prop. 594, 595.

§ 318. Same.—4. By entry for condition broken.—If the particular estate is an estate upon condition, since a contingent remainder could not be made to vest upon the breach of the condition, such a breach and the consequent entry of the reversioner, he being the only one who could enter, would destroy the particular estate, and therewith the remainder dependent upon it.⁶

§ 319. Trustees to preserve—To remove the great danger of destruction by the act of the particular tenant, to which contingent remainders were exposed, a very ingenious method was devised by Sir Geoffrey Palmer and Sir Orlando Bridgman, whereby the contingent remainder was fully protected from the effect of a destruction of a particular estate before its natural termination. It was by interposing between the particular estate and the contingent remainder—a vested remainder to trustees, as it was called, “to preserve contingent remainders.” For example, the limitations would be to A. for life, remainder during the life of A. to trustees to preserve contingent remainders, remainder to the heirs of B. If, by any act of his, A.’s estate is destroyed, whether it be by disseisin, merger, feoffment, or the breach of a condition attached to his estate, the vested remainder to the trustees will take effect in possession. And since their estate is a trust, they cannot in any way defeat it; it continues to exist under all circumstances, until the period of its natural limitation has expired.⁷ In England, and generally in the States of this country, statutes have been passed preventing the destruction of the contingent remainder by the determination of the particular estate in any other mode, except the expiration of the period of natural limitation. Wherever there are such stat-

⁶ *Cogan v. Cogan*, Cro. Eliz. 360; *Sheffield v. Orrery*, 3 Atk. 282; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray, 149; *Williams v. Angell*, 7 R. I. 152; *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. Rep. 195.

⁷ 2 Washburn on Real Prop. 590; 2 Bla. Com. 171; *Fearne Cont. Rem.* 325; *Williams on Real Prop.* 283, 284.

utes it is not necessary to interpose a remainder to trustees; but in times past it was a very essential precaution, and was generally employed.

§ 320. **Actions by remainder-men.**—The relation of the tenant of the particular estate and that of the remainder-man has already been discussed and it has been shown that there are reciprocal rights and duties owing to each and that each has certain rights, as regards the preservation and enjoyment of his interest, that the other is bound to respect.⁸ Since the remainder-man has no right to possession of the estate during the continuance of the particular estate, he is not, generally, entitled to sue for any injury to the possession of the tenant of the preceding estate, but for all injuries to the possession or other acts that would not amount to an injury to the inheritance the tenant and not the remainder-man, is the proper person to sue.⁹ Where, however, the acts of the life tenant or those of a third person are such as result in damage to the inheritance, as where the inheritance is injured by waste, whenever the interest of the remainder-man is so far vested as that it could be legally regarded as an estate in the land, then the remainder-man and not the tenant, is a proper person to maintain the action for such injuries.¹⁰

⁸ *Ante* Sec. 300.

⁹ An action of ejectment cannot be maintained by a remainderman, during the life of the life tenant. *Laster v. Blackwell*, 133 Ala. 337, 32 So. Rep. 166. A remainderman cannot sue in trespass, for any injury to the possession, until termination of the life estate. *Bottorff v. Lewis* (Iowa 1903), 95 N. W. Rep. 262.

¹⁰ Where the inheritance is injured by waste, the remainderman and not the life tenant should sue for such waste. *Learned v. Ogden*, 80 Miss. 769, 32 So. Rep. 278. Life tenant held entitled to recover for injury, by waste, to inheritance, in New York, *Dix v. Jaguay*, 88 N. Y. S. 228, 94 App. Div. 554. Although the common law did not recognize a right of action by a contingent remainderman, equity will grant an injunction, even though there are mesne remaindermen. *Palmer v. Young*, 108 Ill. App. 252.

SECTION III.

ESTATES WITHIN THE RULE IN SHELLEY'S CASE.

SECTION 321.—Origin and nature of the rule.

322.—Requisites of the rule.

§ 321. **Origin and nature of the rule.**—It has long been a rule of the common law, that if an estate for life, or any other particular estate of freehold, be given to one with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent and not by purchase. The first taker is thereby enabled to make a free disposition of the estate in fee, and the heirs take by descent, only when no disposition has been made of it by the first taker. The rule was first given an authoritative utterance in *Shelley's Case*, decided in the time of Lord Coke, and hence it is called "the rule in *Shelley's Case*." Although called "the rule in *Shelley's Case*," it was then an ancient rule of the common law.¹¹

¹¹ *Shelley's Case*, 1 Rep. 94; 2 Washburn on Real Prop. 597; Williams on Real Prop. 253. In *Perrine v. Blake*, 4 Burr. 2579, Mr. Justice Blackstone refers to a case decided in the reign of Edw. II (18 Edw. II fol. 577), in which he thinks the rule was first laid down. Mr. Rawle in his note (Williams on Real Prop. 255, note 1), calls the reader's attention to the fact that the validity of the rule was not brought into question in *Shelley's Case*, but it was there for the first time stated so clearly that it has been given the name of the *rule in Shelley's Case*. In Indiana, where the rule in *Shelley's Case* is said "to be too well settled to admit of controversy," the rule is stated thus: "Where a freehold is limited to one for life, and by the same instrument, the inheritance is limited, either mediately or immediately, to heirs, or heirs of his body, the first taker takes the whole estate, either in fee-simple, or fee-tail; and the word 'heirs,' or 'heirs of his body' are words of limitation and not of purchase." *Taney v. Fahnley*, 126 Ind. 88; *Finch's Sel. Cas. Prop. in Land* 519; *Shimer v. Mann*, 99 Ind. 190. "The rule in *Shelley's Case* is, that if an es-

Blackstone refers it to a case which was tried in the 18 Edw. II. It is not definitely known what are the precise reasons for establishing such an arbitrary rule. Some have held that it was to prevent the loss of the lord's wardships by permitting the heirs to take as purchasers; while others have thought it arose from the general prevalence of the custom to construe the word "heirs," in instruments of conveyance as a word of limitation instead of purchase.¹² Perhaps the best reason is to be found in the fact that, at the time when the rule was first established, a contingent remainder was an impossible limitation, the remainder to the heirs being contingent until the death of the ancestor, and the rule was devised, in order to give effect to the intent of the grantor, as nearly as possible.¹³ But whatever may have been the reason it is a well established rule, and prevails wherever it is not abolished by statute.¹⁴ But in some of the States at the

tate for life, or any other particular estate of freehold, be given to one, with remainder to his heirs, the first taken shall be held to have the fee, and the heirs will take by descent and not by purchase." *Lacey v. Floyd* (Tex. 1905), 84 S. W. Rep. 587, 87 *idem* 665.

¹² 2 Washburn on Real Prop. 597; Williams on Real Prop. 254; 1 Prest. Est. 306.

¹³ This is the suggestion of the author, based upon the opinion of Mr. Williams, in which the author concurs, that at an early day contingent remainders were not recognized as valid legal limitations. See, *ante*, Sec. 305; Williams on Real Prop. 263. A remainder to the heirs of the tenant for life would be a contingent remainder, unless it was made under the rule in Shelley's Case to enlarge the estate of the first taker into a fee.

¹⁴ The rule has been generally recognized by the courts of this country, and it still prevails in perhaps most of the States. *Georg v. Morgan*, 16 Pa. St. 95; *Kleppner v. Lavery*, 70 Pa. St. 73; *James' Claim*, 1 Dall. 47; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Lyles v. Digge*, 6 Harr. & J. 364; *Chilton v. Henderson*, 9 Gill, 432; *Roy v. Garnett*, 2 Wash. (Va.) 9; *Smith v. Chapman*, 1 Hen. & M. 240; *Davidson v. Davidson*, 1 Hawks, 163; *Hull v. Beals*, 23 Ind. 28; *Baker v. Scott*, 62 Ill. 86; *Taney v. Fahnley*, 126 Ind. 88; *Conn. Mut. Life Ins. Co. v. Skinner*, 4 Ohio C. C. 526; *Carson v. Fuhs*, 131 Pa. St. 256; *Van Olinda v. Carpenter* (Ill.), 19 N. E. Rep. 868; *Hageman v. Hageman*, 129 Ill. 164. See *Boykin v. Ancrum*, 26 S. C. 486; *Leathers*

v. Gray, 101 N. C. 162; *Andrews v. Lothrop* (R. I.), 20 Atl. Rep. 97; *Spader v. Powers*, 56 Hun 153; *Wilkerson v. Clark* (Ga.), 7 S. E. Rep. 319; *Leathers v. Gray* (N. C.), 7 S. E. Rep. 657; *Ryan v. Allen*, 120 Ill. 643; *Allen v. Crafts*, 109 Ind. 476; *Cockin's Appeal*, 111 Pa. St. 26. The rule is still enforced in North Carolina (*Morrisett v. Stevens*, 136 N. C. 160, 48 S. E. Rep. 661); Texas (*Lacey v. Floyd*, 84 S. W. Rep. 857, 87 *Id.* 665); South Carolina (*Davenport v. Eskew*, 69 S. C. 292, 48 S. E. Rep. 223); Tennessee (*Bingham v. Weller*, 81 S. W. Rep. 843); Illinois (*Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. Rep. 28); Nebraska (*Albin v. Parmele*, 98 N. W. Rep. 29, 646) and Pennsylvania (*Shapley v. Diehl*, 203 Pa. 566, 53 Atl. Rep. 374). In *Hillman v. Bouslagh*, 13 Pa. St. 344, Chief Justice Gibson, in an able opinion, gives the rule a most earnest support, and defends the policy of retaining it as a part of the American law of real property. "The rule in Shelley's Case," says he, "ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one. . . . It happily falls in with the current of our policy. By turning a limitation for life, with remainder to the heirs of the body, into an estate tail, it is the handmaid not only of *Taltarum's Case*," (in this case estates tail were held for the first time to be barred by a common recovery. See *ante*, Sec. 42), "but of our statute for barring entails by a deed acknowledged in court, and where the limitation is to heirs general it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. . . . It is admitted that the rule subverts a particular intention in perhaps every instance; for, as was said in *Roe v. Bedford*, 4 Maul & Sel. 363, it is proof against even an express declaration, that the heirs shall take as purchasers. But it is an intention which the law cannot indulge, consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation, by making the general intention subservient to the particular one. The donor is no more competent to make a tenancy for life a source of inheritable succession than he is competent to create a perpetuity, or a new canon of descent. The rule is too intimately connected with the doctrine of estates to be separated from it without breaking the ligaments of property." The learned judge is wrong, when he says that the general rule of the law of interpretation and construction does not require the general intention to be subservient to the particular one. In the construction of wills, in which this conflict between a general and a particular intent usually arises, the general intention only controls the particular when the latter is inoperative on account of its illegality or impossibility of performance and the general intent is carried

present time, the rule has been abolished by statute, and the limitation to the heirs would be construed to be a contingent remainder, the heirs taking by purchase.¹⁵

out under the *cy pres* doctrine to prevent a complete failure of the gift. If it be true that the rule in Shelley's Case arose from an inability, according to the early law, to create a contingent remainder, and this is certainly more plausible than to suppose that the courts would arbitrarily nullify the expressed intention of the donor, for that would be an assumption by the courts of legislative powers, then since contingent remainders are now valid limitations, the particular intent of the donor should be allowed to take effect. If it is against the policy of the law to permit the creation of contingent remainders, then they should be abolished by statute. The courts have no legitimate power to effect the change by any such arbitrary and absurd rule of construction, as the rule in Shelley's Case.

¹⁵ The rule has been abolished by statute in Maine, Massachusetts, Connecticut, New York, Missouri, Michigan, Tennessee, Virginia, Kentucky, Alabama, Wisconsin, California, Dakota, Minnesota Mississippi and West Virginia, 2 Washburn on Real Prop. 607, note 2; Kirchwey, Read. on Real Prop. 357; Williams on Real Prop. 260, Rawle's note. In these States the rule has been abolished altogether, both as to grants and to wills. Richardson v. Wheatland, 7 Metc. 172; Bowers v. Porter, 4 Pick. 205; Moore v. Littell, 40 Barb. 488; Williamson v. Williamson, 18 B. Mon. 329; Montgomery v. Montgomery (Ky.), 11 S. W. Rep. 596; Gaukler v. Moran, 66 Mich. 353; McCauley v. Buckner, 87 Ky. 191; Wedekind v. Hallerberg (Ky.), 10 S. W. Rep. 368; Leake v. Watson (Conn.), 21 Atl. Rep. 1075. The rule has been abolished only as to wills, in Kansas, New Hampshire, New Jersey, Ohio, and Oregon. Kirchwey, Read. on Real Prop. 357; 2 Washburn on Real Prop. 607, note 2; Dennett v. Dennett, 40 N. H. 500; Den v. Demarest, 1 N. J. 525; Choutman v. Bailey, 62 N. H. 44. In Mississippi it is abolished as to real estate. Powell v. Brandon, 24 Miss. 343. And in Rhode Island it is declared by statute not to apply to devises, in which the property is limited to one for life and remainder to the *children* or *issue* of the devisee for life. Williams v. Angell, 7 R. I. 145; *In re Willis Will*, 25 R. S. 332, 55 Atl. Rep. 889. But the rule still holds good in all grants and devises in which the limitation in remainder is to the heirs generally, or to the heirs of the body of the first taker. Bullock v. Waterman St. Soc., 5 R. I. 273; Moore v. Dimond, *ib.* 127; Manchester v. Durfee, *ib.* 549; Cooper v. Cooper, 6 R. I. 264; Tillinghast v. Coggeshall, 7 R. I. 333; McNeal v. Sherwood, 53 Atl. Rep. 43. In Moore v. Littell, 41 N. Y. 66, which was affirmed in House v. Jackson, 50 N. Y. 165, it was declared by the New York Court of Appeals, that after the abolition by statute of the rule in Shelley's Case, the limitation to

§ 322. *Requisites of the rule.*—In order that the rule in Shelley's Case may apply, there must be a freehold in the first taker, limited expressly or by implication. An estate less than a freehold would not be sufficient, because a seisin in the first taker is necessary to draw the remainder to the particular estate.¹⁶ But if the limitations appear in a will,

the heirs of the donee for life is a vested remainder. This remarkable decision is altogether inconsistent with the rules of law of remainders, and even with the New York statutory definition of a contingent remainder, viz.: that they are contingent "whilst the person to whom, or the event upon which they are limited to take effect remains uncertain." 1 Rev. Stat., p. 723; Sec. 13; McCall on Real Prop. 113. Prof. McCall, in referring to the case of *Moore v. Littell*, says; "Thus a grant to A. for life, and after his death to his heirs and assigns forever, gives the children of A. a vested interest in the land; although liable to open and let in after born children of A., and also liable, in respect of the interest of any child, to be wholly defeated by his death before his father." *Query*, if there are no born children, in whom is the remainder vested? the collateral heirs? The true doctrine is that such a remainder is contingent, *nemo est hæres viventis*, and this is the rule of the other courts. *Richardson v. Wheatland*, 7 Metc. 169; *Moore v. Weaver*, 16 Gray, 307; *Williams v. Angell*, 8 R. I. 145; *Hillman v. Bouslaugh*, 13 Pa. St. 344.

¹⁶ *Pibus v. Mitford*, 1 Ventr. 372; *Webster v. Cooper*, 14 How. 500; *Ogden's App.*, 70 Pa. St. 509; *Williams on Real Prop.* 256; 2 Washburn on Real Prop. 598, 601. The rule in Shelley's Case applies to equitable estates as well as to legal estates, where the trusts are *executed*. *Croxall v. Shererd*, 5 Wall. 281; *Tillinghast v. Coggeshall*, 7 R. I. 383. If they are *executory*, as they usually are in marriage settlements, or if it is the clear intention of the donor that the tenant for life shall not have the power to cut off the estate in remainder, the rule will not apply. 2 Washburn on Real Prop. 495; *Sand. Uses*, 311; *ones v. Laughton*, 1 Eq. Cas. Abr. 392; *Gill v. Logan*, 11 B. Mon. 231; *Berry v. Williamson*, 11 B. Mon. 245. The rule is applied to executed trusts with this qualification, that the two estates, the freehold in possession and the remainder, must both be legal or both equitable. The rule will not apply where one is legal and the other is equitable. *Sylvester v. Wilson*, 2 T. R. 444; *Adams v. Adams*, 6 Q. B. 860; *Doe v. Ironmonger*, 3 East 533; *Curtis v. Rice*, 12 Ves. 89; *Croxall v. Shererd*, 5 Wall. 281; *Ward v. Armory*, 1 Curt. 419; *Tallman v. Wood*, 26 Wend. 9. But if both are legal it will not prevent the rule from applying if one of them is charged with a trust and the other is an absolute estate.

while a remainder can be limited in chattel interests, the rule in Shelley's Case has been held, nevertheless, to apply, so as to give the absolute estate to the first taker.¹⁷ It must, in the second place, be created by the same instrument as is the remainder to the heirs. If given by different instruments the rule will not apply.¹⁸ But a will and an annexed codicil are in this connection considered as constituting one instrument, and the rule would apply if the life estate was given in the will proper, and the reversion in the codicil. So also would the rule apply if, instead of a grant of a remainder, there appeared in the same instrument a power of appointment to the heirs.¹⁹ In the next place, the subsequent limitation must be made to the heirs of the first taker. If the remainder is limited to the heirs of a stranger, or if it is limited to the joint heirs of two persons, one of whom alone takes the estate in possession, the rule does not apply, and the subsequent limitation remains a contingent remainder in the heirs, as purchasers.²⁰ If the limitation be to the heirs of

Tud. Ld. Cas. 484; *Douglass v. Congreve*, 1 Beav. 59; s. c. 4 Bing. N. C. 1.

¹⁷ *Hughes v. Nicholas*, 70 Md. 484. In Rhode Island, the rule in Shelley's Case is held applicable to personalty, by analogy, if no contrary intent appears. *Evans v. Weatherhead*, 24 R. I. 502, 53 Atl. Rep. 866.

¹⁸ 2 Washburn on Real Prop. 598; Co. Lit. 299 b, Butler's note, 261; *Doe v. Fonnerneau*, 1 Dougl. 509; *Moore v. Parker*, 1 Ld. Raym. 37; *Webster v. Cooper*, 14 How. 500; *Adams v. Guerard*, 29 Ga. 675. See, also, *Taney v. Tahnley*, 126 Ind. 88; *Finch's Sel. Cas. Prop. in Land* 519.

¹⁹ *Williams on Real Prop.* 256; 2 Washburn on Real Prop. 598; *Hayes v. Forde*, 2 W. Bl. 698; Tud. Ld. Cas. 483, 484; Co. Lit. 299 b, Butler's note 261; *Tillinghast v. Coggeshall*, 7 R. I. 383. But where a power of appointment is interposed between an estate for life and a contingent remainder to one's children or to *special* heirs, the rule does not apply, and the children or special heirs take as purchasers, although the interposition of the power would not prevent the application of the rule, where the remainder was limited to the heirs generally. *Dodson v. Ball*, 60 Pa. St. 497; *Yarnall's App.*, 70 Pa. St. 342.

²⁰ *Archer's Case*, 1 Co. 66 b; *Fuller v. Chamier*, L. R. Eq. 682; *Webster v. Cooper*, 14 How. 500; 2 Washburn on Real Prop. 599; *Williams on Real Prop.* 261.

his body, the first taker would have an estate tail instead of a fee.²¹ But if the limitation be to one's heir and the heirs male of the heir, the rule is not applicable, the express limitation in tail preventing an amalgamation of the two estates.²² The rule cannot apply where the life estate is an equitable estate, and the remainder is a legal estate.²³ But, with these exceptions, nothing that the grantor can do will prevent the application of the rule if the remainder in fee or in tail is given to the heirs of the first taker—not even an express direction that the rule should not apply.²⁴ But limitation to the sons, children, or issue of him who takes the life estate, will not be converted by the rule into a fee in the first taker, unless they are created by will, and from a consideration of the whole will, it appears that these words were used in the sense of heirs. And the strongest and clearest evidence is necessary to give this construction to the words *sons* or *chil-*

²¹ *Pibus v. Mitford*, 1 Ventr. 372; *Hillman v. Bouslagh*, 13 Pa. St. 351; *Toller v. Atwood*, 15 Q. B. 929; *Doe v. Harvey*, 4 B. & C. 610.

²² *Tud. Ld. Cas.* 493; *McCullough v. Gliddon*, 38 Ala. 208.

²³ *Rife v. Geyer*, 59 Pa. St. 393; *Mayer's Appeal*, 49 Pa. St. 111; *Reading Trust Co.'s Appeal*, 26 W. N. C. 9; *Handy v. McKim*, 64 Md. 560.

²⁴ *Perrin v. Blake*, 1 W. Bl. 672; *s. o.*, 4 Burr. 2579; *Roe v. Bedford*, 4 Mauel & Sel. 363; *Toller v. Atwood*, 15 Q. B. 929; *Doe v. Harvey*, 4 B. & C. 610; *Jesson v. Doe*, 2 Bligh, 1; *Doebler's App.*, 64 Pa. St. 15; *Klappner v. Laverty*, 70 Pa. St. 73; *Tud. Ld. Cas.* 488, 489; 2 *Washburn on Real Prop.* 602; *Stone v. McEckron*, 57 Conn. 194; *Appeal of Keim*, 125 Pa. St. 480; *Reading Trust Co.'s Appeal*, 26 W. N. C. 9; *Little's Appeal*, 117 Pa. St. 14; *Bassett v. Hawk*, 118 Pa. St. 94; *Henderson v. Walthour* (Pa.), 15 Atl. Rep. 893; *Huntzelman's Appeal*, 136 Pa. St. 142; *Earnhart v. Earnhart*, 127 Ind. 396; *Giffin's Estate*, 138 Pa. St. 327. But see *contra*, *Bedford v. Jenkins*, 96 N. C. 254; *Fields v. Watson*, 23 S. C. 42. In *Belslay v. Engel* (107 Ill. 186), it is said: "the rule is, at most, a technical rule of construction and has always, since the decision in *Perrin v. Blake* (4 Burr. 257), given way to the clear intention of the testator, or donor, when that intention could be ascertained from the instrument." See, also, *Lacey v. Floyd* (Tex. 1905), 84 S. W. Rep. 857, 87 *idem* 665.

dren.²⁵ It is easier to apply this construction to the word *issue*. The general rule is that persons thus described take as purchasers and not by descent, and that the remainders are vested as soon as persons corresponding to the description come into being.²⁶ It has been held also that where the limitation in remainder is to the "bodily heirs" of the first taker, the rule will not apply if the contents of the will shows that those were used in the sense of children.²⁷ The rule will also apply, even though there are intervening limitations to strangers. But the fee in remainder would vest in the first taker expectant upon the termination of the intermediate limitation. The intermediate limitation is not destroyed by merger of the estate in possession and the remainder, under the operation of the rule in Shelley's Case.²⁸

²⁵ See *Greer v. Pate*, 85 Ga. 552; *Jackson v. Jackson* (Ind.), 26 N. E. Rep. 897.

²⁶ *Poole v. Poole*, 3 Bos. & P. 620; *Slater v. Dangerfield*, 15 M. & W. 263; *Doe v. Daviess*, 4 B. & Ad. 43; *Shaw v. Weigh*, Strange, 798; *Robinson v. Robinson*, 1 Burr. 38; *Lees v. Mosley*, 1 Younge & C. 589; *Doe v. Charlton*, 1 M. & G. 429; *Doe v. Collis*, 4 T. R. 209; *Flint v. Steadman*, 36 Vt. 210; *Adams v. Ross*, 30 N. J. L. 512, overruling *Ross v. Adams*, 28 N. J. L. 172; *Taylor v. Taylor*, 63 Pa. St. 483, 3 Am. Rep. 565; *Webster v. Cooper*, 14 How. 500; *Ford v. Flint*, 40 Vt. 394; *Sinton v. Boyd*, 19 Ohio St. 30, 2 Am. Rep. 369; *People's Sav. Bank v. Denig*, 131 Pa. St. 241; *Foster v. McKenna* (Pa.), 11 Atl. Rep. 674; *McDonald v. Dunbar* (Pa.), 12 Atl. Rep. 553; *McCanley v. Buckner* (Ky.), 8 S. W. Rep. 196; *Boykin v. Ancrum* (S. C.), 6 S. E. Rep. 305; *Handy v. McKim*, 64 Md. 566; *Carroll v. Burns*, 108 Pa. St. 286; *Henderson v. Henderson*, 64 Md. 185.

²⁷ *Mitchell v. Simpson* (Ky.), 10 S. W. Rep. 372.

²⁸ 2 Washburn on Real Prop. 601; Williams on Real Prop. 256-260; *Frank v. Frank* (Pa.), 17 Atl. Rep. 11. But see apparently *contra*, *Hadlock v. Gray*, 104 Ind. 596.

CHAPTER XIV.

USES AND TRUSTS.

- SECTION I. *Uses before the Statute of Uses.*
II. *Uses under the Statute of Uses.*
III. *Shifting, Springing and Contingent Uses.*
IV. *Trusts.*

SECTION I.

USES BEFORE THE STATUTE OF USES.

- SECTION 323. Pre-statement.
324. Origin and history.
325. What is a use.
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327. Distinction between Uses and Trusts.
328. How uses may be created.
329. Same — Resulting use.
330. Same — By simple declarations.
331. Who might be *feoffees to use* and *cestuis que use*.
332. What might be conveyed to uses.
333. Incidents of uses.
334. Alienation of uses.
335. Estates capable of being created in uses.
336. Disposition of uses by will.
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§ 323. *Pre-statement.*—The reader has been prepared, by the classification of estates presented in a previous chapter,¹ for the discussion of interests and estates in lands, which are purely equitable; that is, cognizable solely in a court of equity, and separate and distinct from the legal estate, which is alone recognized in a court of law. Equitable mortgages and liens constitute one class of such interests, which have been already

¹ See *ante*, Sec. 26.

considered.² The class of equitable interests, which are more properly comprehended under the term estate, is what is known as Uses and Trusts.

§ 324. *Origin and history.*—It is not proposed to give in detail the history of the origin and introduction into the English jurisprudence of Uses and Trusts, but a few words are necessary as explanatory of their character. At common law the only mode of conveying lands was by transmutation of possession. This element was a necessary ingredient of every conveyance, for a common-law title was inseparable from the right of possession. The power of alienation was also very much restricted. It could only be done with the consent of the lord, and even after these restrictions upon conveyancing were removed, the inability to dispose of lands by will, the cumbersome character of the common-law conveyances, and the burdens attached as incidents to a legal estate, such as the rights of dower and curtesy, the possibility of escheat and forfeiture for attainder of treason or corruption of blood, and the innumerable fines and reliefs required by the feudal law of tenure to be paid to the lord, led to the introduction of Uses and Trusts, which relieved the beneficial owner of all these burdens, and gave him an almost absolute property in the lands. A further impetus was given to their general adoption by the prohibitions imposed by the *magna charta* and the statute of *mortmain* upon the ecclesiastical corporations to hold and acquire lands. These statutes, recognizing and relating solely to legal estates, only prevented such corporations from holding legal estates. The ecclesiastics, with their customary astuteness, had the lands conveyed to persons who could take and hold them in trust, to permit the corporations to enjoy the benefit thereof. It may be doubtful whether the ecclesiastics were the first to adopt this mode of holding lands, but to them certainly may be ascribed the honor of devising the means for the enforcement of the confidence reposed in the

² See *ante*, Secs. 213, 220.

person, to whom the land was conveyed. Finally the civil wars between the houses of Lancaster and York, and the increased danger of attainder and confiscation of estates, resulting from participation in these wars upon one side or the other, caused a large portion of the lands of England to be settled in this manner.* It is supposed, with good reason therefor, that the doctrine of uses and trusts was derived from the civil or Roman law, and corresponds, in some respects, to what is known in that system of jurisprudence as the *fidei commissum*.⁴

§ 325. *What is a use?*—A use or trust is a confidence, which acquired under the operation of the rules of equity the character of an estate, reposed in the person holding the legal estate, who is known as the feoffee to use or trustee, that he shall permit the person designated in the conveyance to the feoffee to use or by the legal owner, and who is called the *cestui que use or trust*, to enjoy the rents and profits of the land. The use or trust is the beneficial interest in and issuing out of the land, while the legal title remained in the person who was seised to the use.⁵ In a court of law he was deemed the

* 2 Washburn on Real Prop. 384–386; 1 Spence Eq. Jur., 439–442; Chudleigh's Case, 3 Rep. 123; 2 Pomeroy Eq. Jur., Sec. 978.

⁴ 2 Washburn on Real Prop. 386; Bac. Law Tracts 315; Cornish, Uses, 10. The *fidei commissum* of the Roman law, however, could only be created by will, and was designed to give the beneficial interest in property to those who were otherwise prohibited from taking as devisee. The testator would direct the heir to transfer the estate to the person designated. This trust was then enforced by the courts. It is, therefore, more proper to say that the *fidei commissum* suggested the use, and the mode of enforcing it, than that the use is derived from the Roman law. Saunder's Justinian, 337, 338; 2 Pomeroy Eq. Jur., Secs. 976, 977.

⁵ 2 Washburn on Real Prop. 388; 2 Bla. Com. 330; Bac. Law Tracts 307; Co. Lit. 271 b, Butler's note, 231, Sec. 2; 2 Pomeroy Eq. Jur., Secs. 978, 979; 1 Spence Eq. Jur. 439–444; Burgess v. Wheate, 1 W. Bl. 158; Tud. Ld. Cas. 252, 253. "An use is a trust or confidence, which is not issuing out of land, but as a thing collateral, annexed in privacy to the estate, and to the person, touching the land, *scil.* that

owner, brought all the actions for the protection of the property against trespass, waste and disseisin, and exercised generally the legal rights of an owner.⁶ He could even maintain an action of ejectment against the *cestui que use*.⁷ The rights of the *cestui que use* were not recognized in a court of law. He has no standing in that court, and only obtained an ample remedy for the protection of his estate when the court of chancery assumed jurisdiction.⁸

§ 326. **Enforcement of the use.**—Before the English court of chancery acquired jurisdiction, the *cestui que use* was compelled to rely upon the good faith of the feoffee to use, although there is supposed to have been an inefficient remedy in the spiritual or ecclesiastical courts. But since these courts had no means of enforcing their decrees, and exerted only a spiritual influence over the conscience, the *cestui que use* was practically dependent upon the honesty of his feoffee to use.⁹ The ecclesiastics were, of course, greatly concerned in providing a sufficient remedy for their protection and the enforcement of their uses. The court of chancery was at that time entirely under their control, for the chancellor and other judges of the court were almost always appointed from the clergy. And being learned in the civil law, they readily

cestui que use shall take the profits, and that the tertenant shall make estates, according to his direction. So that he who hath an use hath not *jus neque in re, neque ad rem*, but only a confidence and trust, for which he hath no remedy, by the common law, but his remedy was only by subpœna in chancery." Co. Rep. 121, Kirchwey, Read, in Law, Real Prop. 140.

⁶ Tud. Ld. Cas. 252; 2 Bla. Com. 330; 1 Spence Eq. Jur. 442; Chudleigh's Case, 1 Rep. 121; 2 Pomeroy Eq. Jur. Sec. 979; 2 Washburn on Real Prop. 388.

⁷ 1 Spence Eq. Jur. 442; Tud. Ld. Cas. 253; Cudleigh's Case, 1 Rep. 121.

⁸ 1 Spence Eq. Jur. 456; Co. Lit. 271 b, Butler's note, 231, Sec. 2; Pom. Ep. Jur., Secs. 979, 980; Tud. Ld. Cas. 252; Lewin on Tr. 3, 4; Co. Rep. 121.

⁹ 1 Spence Eq. Jur. 444; Tud. Ld. Cas. 252; Bac. Law Tracts 307.

found a precedent in the enforcement of the *fidei commissa*¹⁰ of that system of jurisprudence. With this precedent before him, John De Waltham, Bishop of Salisbury, Master of the Rolls, devised the "writ of subpœna," returnable in chancery, and directed against the feoffee to use, by which he was made to account under oath to the *cestui que use* for the rents and profits he had received from the land.¹¹ This writ could at first be issued against the *feoffee to use*, but not against his heirs and assigns. Subsequently it was made issuable against the heirs and all alienees of the feoffee, who took with notice of the use.¹² The court of chancery then for the first time acquired complete jurisdiction over uses and trusts. From that time forward, in the exercise of that jurisdiction, a set of rules has been established for their interpretation and construction, which gave to them, as nearly as it was possible or advisable, the character and incidents of legal estates.¹³

§ 327. *Distinction between uses and trusts.*—Although the words *uses* and *trusts* were employed before the passage of the Statute of Uses, as if they were synonymous; and although they may be used interchangeably when speaking generally of these equitable estates, as they then prevailed, yet a distinction was made between them according to the permanent or temporary character of the estate. If the right to the rents and profits was permanent—that is, of a long duration—it was called a *use*. If the right was only of a temporary character, or given only for special purposes, it was desig-

¹⁰ 1 Spence Eq. Jur. 436; Bac. Law Tracts 315; Digley, Hist. Real Prop., Chap. VI; Kirchwey, Read. in Law Real Prop. 146.

¹¹ 1 Spence Eq. Jur. 438; 2 Washburn on Real Prop. 389; 1 Pom. Eq. Jur., Secs. 428-431.

¹² 1 Spence Eq. Jur. 445; 2 Washburn on Real Prop. 380; 2 Bla. Com. 329; *Burgess v. Wheate*, 1 W. Bl. 156, 2 Pom. Eq. Jur. Sec. 980.

¹³ 2 Washburn on Real Prop. 392; 1 Cruise Dig. 341; 1 Spence Eq. Jur. 435; 2 Bla. Com. 331; Digley, Hist. Real Prop., Chap. VI; 2 Pollock & Maitland's Hist. Eng. Law 226.

nated a *trust*.¹⁴ A more radical difference now exists in the present use of these terms, arising out of the change made in equitable estates by the Statute of Uses.

§ 328. *How uses may be created — By feoffment.*— Since at common law the ordinary conveyance was feoffment with livery of seisin, operating by transmutation of possession and requiring no evidence in writing of such conveyance, a use might have been created before the Statute of Frauds, when employing this mode of conveyance, by a simple declaration of the feoffor at the time that the feoffee was to hold to the use of some other person.¹⁵ The Statute of Frauds, however, requires uses and trusts as well as legal estates to be evidenced by some writing signed by the party to be charged. At the present day, therefore, an oral declaration will not be sufficient to raise a use.¹⁶

§ 329. *Same — Resulting use.*— As a consequence of the introduction of uses, if one makes a conveyance in fee without receiving any good or valuable consideration, equity, presuming that one will not part with a valuable estate without receiving in return a consideration, held that the beneficial or equitable interest remained in or resulted to the grantor. He was supposed to have intended that the use should be reserved to himself. This was called a resulting use. It became, therefore, a general rule that a conveyance of the legal estate in fee, without a consideration, will not carry with it the beneficial interest unless the facts of the case were such as to rebut the presumption that the feoffor did not intend to part with the beneficial interest.¹⁷ But where the estate con-

¹⁴ 2 Washburn on Real Prop. 398; 1 Cruise Dig. 246; Tud. Ld. Cas. 255; San. Uses, 3, 7; 1 Spence Eq. Jur. 448.

¹⁵ 1 Spence Eq. Jur. 449; 2 Washburn on Real Prop. 392; 2 Bla. Com. 331.

¹⁶ Stat. 29 Car. ii, c. 3, Secs. 7, 8; 2 Washburn on Real Prop. 500, 501; Saund. Uses 229; Tud. Ld. Cas. 266.

¹⁷ 3 Washburn on Real Prop. 393; 1 Spence Eq. Jur. 451; 2 Bla. Com.

veyed was less than a fee, there was no resulting use, as the duties and liabilities attached to an estate for life, for years and in tail, were considered a sufficient consideration to prevent the use resulting to the grantor and, also, because the retention of a part of the estate negatives the presumption that he did not intend to part with the beneficial interest in the part which he did convey.¹⁸ The use can result only to the grantor and his heirs.¹⁹ And for the purpose of carrying the use to the feoffee, the smallest nominal consideration was sufficient. It need not be stated in the deed if an actual consideration had passed between the parties; on the other hand, if there is an acknowledgment of the receipt of the consideration in the deed of conveyance, there need be no actual consideration, since the parties to the deed will be estopped from denying it.²⁰ Nor is a consideration necessary where the deed expressly declares to whose use the land shall be held. But if only a part of the use is declared by the deed, the remainder would result to the grantor, in the same manner as if no use had been limited, unless the use declared is limited

331; *Lloyd v. Spillett*, 2 Atk. 150; 2 Pom. Eq. Jur., Sec. 981; *Osborn v. Osborn*, 26 N. J. Eq. 385. "Two kinds of consideration alone were regarded as affording a sufficient motive; these were *blood* and *money*. . . . If no proper evidence of either of these motives existed, the beneficial interest *resulted*, or came back to the donor." Digby Hist. Real Prop., Ch. 6; Kirchwey, Read. in Law Real Prop. 153; Sugd. Gilb. Uses, p. 125 *et sub*.

¹⁸ 1 Prest. Est. 192; 1 Cruise Dig. 376; 1 Spence Eq. Jur. 452; 2 Washburn Real Prop. 396; Tud. Ld. Cas. 258.

¹⁹ 2 Washburn on Real Prop. 393, 394; 1 Prest. Est. 195; 1 Cruise Dig. 373.

²⁰ 1 Spence Eq. Jur. 450, 451; 2 Bla. Com. 329; Tud. Ld. Cas. 255; *Lewin on Tr.* 27; *Squire v. Harder*, 1 Paige 494; *Bk. of U. S. v. Houseman*, 6 Paige 526; *Titcomb v. Morrill*, 10 Allen 15; 1 Greenl. on Ev., Sec. 26; *Griswold v. Messenger*, 6 Pick. 517; *Bragg v. Geddes*, 93 Ill. 39; *Bartlett v. Bartlett*, 14 Gray 277; *Gerry v. Stimpson*, 60 Me. 186; *Wilt v. Franklin*, 1 Binn. 518; *Boyd v. McLean*, 1 Johns. Ch. 582; *Farrington v. Barr*, 36 N. H. 86; *Maigly v. Hauer*, 7 Johns. 341; *Shepherd v. Little*, 14 Johns. 210; 2 Washburn on Real Prop. 394; *Gould v. Linde*, 114 Mass. 366; *Graves v. Graves*, 29 N. H. 129; *Cairns v. Colburn*, 104 Mass. 274.

to the grantor, when the remainder will be in the feoffee.²¹ Where, however, the use in remainder is limited by will, and there is no disposition of the use during the life of the trustee, particularly where the trustee is the wife or other near relative of the testator, a use is held to be limited by implication in the trustee for his or her life.²² The doctrine of resulting uses has been abolished by statute in some of the States.

§ 330. Same — By simple declarations.—Not only could uses be raised by a declaration to that effect, made in connection with a feoffment or other common-law conveyance, as above explained, but also by a simple declaration made by the legal owner that he held the land to the use of another.²³ But since a court of equity lends its aid only to the prevention of an injury or wrong (*injuria*), and will not enforce mere voluntary obligations, these declarations, when made independently of a common-law conveyance, had to rest upon a consideration, in order that they might be enforced. If the declaration was made to a stranger, a valuable consideration was required, but it need not be a substantial one; while in the case of a declaration to a near blood-relation, a good consideration, natural love and affection, would answer.²⁴ And

²¹ 1 Spence Eq. Jur. 449, 511; 2 Bla. Com. 329; *Lloyd v. Spillett*, 2 Atk. 68; *Lampleigh v. Lampleigh*, 1 P. Wms. 112; *St. John v. Benedict*, 23 a; *Tud. Ld. Cas.* 258; 1 Prest. Est. 191, 195; *Pibus v. Mitford*, 1 Ventr. 372; *Tipping v. Cozzens*, 1 Ld. Raym. 33; *Volgen v. Yates*, 5 Seld. 223; *Farrington v. Barr*, 36 N. H. 88; *Sir Edw. Clerc's Case*, 6 Rep. 17; *Kenniston v. Leighton*, 53 N. H. 311; *Graves v. Graves*, 9 Fost. 129; *Sprague v. Woods*, 4 Watts & S. 192; *Walker v. Walker*, 2 Atk. 68; *Lampleigh v. Lampleigh*, 1 P. Wms. 112; *St. John v. Benedict*, 6 Johns. Ch. 116; *Capen v. Richardson*, 7 Gray 370; *Altham v. Angelsea*, 11 Mod. 210; *Boyd v. McLean*, 1 Johns. Ch. 582; *Peabody v. Tarbell*, 2 Cush. 232; *Adams v. Savage*, 2 Salk. 679; *Rawley v. Holland*, 2 Eq. Cas. Abr. 753; 1 Cruise Dig. 376; *Roe v. Popham*, Dougl. (Mich.) 25; *McCown v. King*, 23 S. C. 232; *Gove v. Learoyd*, 140 Mass. 524.

²² *Fisher v. Fisher*, 41 N. J. Eq. 16.

²³ See *post*, Sec. 373.

²⁴ 2 Bla. Com. 329; *Co. Lit.* 271 b, *Butler's note* 231; *Tud. Ld. Cas.* 268; 1 Spence Eq. Jur. 450; 2 Washburn on Real Prop. 394, 395.

under this rule equity always construed a contract of sale or agreement to convey as a declaration to use, and would enforce it, if the requisite consideration was present.²⁵ The Statute of Frauds now requires all such declarations to be proved by some instrument in writing.²⁶

§ 331. Who might be feoffees to use and cestuis que use.—

As a general proposition, all persons who could be grantees in a common-law conveyance can be either *feoffees to use* or *cestuis que use*, infants and married women not excepted. The married woman, as *feoffee to use*, would hold the legal estate free from any attaching rights of her husband, and, as *cestuis que use*, enjoy the beneficial interest as freely as if she were single. Her husband acquires no rights in the equitable estate, since they attach and relate to only legal estates.²⁷ Corporations can be *cestuis que use*.²⁸ It was formerly held that corporations could not be *feoffees to use*, it being supposed impossible to enforce the performance of the use, on account of the intangible, soulless character of the corporation. That doctrine has now been exploded, and courts of equity can enforce their decrees just as effectively against corporations as against natural persons. It is, therefore, the prevailing rule in this country that corporations may hold lands as *feoffees to use*, provided the limitations of their charters do not make such a conveyance foreign to the purposes of their creation.²⁹

²⁵ 2 Washburn on Real Prop. 397; 1 Spence Eq. Jur. 452, 453.

²⁶ See *post*, Sec. 374.

²⁷ Tud. Ld. Cas. 254; 4 Kent's Com. 293; Egerton v. Brownlow, 4 H. L. Cas. 206; Saund. Uses 349; Hill, Trust. 52; Pinson v. Ivey, 1 Yerg. 325; Springer v. Berry, 48 Me. 338; Claussen v. La Franz, 1 Iowa 237; 2 Washburn on Real Prop. 391, 392; 1 Cruise Dig. 340. It is here meant that the husband's rights during coverture do not attach to the wife's equitable estate. But he has curtesy in such estates, unless expressly excluded. See *ante*, Sec. 79.

²⁸ Cruise Dig. 354; 2 Washb. on Real Prop. 391; Tud. Ld. Cas. 254.

²⁹ Ang. & Ames on Corp., Ch. 2, Secs. 6-8; 2 Washburn on Real Prop. 391; Vidal v. Girard, 2 How. 127; Sutton v. Cole, 3 Pick. 232; Phil-

§ 332. **What might be conveyed to uses.**— Every species of real property, which is comprehended under the terms *lands, tenements and hereditaments*, both corporeal and incorporeal, may be the subject of conveyance to uses.³⁰ At an early period it was held necessary for the grantor to be possessed of an estate of which seisin could be predicated, in order that a use might be created out of it.³¹ But this doctrine has long since been abandoned, and chattels, both real and personal, can now be settled to uses. But since a mortgage is treated in equity as a lien, instead of an estate in lands, there can be no conveyance of it to uses, *i. e.*, independently of the debt. The debt may be conveyed to uses, and the mortgage would follow as an incident of the debt.³²

§ 333. **Incidents of uses.**— As uses, considered as estates in lands, were the mere creatures of equity, and acquired in the early days of their existence no actual recognition in a court of law, the court of chancery, in establishing rules for the government and construction of them, while following to some extent the analogies of the law in relation to legal estates, adopted only such rules of the common law as were consistent with the intended character of this equitable estate. It, therefore, discarded the doctrines of feudal tenure and seisin altogether. Nor did the court at first recognize in uses the rights of dower and curtesy. Uses were also held to be not liable to levy and sale under execution; nor were they forfeited to the crown upon attainder until the statute of 33 Hen.

lip's Academy v. King, 12 Mass. 546. "The feoffee to uses must be an individual capable of the conscientious obligation. Hence, a body corporate is incapable of holding to the use of any one. Nor were aliens, or persons attainted, or the king, capable of holding to a use." Digby Hist. Real Prop., Ch. 6; Kirchwey, Read. in Law Real Prop. 151.

³⁰ 2 Washburn on Real Prop. 391; 2 Bla. Com. 331.

³¹ 2 Bla. Com. 331; 1 Cruise Dig. 340; Tud. Id. Cas. 259.

³² 2 Washburn on Real Prop. 408; *Merrill v. Brown*, 12 Pick. 220.

VIII, ch. 20, Sec. 2.³³ But they were descendible to the heirs, in conformity with the common law of descents.³⁴

§ 334. **Alienation of uses.**—For the same reasons, the restrictions imposed upon the common-law power of alienation were not applied to uses. There is no limitation upon the alienation of uses, except that imposed by the Statute of Frauds. Before the passage of that statute no formal assignment in writing was required; a simple direction to the trustee to pay over the rents and profits to the assignee was sufficient. These directions the trustee was bound to follow, and obedience could be enforced in like manner as in the case of the original *cestui que use*.³⁵ But the assignment of the use necessarily had no effect upon the legal estate in the trustee, unless he joined in the conveyance.³⁶ And then the formalities required in all common-law conveyances must have been complied with in order to pass the legal estate.

§ 335. **Estates capable of being created in uses.**—When one has an unlimited use, *i. e.*, a use in fee, whether alone or merged in the legal estate, there is no limitation upon the number and kinds of estates which might be carved out of it. Not only may all the estates known to the common law be

³³ 2 Washburn on Real Prop. 395, 399; 1 Spence Eq. Jur. 455, 456, 460; 1 Washburn on Real Prop. 297; 2 Bla. Com. 331; Jackson v. Catlin, 2 Johns. 261. Uses are now very generally held to be subject to the husband's right of curtesy. See *ante*, Sec. 79. "The legislature, at a very early date, interfered, in the interest of creditors, to render uses liable to be taken in execution for debt." Digby Hist. Real Prop., Ch. 7, Sec. 1; Kirchwey, Read. in Law Real Prop. 155.

³⁴ 2 Bla. Com. 329; 1 Spence Eq. Jur. 454.

³⁵ 2 Cruise Dig. 342; 1 Spence Eq. Jur. 454. The Statute of Frauds required all trusts and confidences to be proved by some writing. 29 Car. 2, Ch. 3. "When the interest . . . of *cestui que use* had been created, that interest might without any formality, by words or acts, evidencing the intention, be transferred, by *cestui que use*, to any one capable of taking a use." Digby Hist. Real Prop., Ch. 6. Kirchwey, Read. in Law Real Prop. 154.

³⁶ 2 Washburn on Real Prop. 396; 2 Bla. Com. 331.

created, such as in tail, for years, for life, in remainder vested or contingent, upon condition and upon limitation,³⁷ but other estates and interests may be limited which are unknown to the common law, and violate its most inflexible rules. Thus, an estate in freehold in the use may be created to commence in the future without a particular estate to support it, whether it be vested or contingent. Or the grantor may limit the use in such a manner as to pass from one to another upon the happening of a contingency; or he may reserve to himself or grant to another the power to divest the present *cestui que use* and vest the use in another to be appointed, or simply by such destruction of the prior use to cause the use to revert to the grantor. These limitations were impossible at common law.³⁸ And in construing the limitations of uses, the strict technical rules are not observed, the intention governing in each case. A fee might, therefore, be created in the use without an express limitation to heirs, if the intention to create such an estate is manifested in any other way.³⁹

§ 336. **Disposition of uses by will.**— Under the feudal system, lands could not be disposed of by will. But uses were held to be capable of devise without limitation; and until the passage of the Statute of Wills, 32 Hen. VIII, which made lands divisible by law, as they were under the Saxon law before the Norman conquest, it was a common custom to convey lands to the use of the grantor, which he could then dispose of by will as well as by deed.⁴⁰ The Statute of Wills

³⁷ 1 Spence Eq. Jur. 455; 1 Cruise Dig. 343; 2 Washburn on Real Prop. 397.

³⁸ 2 Washburn on Real Prop. 397, 398; 1 Cruise Dig. 343; 1 Spence Eq. Jur. 455; Chudleigh's Case, 1 Rep. 135; Shelley's Case, 1 Rep. 101; Fearne Cont. Rem. 284.

³⁹ 1 Spence Eq. Jur. 452; Tud. Ld. Cas. 253; 2 Washburn on Real Prop. 395.

⁴⁰ "It should be remembered that no formality, not even writing, was required to establish a will; any evidence of the expression of the intention of a testator, would be sufficient to raise a use, by which the

obviated the necessity of such a conveyance in respect to all persons who were empowered by that statute to devise lands. As married women were expressly excluded from the benefit of the statute, this practice of conveying to uses to enable a disposition by will still obtained as to them. The will in such cases only operates as an assignment or devise of the use, or, if it be executed under a power of appointment, as a declaration or appointment of a use, and the legal estate remains unaffected in the hands of the trustee. But in chancery the equitable interests thus acquired by the devisee would receive as complete a protection as those of an assignee or grantee *inter vivos*.⁴¹

§ 337. *How lost or defeated.*—The enforcement, and hence the validity of a use, depends upon a privity of estate and person, existing between the feoffee and *cestui que use* in relation to the land. Before the Statute of Uses, any act of the feoffee by which this privity was destroyed, would defeat the use also. If the feoffee lost his seisin by being disseised, or he disposed of the land by deed to a purchaser for consideration and without notice of the use, the use would be defeated, whether it was vested or contingent, in possession or in remainder. But a conveyance to one with notice, or without consideration, or a descent of the lands to the heirs of the feoffee would not affect the use. The use could still be enforced against the assignee or heir.⁴² Where the feoffee was disseised, he alone could recover the seisin according to the common law, and the *cestui que use* could not enforce the use against the disseisor. And, although even now the disseisin of the trustee is likewise a disseisin of the *cestui que use*, and

next legal owner would be bound." Digby, *Hist. Real Prop.* Ch. 6; Kirchwey, *Read. in Law, Real Prop.* 155.

⁴¹ Co. Lit. 271 b, Butler's note 231; Tud. Ld. Cas. 268; 2 Bla. Com. 329; 2 Washburn on Real Prop. 395, 396; 6 Cruise Dig. 3, 4.

⁴² Co. Lit. 371 b, Butler's note 231, Sec. 2; Tud. Ld. Cas. 254; Lewin on Tr. 2; 2 Washburn on Real Prop. 389, 400; 1 Spence Eq. Jur. 456; Chudleigh's Case, 1 Rep. 120.

if continued for a sufficient length of time, would bar both the equitable and legal estates, yet at present, the *cestui que use* may, upon his own motion, and without the co-operation of his trustee, have the disseisor declared a trustee, holding the legal estate subject to the use.⁴³

⁴³ See preceding note; 1 Spence Eq. Jur. 501; 1 Cruise Dig. 403.

SECTION II.

USES UNDER THE STATUTE OF USES.

SECTION. 338. History of the Statute of Uses.

- 339. When statute will operate.
- 340. A person seised to a use and *in esse*.
- 341. Freehold necessary.
- 342. Use upon a use.
- 343. Feoffee and *cestui que use* — Same person.
- 344. A use *in esse*.
- 345. *Cestui que use in esse*.
- 346. Words of creation and limitation.
- 347. Active and passive uses and trusts.
- 348. Uses to married women.
- 349. Cases in which the statute will not operate.

§ 338. History of the Statute of Uses.— As has been stated in the preceding section, uses became a very common mode of limiting estates. In consequence of the equitable and uncertain character of the use, and its freedom from the burdens of common-law estates, its popularity gave rise to the constant perpetration of frauds upon the legal rights of others. "Heirs were unjustly inherited; the king lost his profits of attainted persons, aliens born, and felons; lords lost their wards, marriages, reliefs, heriots, escheats, aids; married men lost their tenancies by the curtesy, and women their dower; purchasers were defrauded; no one knew against whom to bring his action, and manifest perjuries were committed." ⁴⁴ Several attempts were made by the enactment of statutes to check these abuses, notably a statute in the reign of Richard III (1 R. III, ch. 1), but to no avail. Means of avoiding the operation of these statutes were soon discovered, and the abuses were as grievous after as they were before their en-

⁴⁴ 1 Sugd. Pow. (ed. 1856) 78.

actment. Finally the statute of 27 Hen. VIII, ch. 10, the celebrated Statute of Uses, was passed by parliament.⁴⁵ The evident intention of the legislator was to abolish the doctrine of uses altogether by the statutory transfer of the legal estate from the *feoffee to use* to the *cestui que use* in every case, whatever may be the limitations upon the use. But the statute met with the most determined opposition from the bench and bar. Notwithstanding the many alleged frauds which could be committed by an abuse of the doctrine, public sentiment was opposed to its absolute destruction, and was in favor of preserving the power of creating an equitable estate in the nature of a use. And notwithstanding the remedial character of the statute, it received at the hands of the profession

⁴⁵The statute enacted that "where any person or persons stood or were *seized*, or at any time thereafter should happen to be *seized*, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the *use, confidence or trust* of any *other* person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner of means whatsoever it be; that in every such case all and every such person and persons and bodies politic, that have or hereafter shall have, any such use, confidence or trust, in fee simple, fee tail, for term of life, or for years or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful *seisin, estate and possession*, of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in the use, confidence or trust of or in the same; and that the estate, title, right and possession, that was in such person or persons, that were or hereafter shall be seized of any lands, tenements or hereditaments to the use, confidence or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use, confidence or trust, after such *quality, manner, form and condition* as they had before, in or to the use, confidence or trust that was in them." This statute has either been adopted in the different States of this country as part of the common law, or substantially re-enacted, so that it prevails generally throughout the United States. 2 Pom. Eq. Jur., Sec. 530, note 1; Perry on Tr. 299.

a strict and technical construction, and was permitted to operate only so far as it was impossible to render nugatory its express provisions. Instead of destroying uses, the statute only established them upon a firmer basis. By a remarkable course of judicial construction—it was practically legislation—the modern doctrine of trusts arose, which obtains to this day, and which includes every species of equitable estate which, under the statute, is capable of creation without being merged into the legal estate.

§ 339. *When statute will operate.*—The Statute of Uses will only operate upon a conveyance to uses, and transfer the legal to the holder of the equitable title, when the following three elements are present: *First*, a person seised to a use, and *in esse*; *second*, a *cestui que use in esse*; and *third*, a use *in esse*.⁴⁶

§ 340. *A person seised to a use and in esse.*—Any person who was capable of being seised before the statute would satisfy the requirements. And although at first it was supposed and held, that aliens and corporations could not be seised to uses, at the present day there is no such restriction. In regard to alien feoffees to use, the general rules of equity relating to trusts will apply, and prevent the failure of the use because of their incapacity to hold the seisin.⁴⁷ And in this country corporations are included under the term “persons,” and may be seised to uses if under the limitations their charters permit of such holding.⁴⁸ But the person seised must be

⁴⁶ 1 Cruise Dig. 349; 2 Washburn on Real Prop. 407.

⁴⁷ 2 Washburn on Real Prop. 408; 1 Cruise Dig. 349; Bac. Law Tracts 347, 348.

⁴⁸ Sutton v. Cole, 3 Pick. 240; U. S. v. Amedy, 11 Wheat. 392; Vidal v. Girard, 2 How. 127; Bethlehem Borough v. Perseverance Fire Co., 81 Pa. St. 445; First Parish, etc., v. Cole, 3 Pick. 232-237. But if the use or trust is foreign to the purposes of its institution, the corporation cannot hold the seisin or legal estate. A new trustee must be appointed to take its place. Matter of Howe, 1 Paige 214; Sloan v. Mc-

in esse. If by reason of the limitations of the conveyance the *feoffee to use* is uncertain, as he would be if the legal estate upon which the use depends is a contingent remainder, the statute cannot operate until the contingency happens, upon which the remainder becomes vested.⁴⁹

§ 341. **Freehold necessary.**—Seisin cannot be predicated of leasehold estates. In order, therefore, that the statute may take effect, the estate in the *feoffee to use* must be a freehold for the reason that the statute only provides for the transfer of the legal estate where one is *seised* to the use of another. All leaseholds held to uses remain unexecuted as before the statute, and the uses are enforceable only in a court of equity. It was once supposed that the freehold must be greater than a life estate; but it is now held that any freehold estate is sufficient, including life estates and all estates of inheritance.⁵⁰ If the freehold, upon which the use depends, is not commensurate with the use, the use will be valid, and will be executed, only as far as the legal estate extends. If the legal estate in the *feoffee* is only a life estate, the use is good only for that time, even though the limitation of the use be in terms a fee simple.⁵¹ But it is probable at the present day that the rule would be so far relaxed as to make the legal estate by construction co-extensive with the use, unless a smaller estate is expressly limited, in conformity with the rule governing the same question in its connection with the doctrine of

Conahy, 4 Ohio 157; Jackson v. Hartwell, 8 Johns. 422; Mason v. M. E. Church, 27 N. J. Eq. 47.

⁴⁹ 2 Washburn on Real Prop. 408; Bac. Law Tracts 349.

⁵⁰ 1 Cruise Dig. 350, 351, 353; Tud. Ld. Cas. 257-259; Galliers v. Moss, 9 B. & C. 267; 1 Prest. Est. 190; 1 Spence Eq. Jur. 466-490; Ashhurst v. Givens, 5 Watts & S. 327; Merrill v. Brown, 12 Pick. 220.

⁵¹ Tud. Ld. Cas. 259; Sandf. on Uses 109; Jenkins v. Young, Cro. Car. 230; 2 Washburn on Real Prop. 409.

trusts.⁵² And an estate tail has been held sufficient to support a use in fee simple.⁵³

§ 342. Use upon a use.—Since seisin requires a legal estate, and the person, out of whom the legal estate is to be drawn by the statute, and transferred to the *cestui que use*, was required to be seised, the courts have held that the statute can only execute the first use, and can have no effect upon the second or other use depending upon the first. For example, an estate is limited to the use of A. to the use of B. The statute can execute the use in A., but cannot go further and transfer the legal estate to B., the final and actual *cestui que use*, because by the strict construction of the statute the legal estate can only pass from persons who were seised of the legal estate under the deed. A. had only a use, and therefore was not seised. But inasmuch as after the execution of the use the *cestui que use* was to hold the legal estate in “such quality, manner, form and condition” as he had in the use, A. in the case supposed would hold the legal estate to the use of B., and accountable to B. in equity for the rents and profits.⁵⁴

⁵² Doe v. Nichols, 1 B. & C. 336; Doe v. Ewart, 7 A. & E. 636; Norton v. Norton, 2 Sandf. 296; Barker v. Greenwood, 4 M. & W. 421; Renzichausen v. Keyser, 48 Pa. St. 351. See *post*, Sec. 371.

⁵³ 1 Cruise Dig. 352; 2 Washburn on Real Prop. 409.

⁵⁴ 2 Washburn on Real Prop. 406, 409, 457, 460, 461; Tyrell's Case, Dyer 155, 1 Co. Rep. 136 b, 187; Croxall v. Shererd, 5 Wall. 282; Wyman v. Brown, 50 Me. 157; Hopkins v. Hopkins, 1 Atk. 591; Willett v. Sanford, 1 Ves. Sr. 186; 2 Pom. Eq. Jur., Sec. 985. The rule above enunciated, that a use cannot be limited upon a use, has been abolished by statute in New York, California, Michigan, Minnesota, and Wisconsin. See *post*, Sec. 347, note. And it has also been disapproved and adversely commented on by the Massachusetts court. Thatcher v. Omans, 3 Pick. 521, 528. But it is, perhaps, generally recognized in this country wherever it has not been changed by statute. And, basing their conclusions upon this doctrine, the courts have held that where in a deed of bargain and sale the estate is limited to the bargainee to the use of another, it is such a use upon a use as will not be executed by the statute. See Guest v. Farley, 19 Mo. 147; Jackson v. Myers, 3

§ 343. *Feoffee and cestui que use*—Same person.—Where the *feoffee to use* and the *cestui que use* are the same person, there is a merger of the equitable in the legal estate without the aid of the Statute of Uses. He takes an absolute estate at common law, unless such a merger would defeat the purposes of the conveyance.⁵⁵ Nor would there be a merger, if the use to the feoffee was not as extensive as the legal estate which is conveyed to him, as where the estate is a fee, and his use is a life interest, or he takes the use jointly with another. In such cases the use could only be executed by the statute.⁵⁶ But, nevertheless, if a use is limited upon the use of the feoffee, it will be construed such a limitation of a use upon the use as to preclude the execution of the second use. Thus, in a conveyance to A. to the use of A. to the use of B., although, in the absence of the use to B., A. would have been held to be in possession of the legal estate at common law by the merger of the equitable in the legal estate, yet this express limitation to his use will prevent the operation of the statute upon the use in B. A. would hold the legal estate, and the use in B. would remain unexecuted.⁵⁷ In some of the States

Johns. 388, 396; *Jackson v. Cary*, 16 Johns. 302; *Croxall v. Shererd*, *supra*; *Price v. Sisson*, 2 Beas. 168. This is, however, only the case with a pure bargain and sale deed. When such a limitation occurs in a modern deed of conveyance, which might be treated as a common-law conveyance, as well as a bargain and sale, and such is supposed to be the case where the operative words are "grant, bargain and sell," or "give, grant, bargain and sell," the use would presumably be executed by the statute, the bargainee or grantee having acquired the seisin and the legal estate by force of the deed as a common-law conveyance.

⁵⁵ 2 Prest. Conv. 481; Co. Lit. 271 b, Butler's note 231; 1 Cruise Dig. 354; Tud. Ld. Cas. 257; *Jackson v. Cary*, 16 Johns. 302.

⁵⁶ 1 Cruise Dig. 357; Tud. Ld. Cas. 258; *Sammes' Case*, 13 Rep. 56; Sand. on Uses 94, 96.

⁵⁷ *Doe v. Passingham*, 6 B. & C. 305, 317; *Williams on Real Prop.* 161; Tud. Ld. Cas. 268; *Doe v. Martin*, 4 T. R. 89; 2 Smith Ld. Cas. 454; *Whetstone v. Bury*, 2 P. Wms. 146; 1 Sugden on Pow. 168, 169; *Moore v. Shultz*, 13 Pa. St. 98; *Hayes v. Tabor*, 41 N. H. 521, 526; *Atty-Gen. v. Scott*, Cas. temp. Talb. 138; *Price v. Sisson*, 2 Beas. 168, 173, 174; 2 Bla. Com. 336; *Franciscus v. Reigart*, 4 Watts 118. *Contra*, *Hurst v. McNiel*, 1 Wash. C. Ct. 70.

this doctrine concerning the effect of a use upon a use has been abolished by statute, and the legal title is made to pass through all the intermediate *cestuis que use* until the final and actual beneficiary is reached, when it becomes vested in him.⁵⁸

§ 344. **A use in esse.**—It matters not whether the use is one in possession, reversion, or remainder, if the vesting of the title thereto is not contingent, it is a use *in esse*, and will be executed at once by the statute. If the use is one in possession it will be executed immediately, both in title and in possession. If it is to commence in the future it is called, according to the terms of the limitation, a contingent, springing, or shifting use, and will be considered in a subsequent section.⁵⁹ Nor is it important in what manner the use is created,—whether by express limitation or by law, as in the case of a resulting use, however the use arises,—if it is *in esse*, i. e., vested, the statute will execute it.⁶⁰ If the use is contingent, the use is not *in esse* until the happening of the contingency upon which its vesting depends, when it will be executed in the same manner as if it had been vested from the time of its creation.⁶¹ A contingent use cannot be executed by the statute of uses into a legal estate, because the transfer of the seisin would give the *cestui que use* a vested estate, while he had in the use only a contingent estate. And the statute required that the *cestui que use* should take the seisin or legal estate “in such quality, manner, form and condition,” as he had the use.

⁵⁸ See *ante*, Sec. 342, note; and *post*, Sec. 349, note.

⁵⁹ See *post*, Secs. 350, 357.

⁶⁰ 1 Cruise Dig. 358; *Hopkins v. Hopkins*, 1 Atk. 591; *Chudleigh's Case*, 1 Rep. 126; *Osman v. Sheafe*, 3 Lev. 370; *Doe v. Salkeld*, Willes, 674; 2 Smith's Ld. Cas. 288, 297; *Hays v. Kershaw*, 1 Sandf. Ch. 258; Tud. Ld. Cas. 262.

⁶¹ *Chudleigh's Case*, 1 Rep. 126; Tud. Ld. Cas. 262; *Shep. Touch. Prest. ed.* 529 n; Sand. on Uses 110; 1 Sugden Pow. 41. See *post*, Secs. 351, 353.

§ 345. *Cestui que use in esse*.—There must, furthermore, be some ascertained person *in esse* who is to take and who can take the use under the conveyance. As a general proposition, subject to an exception to be mentioned elsewhere,⁶² the character of the *cestui que use* will not affect the execution of the use. Any person *in esse* will fulfil the requirements of the statute.⁶³ But if the *cestui que use* is not *in esse*, or not ascertained, the use is future and contingent, and the operation of the statute is suspended until the *cestui que use* is known.⁶⁴ If a future use is to vest upon the happening of some contingency independent of human action, it is called a contingent, springing, or shifting use. But if the uncertainty or contingent character is to be settled by the act of some person or persons designated by the grantor or testator, then the limitation, although in fact nothing more than a contingent future use, receives the name of a power.⁶⁵

§ 346. Words of creation and limitation.—No special form of expression or set of words is necessary in the creation of uses, provided such words are used, as clearly show the intention of the grantor that a use was to be declared in favor of another. The Statute of Uses employs the words “use, confidence, or trust,” and it would accordingly be safer to adopt one of these words, although it is not necessary.⁶⁶ Although the employment of technical words of limitation was not necessary in the creation of a use before the statute,⁶⁷ and since the statute they are not always necessary in the limitation of equitable estates which are not executed by the statute,

⁶² See *post*, Sec. 348.

⁶³ 1 Cruise Dig. 354; 2 Washburn on Real Prop. 410.

⁶⁴ 1 Cruise Dig. 354; 2 Bla. Com. 336; *Jackson v. Myers*, 3 Johns. 388; *Reformed Dutch Church v. Veeder*, 4 Wend. 494; *Ashurst v. Given*, 5 Watts & L. 323. See *post*, Sec. 351.

⁶⁵ 2 Washburn on Real Prop. 420; *Shep. Touch. Prest.* ed. 529 n.

⁶⁶ 2 Washburn on Real Prop. 411; *Tud. Ld. Cas.* 258.

⁶⁷ 1 Spence Eq. Jur. 452; 1 Cruise Dig. 343; *Tud. Ld. Cas.* 253; 2 Washburn on Real Prop. 395.

and which properly fall under the head of trusts,⁶⁶ yet if the statute does operate the use will be valid for the purpose of execution, only so far as the words of limitation are capable of limiting similar estates at common law. The word "heirs" is therefore necessary to a use in fee, where the common law in respect to words of limitation has not been changed by statute, and its absence cannot be supplied by words of similar import. A conveyance, therefore, to the use of A. and the issue of his body would be neither an estate tail nor a fee simple, and A. would take only a life estate.⁶⁷

§ 347. **Active and passive uses and trusts.**—Both before and after the passage of the statute, uses and trusts have been divided into active and passive. Where the *feoffee to use* was required to perform some duty in respect to the estate, the use was an active one. Where the feoffee had nothing to do but to hold the legal title and seisin for the support of the use, it was called passive. Now, since the feoffee can perform these duties only as long as he retains the legal estate, the statute could not execute an active use or trust without defeating the express purpose and intention of the grantor. Furthermore, his estate in the use was subject to the performance of this duty by the legal owner, and an execution of the use would not vest the seisin and estate after "such quality, manner, form and condition" as he had in the use. The courts, therefore, held that it was not the will of the Legislature to execute active uses.⁷⁰ And under the strict construction of the statute the slightest, most un-

⁶⁶ *Villiers v. Villiers*, 2 Atk. 71; *Fisher v. Fields*, 10 Johns. 505; *Cleveland v. Hallett*, 6 Cush. 406. See *post*, Sec. 371.

⁶⁷ Tud. Id. Cas. 261; 1 Cruise Dig. 354; Sand. on Uses 122; 2 Washburn on Real Prop. 380. In most of the States the common law in respect to the employment of technical words of limitation has been abolished by statute. The above rule, therefore, possesses very little practical importance. See *ante*, Sec. 30.

⁷⁰ 2 Washburn on Real Prop. 467. See note under Sec. 347.

important duty in the trustee would prevent the operation of the statute.⁷¹

§ 348. *Uses to married women.*— So also where the purpose of the trust is that the *cestui que use*, a married woman, should hold and enjoy the estate for her own separate use, the statute will not execute the use. For the execution of the use would give to the husband control over the property and its rents and profits during coverture, and the common-law right of curtesy would attach because of her disability to hold the legal estate free from his control.⁷² In making a conveyance to the separate use of a married woman, her power of alienation may, by a special clause, be entirely taken away during the continuance of the marriage, and this restriction will revive upon any subsequent marriage, if the trust is itself revived by such second marriage.⁷³ In the absence of such a restraining clause, in England and some of the States, a married woman is to be treated, in respect to her separate

⁷¹ Thus, the statute was held not to execute the use, where the trustee was directed to sell or dispose of the property—to collect and pay over the rents and profits—to have the active management of the estate—to permit the *cestui que use* to receive the *net* profits—to apply the profits to the maintenance of the *cestui que use*—to pay annuities out of the rents, or to receive the rents and allow them to accumulate. In any such case, the legal estate being held necessary to the performance of the trustee's duty, the statute could not operate, and the use remained an equitable estate, to be enforced by the courts of equity. 1 Prest Est. 185; Co. Lit. 290 b, note 249, Sec. 6; 1 Cruise Dig. 385; Doe v. Briggs, 2 Taunt. 109; Nevil v. Saunders, 1 Vern. 415; Bass v. Scott, 2 Leigh 356; Posey v. Cook, 1 Hill (S. C.) 413; Norton v. Leonard, 12 Pick. 152-158; Morton v. Barrett, 22 Me. 257; Barnett's App., 46 Pa. St. 398; Fay v. Taft, 12 Cush. 448; Lancaster v. Dolan, 1 Rawle 231.

⁷² 1 Cruise Dig. 385; Harton v. Harton, 7 T. R. 653; Stearcy v. Rice, 27 Pa. St. 75; Bush's App., 33 Pa. St. 85; Nevill v. Saunders, 1 Vern. 415.

⁷³ Hawkes v. Hubback, L. R. 11 Eq. 5; *In re Gaffee's Trusts*, 1 Macn. & G. 541; Tullett v. Armstrong, 4 My. & Cr. 377; Shirley v. Shirley, 9 Paige 363; Baggett v. Meux, 1 Phil. 627. But see Dubs v. Dubs, 31 Pa. St. 149; Miller v. Bingham, 1 Ired. 423.

property, as a *feme sole*, and she may dispose of the equitable estate as she pleases.⁷⁴ In a number of the States, however, the English rule has been discarded, and the contrary doctrine maintained that the married woman has no power over her separate estate, except what is expressly granted or reserved to her in the deed or settlement.⁷⁵ The reason why the statute of uses could not execute the separate use of a married woman, was that she could not, according to the common law, take and hold the seisin and estate in "such quality, manner, form and condition," as she had in the use. For this reason it is to be presumed that in those States where the disability of married women is removed, and they are permitted to hold and dispose of property as if they were single, the reason failing, the rule would also fail, and the statute would execute the use.⁷⁶ So, likewise, since the passive use in the married woman is not executed, only because her disability at common law prevents her taking and holding the same rights and privileges in the legal estate as she had in the use, if she assigns the use to one, who is not under a similar disability, the statute will at once execute the use, and her grantee would get the absolute legal estate, without the joining of the trustees in the conveyance.⁷⁷ And the husband would only have to join in the conveyance in order to bar his curtesy, if he had any in the equitable estate.

⁷⁴ *Fettiplace v. Gorges*, 1 Ves. 46; *Rich v. Cockrell*, 9 Ves. 69; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp.*, 13 Ves. 190; *Major v. Lusley*, 2 Russ. & My. 357; *Essex v. Atkins*, 14 Ves. 542; *Dyett v. North American Coal Co.*, 20 Wend. 570; 7 Paige Ch. 1; *Powell v. Murray*, 2 Edw. Ch. 636; *Gardner v. Gardner*, 22 Wend. 526; *Imlay v. Huntington*, 20 Conn. 175; *Collins v. Larenburg*, 19 Ala. 685; *Coleman v. Woolley*, 10 B. Mon. 320.

⁷⁵ *Ewing v. Smith*, 3 Desau 417; *Reed v. Lamar*, 1 Strobb. Eq. 27; *Calhoun v. Calhoun*, 2 Strobb. 231; *Magwood v. Johnson*, 1 Hill Ch. 228; *Lancaster v. Dolan*, 1 Rawle 231; *Wallace v. Coston*, 9 Watts 137.

⁷⁶ So it was held in *Sutton v. Aiken*, 62 Ga. 753; *Bratton v. Massey*, 15 S. C. 277; *Bayer v. Cockerill*, 3 Kan. 292.

⁷⁷ See *ante*, Sec. 73.

§ 349. **Cases in which the statute will not operate.**—To recapitulate, the following are the principal cases in which the statute will not execute the use: 1. Uses in chattel interests. 2. A use upon a use. 3. Contingent uses, whether the contingency depends upon the uncertainty of the *cestui que use*, or the use itself. 4. Active uses or trusts. 5. Uses to married women. Every other use will be executed immediately upon their creation, the *feoffee to use* acting merely as a conduit for the transfer of the seisin to the *cestui que use*. Contingent uses are executed when they become vested, while the other classes of uses above enumerated remain throughout their entire duration unexecuted, and enforced as trusts by chancery.⁷⁸

⁷⁸ As has been remarked in a preceding note, the English Statute of Uses has been superseded in some of the States by modern statutes, materially different in their operation from the old statute. New York first set the example, in 1848. The statute of New York abolishes all express trusts heretofore known, and enumerates the classes of active trusts which can be created. All other trusts, and particularly passive trusts, are declared to be legal estates, and the seisin vests in the *cestui que use* or *trust* by force of the statute. 1 Rev. Stat. N. Y., p. 727, Secs. 45-50. In New York, therefore, all uses are converted into legal estates, except the express trusts enumerated in the statute, and trusts arising by implication of law. 1 R. S. N. Y. 728, Secs. 51, 52, 53, 55; *Leggett v. Perkins*, 2 N. Y. 297; *Downing v. Marshall*, 23 N. Y. 377; *Marvin v. Smith*, 46 N. Y. 571; *Rose v. Hatch*, 125 N. Y. 427; *Greene v. Greene*, 125 N. Y. 506. The future contingent uses become, by operation of the statute, future contingent estates of a legal character, and the common law was so changed as to admit of the limitation of legal estates, which were before only possible as the limitation of a use. 1 R. S. N. Y. 724, Secs. 16-19. This legislation has, in substance, been followed in California, Michigan, Minnesota and Wisconsin. In these States, therefore, the foregoing presentation of uses under the Statute of Uses, as well as the subsequent section on future or contingent uses, must be taken with the qualifications arising under the local statutes prevailing there.

SECTION III.

CONTINGENT, SPRINGING, AND SHIFTING USES.

SECTION 350. Future uses.

351. Contingent future uses — How supported.

352. Importance of the question.

353. The solution of the question.

354. Contingent uses.

355. Springing uses.

356. Shifting uses.

357. Future uses in chattel interests.

358. Shifting and springing uses — How defeated.

359. Incidents of springing and shifting uses.

§ 350. **Future uses.**— It has been explained that a use could be limited to commence *in futuro* with or without a preceding estate in the use to support it, and even in derogation of the preceding estate, and that it may be either vested or contingent.⁷⁹ If it is a vested use the statute will operate immediately and convert it into a legal estate, having the characteristics of a vested estate in reversion. But if the use is contingent, the operation of the statute is suspended until the use vests or comes *in esse*. These future uses are divided into contingent, springing, and shifting uses, and will here be explained in the order named.

§ 351. **Contingent future uses — How supported.**— In a conveyance, where there is a contingent use of limited duration, and consequently there are other vested uses, the latter are executed *eo instanti*, whether they are created by express limitation or arise by operation of law under the doctrine of resulting uses; while the contingent use remains unexecuted until the contingency happens. But in order that the statute

⁷⁹ See *ante*, Sec. 335.

may operate, there must be a seisin somewhere to feed the contingent uses as they arise. Great difficulty is experienced in discovering where that seisin is to be found, and in determining its character. For example, if an estate is limited to the use of A. for life, to the use of B.'s unborn son, to the use of C. in fee. The uses in A. and C. being vested, are immediately executed by the statute, while the use to the unborn son of B., being contingent, remains unaffected. A., under the statute, acquires a legal estate for life, and C. a vested remainder in fee. The statute, therefore, transfers to A. the seisin for life and to C. the seisin in fee in remainder. What is the nature of the seisin left to support the contingent use in B.'s unborn son, and where is it to be found when the use vests?

§ 352. **Importance of the question.**—The apparent necessity of locating this seisin and of determining its character arose from the consideration of two questions, viz.: 1. After the legal estate had been vested in A. for life and in C. in remainder, was not the entire seisin exhausted and drawn out of the feoffees or releasees to uses? 2. If any seisin did remain in the feoffees, could it not be destroyed and the contingent use defeated by a feoffment of the feoffees?

§ 353. **The solution of the question.**—A great deal of speculative discussion was indulged in by the earlier judges and writers, and a variety of opinions was the result. Some held that the entire seisin vested in the executed uses, subject to the future vesting of the contingent use; others maintained that sufficient seisin remained "*in nubibus, in mare, in terra, in custodia legis,*" ready to become united with the contingent use when the contingency happens; while, perhaps, the largest number sustained the view that a portion of the seisin, which they called a *scintilla juris* (a right to recover the seisin), remained in the feoffees to feed the uses as they came into being. But, under this view of the case, it was necessary

for the feoffees to enter in order to revive the seisin for the contingent use, and any feoffment-by them would result in the destruction of the *scintilla juris*, and along with it the use depending upon it. But the modern writers upon uses have discarded all this abstruse and subtle reasoning, and support the more rational doctrine advocated by Mr. Sugden that "upon a conveyance to uses . . . immediately after the first estate is executed, the releasees to uses are divested of the whole estate, the estates limited previously to the contingent uses take effect, the contingent uses take effect as they arise, by force of and relation to the seisin of the releasees under the deed, and vested remainders over take effect according to the deed, subject to open and let in the contingent uses."⁸⁰ The seisin receives, by force of the statute, the power or capacity of feeding all the uses as they arise, and of being transmitted from one to another as they vest in possession.⁸¹ The maintenance of this view does away with the *scintilla juris*, and removes the necessity of a re-entry by the feoffee to regain the seisin for the support of the contingent use, even where there has been a disseisin of all the parties to the deed.⁸²

§ 354. *Contingent uses*.—In the foregoing pages, the term *contingent use* has been used to signify any future or executory use whose vesting in title depends upon a contingency. But the term has been given a more restricted signification, meaning contingent uses which would be good contingent remainders if they had not been limited by way of uses.⁸³ It

⁸⁰ 3 Prest. Conv. 400; 1 Sugden on Pow. 20-48; 4 Kent's Com. 238-247; Fearne Cont. Rem. 205; 2 Washburn on Real Prop. 611; Chudleigh's Case, 1 Rep. 120; Brent's Case, Dyer 340; Tud. Ld. Cas. 260; Sand. on Uses 110.

⁸¹ 2 Washburn on Real Prop. 420.

⁸² 1 Sugden on Pow. 17-48; Fearne Cont. Rem. 293, 295, and Butler's note; 1 Cruise Dig. 282; 4 Kent's Com. 238-246; 2 Washburn on Real Prop. 611, 612.

⁸³ 1 Prest. Abstr. 105; 4 Kent's Com. 258; 2 Washburn on Real Prop. 608.

is a cardinal rule in the construction of all future estates, whether created by deed or will, that if they can take effect as remainders they will be construed to be such, even if they are limited as uses.⁸⁴ A contingent use is, therefore, treated in all essential particulars as a contingent remainder, and requires a particular estate of freehold to support it. If the use is not vested during the existence of the particular estate in the use, it fails in the same manner as if it had been limited as a common-law contingent remainder. And if, at the time of the conveyance, the future uses can take effect as remainders, they cannot take effect as future or executory uses when a change of circumstances has made them void as contingent remainders.⁸⁵ And even where the future estate is void in its inception, if it is limited by way of a remainder, as where the vesting of the future use is made to depend upon the duration of a particular estate, which cannot support a contingent remainder because it is less than a freehold, the future use will be void as a remainder, and cannot be construed as a springing or shifting use.⁸⁶ But where the future use is not made to depend upon a preceding use, as where it is to vest at a time subsequent to the natural termination of the particular use, a limitation entirely repugnant to the law of remainders, it will be held to be a shifting or springing use, which will vest independently of the preceding estate.⁸⁷

⁸⁴ Co. Lit. 217; Fearne Cont. Rem. 284; 1 Prest. Abstr. 108; 2 Washburn on Real Prop. 609.

⁸⁵ Fearne Cont. Rem. 284, and Butler's note; 2 Cruise Dig. 261; *Adams v. Savage*, Salk. 679; *s. c.*, 2 Ld. Raym. 854; *Goodtitle v. Billington*, Dougl. 758; *Davies v. Speed*, Salk. 675. But see *Carroll v. Hancock*, 3 Jones L. 471; *Nichols v. Denny*, 37 Miss. 59.

⁸⁶ *Adams v. Savage*, 2 Ld. Raym. 854; *Williams on Real Prop.* 293; *Southsett v. Stowell*, 1 Modern 238; *Cole v. Sewell*, 4 Dru. & Warr. 27; *Tud. Ld. Cas.* 263; 4 Kent's Com. 293; 2 Washburn on Real Prop. 612, 613. Mr. Washburn cites *Wils. Uses* 9, in opposition to the text. 2 Washburn on Real Prop. 621.

⁸⁷ 2 Washburn on Real Prop. 621; *Gore v. Gore*, 2 P. Wms. 28.

§ 355. **Springing uses.**—A springing use is one to commence in the future, unsupported by the limitation of a preceding use, and which does not by its vesting defeat or cut short any prior limitation. Thus, a limitation to the use of B. and his heirs after the death of A. Until the death of A. the use results to the grantor, and at his (A.'s) death it is executed in B. and his heirs. A springing use may be either vested or contingent, according to the certainty or uncertainty of the event upon which it depends. The example given above is a vested springing use, as A. is sure to die, and the use takes effect whether B. dies before A. or survives him; but a limitation to the heirs of B. after the death of A. would be contingent, because of the uncertainty of B.'s dying before A.⁸⁸

§ 356. **Shifting uses.**—A shifting or secondary use is one which is so limited, that its vesting will defeat the prior estate in the use, and is always contingent. The use, upon the happening of the event, shifts from the first taker to the second. It has been explained that at common law no estate could be limited after a fee or in derogation of the preceding estate.⁸⁹ But there is no such restriction upon the limitation of uses. The use in fee may, upon the happening of successive events, be made to shift from one person to another without limit, provided the doctrine of perpetuity is not thereby violated. A shifting use is, therefore, one class of what are called conditional limitations. A conditional limitation can only be created under the Statute of Uses or the Statute of Wills. Under the former it is known as a shifting use, while under the latter it is called an executory devise.⁹⁰ The dis-

⁸⁸ 2 Cruise Dig. 263; 2 Washburn on Real Prop. 600-613; 4 Kent's Com. 298; Egerton v. Brownlow, 4 H. L. Cas. 206; Mutton's Case, Dyer 274; Jackson v. Dunsbaugh, 1 Johns. Cas. 96; Wyman v. Brown, 50 Me. 156; McKee v. Marshall (Ky.), 5 S. W. Rep. 415; McCown v. King, 23 S. C. 232.

⁸⁹ See *ante*, Secs. 211, 296.

⁹⁰ Fearne Cont. Rem. 385; 1 Spence Eq. Jur. 452; Egerton v. Brown-
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inction between a future limitation as a conditional limitation, and a contingent remainder, has been already discussed,⁹¹ and will require no further elucidation.

§ 357. **Future uses in chattel interests.**—At common law it is impossible to create a remainder in a chattel interest. The lessee of a term of years could grant a part of the term to one and the rest to another, as, for example, out of a term of thirty years he could assign it to A. for ten years and to B. for twenty years, beginning at the close of A.'s term. But he could not give A. a life estate and B. a remainder in fee.⁹² This is possible, however, by way of a future use. Where, therefore, such a limitation of a term is made by way of a use, it will not take effect as a remainder, but as a springing or shifting use, according to the terms of the limitation.⁹³

§ 358. **Shifting and springing uses—How defeated.**—At common law the destruction of the particular estate by feoffment, or other act of the tenant, will defeat any contingent remainder depending upon it.⁹⁴ And such is also the rule in regard to contingent uses.⁹⁵ But no act of the tenant of a low, 4 H. L. Cas. 209; 2 Cruise Dig. 264; Co. Lit. 271 b, note 231, Sec. 3; Tud. Ld. Cas. 363; *Winchelsea v. Wentworth*, 1 Vern. 402; 2 Washburn on Real Prop. 622-624. An example of a shifting use, would be, a limitation to A. and his heirs, and if B. should return from Rome, then over to C. and his heirs. The return of B. from Rome would determine the use in A. and execute the use in C. *Cogan v. Cogan*, Cro. Eliz. 360; *Carwardine v. Carwardine*, 1 Eden 34; *Winchelsea v. Wentworth*, *supra*; *Doe v. Whittingham*, 4 Taunt. 22; *Buckworth v. Thirkell*, 3 B. & P. 655; *Batley v. Hopkins*, 6 R. I. 445; *Fogarty v. Stack* (Tenn.), 8 S. W. Rep. 846.

⁹¹ See *ante*, Secs. 211, 206, 310, 313.

⁹² 1 Cruise Dig. 235; *Fearne Cont. Rem.* 401; 4 Kent's Com. 270; *Wright v. Cartwright*, 1 Burr. 284.

⁹³ 2 Bla. Com. 174; *Fearne Cont. Rem.* 401, Butler's note; *Lampet's Case*, 10 Rep. 46; *Wright v. Cartwright*, 1 Burr. 284; 2 Washburn on Real Prop. 624, 625.

⁹⁴ See *ante*, Sec. 314.

⁹⁵ *Faber v. Police*, 10 S. C. 376. And see cases and references cited in note 93.

preceding estate will effect the destruction of a springing or a shifting use, which is in its nature independent of any prior estate which may be had in the use.⁹⁶ It was formerly supposed that, if the tenant of the particular estate was dis-seised, in order that the contingent use might be executed, there must be an actual entry by the tenant and the actual seisin regained. But this doctrine has been repudiated by the best authorities, and it is now held that the contingent use would vest in title, whether the tenant is seised or has been disseised, and that the contingent *cestui que use* acquires the right of entry by the force of the Statute of Uses.⁹⁷

⁹⁶ 2 Cruise Dig. 281; 4 Kent's Com. 241; Tud. Ld. Cas. 263; Archer's Case, 1 Rep. 67; Chudleigh's Case, 1 Rep. 120; 2 Washburn on Real Prop. 582, 583, 625, 626. See Owings v. Hill (Ky.), 5 S. W. 418.

⁹⁷ Fearnle Cont. Rem. 286, 290, 295; 1 Kent's Com. 242, 247; 1 Sugden on Pow. 17-48; 2 Cruise Dig. 282, 284; Tud. Ld. Cas. 260; Chudleigh's Case, 1 Rep. 120; Wegg v Villers, 2 Rolle. Abr. 796. This last case is very celebrated, on account of the fact, that the suit was brought on the settlement by Lord Coke of his property upon his wife and daughter. The following is the account given of the case by Mr. Washburn, which is here appended, because a thorough appreciation of the fine points of the case involves an accurate knowledge of the principles enunciated in the preceding pages. "The circumstances under which it (the case of Wegg v. Villers) arose were these, as stated by the biographer of Lord Coke. The relations of Lord Coke with his wife, Lady Hatton, it is well known, were not of the most pleasant kind. Coke having fallen into disgrace with King James, while acting as Lord Chief Justice, sought to regain the favor of that weak and capricious monarch, and it was through the agency of Buckingham, who was, at the time, the King's favorite, that he sought to operate upon the King. Buckingham had a brother, Sir John Villers, and Coke a daughter, Frances, by Lady Hatton, and he proposed a match between them. The mother, angry at not having been consulted in the matter, carried her daughter off, and secreted her. Coke, discovering her place of concealment, went with his sons and seized her by force. Lady Hatton appealed to the Privy Council, and it became an affair of state. It was at length adjusted, upon Lord Coke's paying £10,000 sterling, and entering into articles of settlement upon the marriage of his daughter, pursuant to articles and directions of the Lords of the Council. The adroitness with which this settlement was drawn, and the cunning manner in which he arranged its provisions, so as to defeat it or let it stand good as he might choose, will be perceived by recurring to its terms,

and remembering and applying the idea advanced in Chudleigh's Case, that the uses, so far as contingent, must have an actual seisin in some one, answering to a feoffee's, to sustain them. In the first place, the conveyance was made by covenant to stand seised on his part, and the limitations derived their force and effect from the seisin in himself, for he covenanted to stand seised to the use of himself for life, remainder to the use of his wife for life, remainder to the use of his daughter for life, remainder to her first and other sons in tail, reversion to his own right heirs. This gave an estate to him for life in possession, a vested estate for life in remainder to his wife, and the same to his daughter for life in remainder, with contingent uses by way of remainder to unborn sons in tail, reserving to himself, after and above all these limitations, a reversion* in fee. Lord Coke then made a deed of *grant* of this reversion to a third person without consideration, and in his deed recited the foregoing settlement. He then made a *feoffment* in fee of the lands thus settled, with livery of seisin. As all the estates but the reversion were by way of use, it was the seisin that was in him as covenantor and reversioner which was to support them, and if this was destroyed, so far as these were contingent, they would be defeated. But as his grant of this reversion was to one having notice, it remained subject to the settlement, and the seisin of this grantee was that out of which these uses were to arise in the same way as from the seisin which Lord Coke had had before the grant. But as he was also in possession for life, the effect of his feoffment was not only to destroy his own seisin and estate, but to make a discontinuance of that of his grantee the reversioner, together with the estates of the wife and daughter. But it left a right of entry in the daughter. But as this discontinuance was a forfeiture of the father's life estate, and that of his wife during coverture, it gave a right of entry in the daughter as holder of the next vested estate, and a contingent right of entry to the wife, dependent on her surviving her husband. The former was sufficient to support the contingent use to the daughter's first son, provided there should be a seisin to serve such use, when it should arise. As it turned out, Lord Coke's wife survived him, and having, by the right of entry which she thereby acquired, entered upon the estate, reinstated the divested estates, including that of the grantee of the reversion, out of whose seisin the contingent uses were to arise, and the limitations took effect in their order. If, however, Lord Coke had made his feoffment before making the grant of the reversion, the effect would have been to have worked a disseisin and divested all of the then subsisting estates, including the estate or seisin out of which the contingent uses were to arise, and which was to serve them. For as there was no privity between his feoffee, his wife or daughter and his heirs, whose seisin alone could support their contingent uses, no entry by the wife or daughter could restore the estate and seisin of Lord Coke or his

§ 359. *Incidents of springing and shifting uses.*—All such uses are capable of being disposed of in equity by assignment or by will, and they descend to the heirs of the *cestui que use*, and this, too, when the use is contingent, provided the contingency does not depend upon the uncertainty of the *cestui que use*. But they cannot be aliened by deed.⁹⁸ Where a springing use is vested, since the statute executes it *eo instanti*, it becomes a future legal estate with all the ordinary rights attaching thereto. Such a use can be disposed of in any manner of which a legal vested estate is capable. For the protection of the interests of these *cestuis que use* against any acts of waste by the prior tenant, the rules of the common law in respect thereto apply by analogy, and chancery, upon the application of the *cestui que use*, would restrain the commission of waste just as if his estate had been a contingent remainder.⁹⁹ Springing and shifting uses are, in their characteristics, essentially the same as executory devises, differing only in the manner of their creation; it would be a mere repetition, therefore, to discuss their incidents separately, beyond what has been said. This subject will be resumed under the head of executory devises.¹

heirs, contrary to his own feoffment, since he himself could not have entered against such a feoffment. Now the cunning part of the arrangement, which was defeated by his dying while things were in the above state, was this. If he had seen fit to sustain the remainders, he would have suppressed the feoffment, and only have shown the grant of the reversion, to counteract the feoffment, if that should be set up by any one. Whereas if he had wished at any time to destroy the remainders, he would have suppressed the grant of the reversion, and left the feoffment to have its effect. As he left both these in force, it gave rise to the action above named, and an indefinite amount of refinement and ingenious discrimination upon a rule of law too subtle to be apprehended by ordinary minds." 2 Washburn on Real Prop. 529-631.

⁹⁸ Fearne Cont. Rem. 366, and Butler's note; Jones v. Roe, 3 T. R. 88; Hobson v. Trevor, 2 P. Wms. 191; 2 Washburn on Real Prop. 626.

⁹⁹ Fearne Cont. Rem. 362, and Butler's note; Stansfield v. Habergram, 10 Ves. 275; 2 Washburn on Real Prop. 626.

¹ See *post*, Ch. 15, Secs. 395-398, 400-402.

SECTION IV.

TRUSTS.

- SECTION 360.** What are trusts.
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 - 365. Implied trusts.
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 - 370. Liability for debts.
 - 371. Words of limitation.
 - 372. Doctrine of remainders applied to trusts.
 - 373. How created and assigned.
 - 374. Statute of Frauds.
 - 375. How affected by want of a trustee.
 - 376. Removal of trustees.
 - 377. Refusal of trustee to serve.
 - 378. Survivorship.
 - 379. Merger of interest.
 - 380. Rights and powers of trustees.
 - 381. Rights and powers of *cestuis que trust*.
 - 382. Alienation of trust estate.
 - 383. Liability of third persons for performance of the trust.
 - 384. Compensation of trustee.

§ 360. What are trusts? — The Statute of Uses makes use of the words “use, confidence, and trust,” and recognizes no distinction between them, and before the statute there was, as has been shown,² no material difference between them, and such would have been the case in modern times if the statute had prevented the continued existence of equitable estates, in conformity with the design and intention of the legislators.

² See *ante*, Sec. 327.

But the statute was construed to have no effect upon certain equitable interests,³ which remained equitable and distinct from the legal estate after as well as before the statute. For the sake of convenience, and the purpose of distinguishing them from those uses and trusts which were executed by the statute, the term *trust* has since been exclusively applied to those equitable interests, which remain such, while the term *use* represents all such interests as are converted into legal estates, either *eo instanti* or subsequently, as in the case of contingent uses.⁴

§ 361. **Active and passive trusts.**—Where a special duty is to be performed by the trustee in respect to the estate, such as to collect the rents and profits, to sell the estate, etc.,⁵ the trust is called *active*. It is the duty which prevents the operation of the statute, for the trustee must have the legal estate in order to perform his duties.⁶ All other trusts are denominated *passive trusts*, because there is no duty imposed upon the trustee. He simply acts as a reservoir of the legal estate, because from the terms and character of the convey-

³ See *ante*, Sec. 349.

⁴ 1 Spence Eq. Jur. 491, 493, 494; 1 Prest. Est. 186-190; Tud. Ld. Cas. 268-276; 2 Bla. Com. 336; Doe v. Hamfrey, 6 A. & E. 206; Doe v. Biggs, 2 Taunt. 169; Doe v. Collier, 11 East 377; 4 Kent's Com. 314; Ayer v. Ayer, 16 Pick. 327-330; Fisher v. Fields, 10 Johns. 505; 2 Pom. Eq. Jur. Secs. 984-986. "A trust for the sole benefit of the trustees' children, under which the trustees were charged with no functions except to hold the property for the children, became, at the maturity of the children, a dry trust, executed by the statute of uses, and the legal title was vested in the beneficiaries." Ottomeyer v. Pritchett (Mo. 1903), 77 S. W. Rep. 62.

⁵ 1 Cruise Dig. 384; Co. Lit. 290 b, 249; Sec. 6; Tud. Ld. Cas. 270; 1 Prest. Abst. 143; Sherman v. Dodge, 28 Vt. 26; Aiken v. Smith, 1 Sneed. 304; Welles v. Castles, 3 Gray 323; Ackland v. Lutley, 9 A. & E. 879; Douglass v. Cruger, 80 N. Y. 15; Culbertson's App., 76 Pa. St. 145; Brooks v. Marbury, 11 Wheat. 78; William's Appeals, 83 Pa. St. 377; Appeal of Watson, 125 Pa. St. 340; McClellan's Appeals, 130 Pa. St. 451; Grothe's Appeal, 26 W. N. C. 265; Ruby's Appeal (Pa.), 11 Atl. Rep. 398.

⁶ See authorities cited in preceding note.

ance and limitation the statute cannot transfer the legal estate to the *cestui que use* or *trust*. Such would be a use upon a use, a use in chattel interest, and uses to persons incapable of holding the legal estate—for example, married women.⁷

§ 362. **Executed and executory trusts.**—Where the limitations are all definitely settled by the deed of creation, and there is nothing further to be done in order to determine the exact interest of the *cestui que use* and the duration of the trust, the trust is said to be *executed*. But where the terms of the trust-deed simply define how the settlement shall be made, and imposes that duty upon the trustee, the trust is called *executory*. All passive trusts and such active trusts, in which the duty of the trustee is confined to the ordinary administration of the property, are executed trusts, while active trusts, in which it is the duty of the trustee to convey to the person named, or to determine the shares which several shall take, and the like, are comprehended under the head of executory trusts. Executory trusts bear a close resemblance to powers when granted to trustees, to which more particular reference will be made in the treatment of that subject.⁸

⁷ *Doe v. Passingham*, 6 B. & C. 305; *Doe v. Collier*, 11 East 377; *Hayes v. Tabor*, 41 N. H. 521; *Kuhn v. Newman*, 26 Pa. St. 227; *Steady v. Rice*, 27 Pa. St. 75; *Webster v. Cooper*, 14 How. 488; *Wagstaff v. Smith*, 9 Ves. 520; *Boyd v. England*, 56 Ga. 598; *Sutton v. Aiken*, 62 Ga. 733; *Bolles v. State Trust Co.*, 27 N. J. 308; *Rogers Loc. Works v. Kelly*, 19 Hun 399; *Weber v. Weber*, 58 How. Pr. 255; *Martin v. Funk*, 75 N. Y. 134; *Boone v. Bank*, 84 N. Y. 83; *Badgett v. Keating*, 31 Ark. 400.

⁸ It will be observed that the terms *executed* and *executory*, when applied to modern trusts, have a different significance from that which is given to them, in referring to the operation of the Statute of Uses upon uses. *Fearne Cont. Rem.* 55, 113, 139; 4 *Kent's Com.* 304, 305. Mr. Lewin defines these classes of trusts thus: "Trusts executed are where the limitations of the equitable interest are complete and final; in the trust executory, the limitations of the equitable interest are not intended to be complete or final, but merely to serve as minutes and instructions for perfecting the settlement at some future period." Lewin

§ 363. **Express trusts.**—All the trusts, which have been heretofore discussed, receive the further appellation of *express trusts*, because they are expressly created by some deed or other instrument of conveyance, and are to be distinguished from those trusts, which are explained in the succeeding paragraphs, and which arise by operation of law for the prevention of injury and the furtherance of justice. Express trusts are created by the express act of the party owning the property. And it may be stated here that the law will never imply a trust where one has been created expressly, even though the express trust is void for the want of some essential formality, unless the consideration is paid by the *cestui que trust* under such circumstances as to give rise to a resulting trust.⁹

§ 364. **Implied, resulting, and constructive trusts.**—Trusts which arise by implication of law are subdivided by the books into *implied*, *resulting*, and *constructive* trusts. These names are purely arbitrary, and do not convey to the mind any idea of the distinguishing feature of the trusts which they respectively represent. All trusts created by operation of on Tr. 45; 2 Pom. Eq. Jur., Secs. 1000, 1001; Saunders v. Edwards, 2 Jones Eq. 134; Cushing v. Blake, 30 N. J. 689; 1 Eq. Ld. Cas. 1-36; Neves v. Scott, 9 How. 211; Bowen v. Chase, 94 U. S. 812; Riddle v. Cutter, 49 Iowa 547; Tallman v. Wood, 26 Wend. 9; Garnsey v. Mundy, 24 N. J. 243; Garner v. Garner, 1 Deems 437; Farr v. Gilreath, 23 S. C. 502. "In order to create a trust, there must be an absolute parting, on the part of the settlor, with the interest which had been his up to the time of the declaration of the trust, and a specific property to be held by the trustee." Taylor v. Coriell (N. J. Ch. 1904), 57 Atl. Rep. 810.

⁹ 1 Spence Eq. Jur. 496; 2 Washburn on Real Prop. 436, 437; 2 Pom. Eq. Jur., Secs. 987, 1030; Farrington v. Barr, 36 N. H. 86; Gibson v. Foote, 40 Miss. 782; Graves v. Graves, 29 N. Y. 129; Nightingale v. Hidden, 7 R. I. 121; Haggard v. Benson, 3 Tenn. Ch. 268; Ward v. Armstrong, 84 Ill. 151. "An express trust pertaining to real estate must, in the absence of fraud, be evidenced by some memorandum thereof, signed by the party to be charged therewith." Prouty v. Moss (Ill. App. 1903), 111 Ill. App. 536. "So long as an express trust exists, and is recognized by the trustee, it never becomes stale." Owsley v. Owsley (Ky. 1903), 77 S. W. Rep. 394.

law may be said to be *implied* or *constructive*, while the use of the word *resulting* serves, perhaps, to confound these trusts with resulting uses. But it is convenient to make use of this subdivision, and for the want of better terms, these are employed to denote the three classes. Trusts created by operation of law cannot be executed by the Statute of Uses. They are not recognized by courts of law. They are the creations of equity, and are applied by the court of equity to all inequitable transactions where the ends of justice cannot be otherwise attained.¹⁰ But such trusts cannot be enforced against the property, after it has passed into the hands of a *bona fide* purchaser for value.¹¹

§ 365. *Implied trusts.*—Whenever the owner of land directs a certain disposition of it, which is to inure to the benefit of a third person without expressly creating a trust in his behalf, under the maxim that equity treats that as done which ought to be done, a trust will be implied in behalf of such beneficiary. Thus, if the testator directs his lands to be sold for the satisfaction of his debts, an implied trust is raised in favor of the creditors which will enable them to compel a performance of the trust by the executor. This implied trust was specially valuable in the days when real property was not liable for the debts of the owner.¹² Another well-known application of the doctrine is the case of equitable conversion, so-called. When a contract for the sale of real property is made for a valuable consideration, and it is evidenced by an instrument in writing, equity will, by

¹⁰ 2 Washburn on Real Prop. 437; 2 Pom. Eq. Jur., Sec. 1030; 1 Spence Eq. Jur. 496; 1 Prest. Est. 191; *Nightingale v. Hidden*, 7 R. I. 121; *Thompson v. Peake*, 7 Rich. 353, and cases cited in subsequent notes.

¹¹ *Kearney v. Fleming*, 10 N. Y. S. 169.

¹² 1 Spence Eq. Jur. 509; 2 Washburn on Real Prop. 438. This species of trust is, however, really an express trust, although it arises by construction, and is not strictly created by express limitation. 2 Pom. Eq. Jur., Sec. 1010. See *Walker v. Whiting*, 23 Pick. 313; *Fay v. Taft*, 12 Cush. 448; *Randolph v. Randolph*, 40 N. J. Eq. 73.

raising an implied trust in favor of the vendee, treat the vendor as his trustee in respect to the land to be conveyed, and the trust will be enforced by a decree for specific performance.¹³ And so settled is the fiduciary character of the relation of vendor and vendee under an executory contract of sale, that the vendee may enjoin the vendor from the commission of waste.¹⁴ This trust may, as well, be enforced against the subsequent purchaser from the vendee, with notice of the prior contract of sale.¹⁵ At this point attention should be given to an apparent contradiction. The implied trust, just explained, which arises from an executory contract for the sale of land, is held to be beyond the operation of the Statute of Uses,¹⁶ so that the *cestui que trust*, or executory vendee, would never acquire the legal title to the land, unless the trust is enforced by a decree for specific performance of the executory contract of sale.¹⁷ In a previous paragraph,¹⁸ where the creation of uses by simple declarations is explained, it is stated that "Equity always construed a contract of sale or agreement to convey as a declaration to uses, and would enforce it if the requisite consideration was present." That

¹³ 1 Spence Eq. Jur. 509; Jackson v. Morse, 16 Johns. 107; Coman v. Lakey, 80 N. Y. 345; Pelton v. Westchester Fire Ins. Co., 77 N. Y. 605; Musham v. Musham, 87 Ill. 80; Felch v. Hooper, 119 Mass. 52; Coffey v. Argo (Ill.), 24 N. E. Rep. 1068; Greene v. Brooks, 81 Cal. 328. But there must, of course, be a written agreement of sale to satisfy the Statute of Frauds, or such a part performance as will take the case out of the statute. Harris v. Barnett, 3 Gratt. 339; Hill v. Meyers, 43 Pa. St. 170; Phillips v. Thompson, 1 Johns. Ch. 131; Ryan v. Dox, 34 N. Y. 312; 3 Washburn on Real Prop. 215. An implied trust will also arise in favor of partnership-creditors in respect to the partnership property, when the insolvency of a firm or of its members creates a contention of interests between the partnership creditors and the creditors of the individual partners. Hastings v. Drew, 76 N. Y. 9; Bartlett v. Drew, 57 Id. 587; Murray v. Murray, 5 Johns. Ch. 60.

¹⁴ Moses v. Johnson, 88 Ala. 517.

¹⁵ McWhinn v. Martin (Wis.), 46 N. W. Rep. 118.

¹⁶ See *ante*, Sec. 364.

¹⁷ See *supra*.

¹⁸ See *ante*, Sec. 330.

is, equity would treat a bargain and sale of lands as the express creation of a use, which could be executed into a legal estate by the Statute of Uses, if the use so created did not come within one of the five classes of cases, in which the statute did not operate.¹⁹ Wherever the English statute of enrollment is in force, no use created by bargain and sale can be executed by the Statute of Uses, unless it be created by deed sealed and recorded. In England, therefore, a use created by a bargain and sale, which did not conform to the requirements of the Statute of Enrollment, would be denominated an implied trust, which could be enforced only by a decree for specific performance. But this distinction between these two classes of equitable estates only obtains where the mode of creating uses by simple declarations is regulated by statute, beyond the requirement of the Statute of Frauds, that it should be manifested in writing. Where there is no such regulation of the creation of uses, the executory bargain and sale would be expected, and according to one set of authorities it is held to create a use which could be executed into a legal estate; but according to the second and more numerous as well as more modern set of cases, it would be an implied trust, which would remain an equitable estate until the trust is enforced by a decree for specific performance. There is but one way to reconcile these otherwise conflicting decisions, apart from the historical explanation, that it is a meaningless survival or adoption of a distinction which was caused by the provisions of the statute of enrollment, but which now, in the absence of such statutory regulations, serves only to create confusion, viz.: that the character of the equitable estate created by a bargain and sale would depend upon the intention of the parties in making the bargain and sale. If, in executing the written contract of sale, the intention was to pass an absolute title, the equitable estate of the vendee would be a use and not an implied trust; and if the intention of the parties was to make the bargain and sale only pre-

¹⁹ See Secs. 346, 542.

liminary to a specific and more formal performance, then the bargain and sale creates an implied trust and not a use.²⁰

§ 366. **Resulting trusts.**—These trusts arise in two principal cases: *First*, where only a part of the trust is declared, and the result remains undisposed of. In such a case there is a resulting trust in favor of the grantor. Resulting trusts of this class are such as result to the grantor, but which, on account of the terms of the conveyance, cannot be executed as uses. Where the statute can operate, the equitable interest is a resulting use, and becomes a legal estate under the statute. Resulting interests in chattels, held in trust, are *resulting trusts*, and *not* resulting uses.²¹ Thus in the devise of an income to one, when he becomes of age, there is a resulting trust in the immediate income to the devisor's heirs; or where property is directed to be sold for certain purposes, and the proceeds are more than sufficient for the purposes of the trust, there is a resulting trust in the surplus to the heirs of the devisor.²² There is also a resulting trust in favor of the grantor and his heirs where the purposes of

²⁰ See *Hanks v. Foisom*, 11 Lea 555, opinion by Chancellor Cooper, citing *Beecher v. Hicks*, 7 Lea 211; *Carnes v. Apperson*, 2 Sneed 562; *Topp v. White*, 12 Heisk. 165, 173; *Anderson v. Clears*, 7 Heisk. 667; *Lafferty v. Whitesides*, 1 Swan. 123.

²¹ They are called resulting trusts, because they cannot be executed by the statute. In every other respect they are like resulting uses, and will arise only under such circumstances as would cause a resulting use in the freehold estate. A resulting trust in a chattel only arises when there is no consideration to the grantor and no consideration expressed in the grant. For the particular cases in which there will be a resulting use and, if it be a chattel interest, a resulting trust, see *ante*, Sec. 329.

²² *Lloyd v. Lloyd*, L. R. 7 Eq. 458; *Longley v. Longley*, L. R. 13 Eq. 133; *Hogan v. Jaques*, 19 N. J. Eq. 123; *Loring v. Elliot*, 16 Gray, 568; *Hogan v. Stahorn*, 65 N. C. 279; *McCallister v. Willey*, 52 Ind. 282; *Trapnall v. Brown*, 19 Ark. 39; *Pouce v. McElroy*, 47 Cal. 154; *Kennedy v. Nunan*, 52 Cal. 326; *Edinger v. Heiser*, 62 Mich. 598; *Schlessinger v. Mallard*, 70 Cal. 326; *Ball v. Gaff* (Ky.), 1 S. W. Rep. 724; *Buffington v. Maxam*, 152 Mass. 477.

the express trust have failed, from whatever cause the failure may arise. Thus, if the trust be to appoint the estate in favor of a certain person, and the trustee fails to appoint, or the person dies before appointment, the trust will result to the grantor.²³ The trustee will in none of these cases enjoy the trust, even though a nominal consideration be mentioned in the deed. Nothing will prevent the resulting of the trust to the grantor but the payment of an adequate, or at least substantial, consideration.²⁴ The nominal consideration will prevent the resulting of such a use as will be executed by the statute, but will have no effect upon the resulting trust.

§ 367. Same — Payment of consideration.—The second class of resulting trusts includes those cases in which the estate is purchased in the name of one person and the consideration is paid by another. But two circumstances must concur in order that a trust may result to the one paying the consideration: *First*, the execution of the deed in the name of the one person must be the result of some fraud, accident, or mistake. Or, if it is done with the knowledge and consent of the person paying the consideration, his intention that he should have the beneficial interest in the estate must be clearly established.²⁵ The payment of the consideration and the in-

²³ 1 Cruise Dig. 375, 394; *Ashhurst v. Givens*, 5 Watts & S. 327; *Sturtevant v. Jaques*, 14 Allen 523; *Shaw v. Spencer*, 100 Mass. 382; *Nichols v. Allen*, 130 Mass. 211; *Oliffe v. Wells*, 130 Mass. 221; *Power v. Cassidy*, 79 N. Y. 602; *Stansfield v. Habergham*, 10 Ves. 273; *Pratt v. Miller*, 23 Neb. 496; *Parker v. McMillan*, 55 Mich. 265.

²⁴ 1 Spence Eq. Jur. 467; 2 Washburn on Real Prop. 438; 2 Pom. Eq. Jur., Sec. 1033. See *Clark v. Hershey*, 52 Ark. 473.

²⁵ *Dyer v. Dyer*, 2 Cox 92; 1 Eq. Ld. Cas. 314; *Lloyd v. Read*, 1 P. Wms. 607; *Withers v. Withers*, Ambl. 151; *Rider v. Kidder*, 10 Ves. 360; *Medmer v. Medmer*, 26 N. J. Eq. 269; *Smith v. Patton*, 12 W. Va. 541; *Lee v. Browder*, 51 Ala. 288; *Thomas v. Standiford*, 49 Md. 181; *Tilford v. Torrey*, 53 Ala. 120; *Cunningham v. Bell*, 83 N. C. 328; *Kelley v. Jenness*, 50 Me. 455; *Hopkinson v. Dumas*, 42 N. H. 306; *Nixon's App.*, 63 Pa. St. 279; *Clark v. Clark*, 43 Vt. 685; *Boyd v. McLean*, 1 Johns. Ch. 582; *Brooks v. Shelton*, 54 Miss. 353; *Hampson v. Fall*, 64 Ind. 382; *Duval v. Marshall*, 30 Ark. 230; *McGovern v. Knox*,

tention of the parties in respect to the beneficial interest may be established by parol evidence, even against the express recitals of the deed. But the evidence must be clear. It would seem that this would be a clear violation of the Statute of Frauds, where the deed was taken in the name of another with the understanding that the one paying the consideration shall be the beneficial or equitable owner. For it is difficult to see in what way such a trust differs from an express trust, which is required to be manifested by some writing. But the decisions have held that it was not necessary for it to be in writing, and such must be taken to be the law.²⁶ In like

21 Ohio St. 547; *Latham v. Henderson*, 47 Ill. 185; *Mathis v. Stufflebeam*, 94 Ill. 481; *Moss v. Moss*, 95 Ill. 449; *Johnson v. Quarles*, 47 Mo. 423; *Boskowitz v. Davis*, 12 Nev. 446; *Logan v. Walker*, 1 Wis. 527; *Case v. Coddington*, 38 Cal. 191; *Roberts v. Ware*, 40 Cal. 634; *Mershon v. Duer*, 40 N. J. Eq. 333; *Osgood v. Eaton*, 82 N. H. 512; *Parker v. Logan*, 82 Va. 376; *Farrington v. Duval* (S. C.), 10 S. E. Rep. 944; *Nance v. Nance*, 28 Ill. App. 587. "A resulting trust in favor of one furnishing money for the purchase of real estate cannot arise in opposition to the intention of the parties." *Funk v. Hensler* (Wash. 1903), 72 Pac. Rep. 102. "A resulting trust will not arise in favor of one paying a part of the price of land conveyed to another unless it is shown that he paid some definite part of the consideration." *Onasch v. Zinkel*, 72 N. E. Rep. 716, 213 Ill. 119. "A voluntary conveyance cannot be held to create a resulting trust for the grantor." *Gallagher v. Northrup* (Ill. App. 1904), 114 Ill. App. 368. "There is not a resulting trust in favor of the purchaser at execution sale where the deed to her is void." *Livingstone v. Murphy* (Mass. 1905), 72 N. E. Rep. 1012.

²⁶ See *Willis v. Willis*, 2 Atk. 71; *Gascoigne v. Thwing*, 1 Vern. 366; *Heard v. Pilley*, L. R. 4 Ch. 548; *Baker v. Vining*, 30 Me. 121; *Boyd v. McLean*, 1 Johns. Ch. 582; *Hennesy v. Walsh*, 55 N. H. 515; *Parker v. Snyder*, 31 N. J. Eq. 164; *Whitmore v. Learned*, 70 Me. 276; *Thomas v. Standiford*, 49 Md. 181; *Miller v. Blose's Exr.*, 30 Gratt. 744; *Lee v. Browder*, 51 Ala. 288; *Agricultural Assn. v. Brewster*, 51 Texas 257; *Murphy v. Peabody*, 63 Ga. 522; *Smith v. Patton*, 12 W. Va. 541; *McCreary v. Casey*, 50 Cal. 349; *Ward v. Armstrong*, 84 Ill. 151. "The statute of frauds is inapplicable in the case of resulting trusts." *Lynch v. Herrig* (Mont. 1905), 80 Pac. Rep. 240. "A resulting trust can only be created by a writing." *Los Angeles & B. Oil & Development Co. of Arizona v. Occidental Oil Co.* (Cal. 1904), 78 Pac. Rep. 25.

manner the presumption of a trust arising from the payment of the consideration may be rebutted by parol evidence, showing that the one paying the consideration intended that the grantee in the deed should have the benefit of the purchase as a gift, provided such parol evidence does not contradict the terms of the deed.²⁷ The second circumstance is, the consideration must be paid by the person claiming the resulting trust at the time of the transaction of sale or conveyance. Any subsequent payment of the consideration by such person, even though he has been compelled to do so as surety of the grantee, will not raise a trust.²⁸ The absence of either of these circumstances will prevent the trust resulting from the payment of the consideration.²⁹ And the evidence in sup-

²⁷ *Lane v. Dighton*, Ambl. 409; *Benbow v. Townsend*, 1 My. & K. 506; *Hopkinson v. Dumas*, 42 N. H. 303; *Edwards v. Edwards*, 39 Pa. St. 378; *Carter v. Montgomery*, 2 Tenn. Ch. 216; *Adams v. Greerard*, 26 Ga. 651; *Warner v. Steer*, 112 Pa. St. 634; *Tryor v. Huntton*, 67 Cal. 325.

²⁸ *Howell v. Howell*, 15 N. J. Eq. 78; *Buck v. Swazey*, 35 Me. 41; *Hopkinson v. Dumas*, 42 N. H. 301; *Mershon v. Duer*, 40 N. J. Eq. 333; *Brown v. Cave*, 23 S. C. 251; *Shaw v. Shaw*, 86 Mo. 594; *Walsh v. McBride* (Md.), 19 Atl. Rep. 4; *Pulford v. Morton*, 62 Mich. 25; *Rice v. Pennypacker*, 5 Del. Ch. 33. So also will a trust result to one who pays a part of the purchase-money with the intention that he shall have an interest in the land. But in order that there may be a resulting trust in his favor, the exact amount which he advances must be clearly established. Any doubt or uncertainty in that respect will prevent the trust from resulting. *Shoemaker v. Smith*, 11 Humph. 81; *Smith v. Smith*, 85 Ill. 189; *Cramer v. Hoose*, 93 Ill. 503; *Shea v. Tucker*, 56 Ala. 450; *McCreary v. Casey*, 50 Cal. 349; *Botsford v. Burr*, 2 Johns. Ch. 405; *Smith v. Straham*, 16 Texas 314; *Sayre v. Townsend*, 15 Wend. 647; *Springer v. Springer*, 114 Ill. 558; *Somers v. Overhulser*, 67 Cal. 237.

²⁹ *McCue v. Gallagher*, 23 Cal. 53; *Gee v. Gee*, 32 Miss. 190; *Gibson v. Foote*, 40 Miss. 792; *Ramsdell v. Emory*, 46 Me. 311; *Botsford v. Burr*, 2 Johns. Ch. 405; *McCullough v. Ford*, 96 Ill. 439; *House v. House*, 57 Ala. 262; *Kennedy v. Price*, 57 Miss. 771; *Hennesy v. Walsh*, 55 N. H. 515, and cases cited in the preceding notes. *Heneke v. Flor-ing*, 114 Ill. 554; *Green v. Dietrich*, 114 Ill. 636; *Burdette v. May*, 100 Mo. 13; *Nance v. Nance*, 28 Ill. App. 587; *Rice v. Pennypacker*, 5 Del. Ch. 33. There is no resulting trust in favor of one whose money is ex-

port of both propositions must be clear and free from reasonable doubt.³⁰ Resulting trusts are now regulated by statute in New York, Michigan, Indiana, Kentucky, Minnesota, Wisconsin and Kansas. They all substantially abolish such resulting trusts as arise in a conveyance to one person in favor of another who has paid the consideration, except in favor of the judgment-creditors of the latter. They may enforce the trust in their behalf if they were creditors at the time of the conveyance.³¹ But the statutes expressly except those cases where the deed has been taken in the name of another, through some accident, fraud or mistake.³² These resulting trusts rest upon the presumption that the person beneficially entitled has been deprived of his interest against his will. But where the relation between the parties is so close as to permit of the counter-presumption that the one paying the consideration intended it as a gift to the one in whose name the deed is taken, as where the parties are husband and wife, parent and child, and the like, there will be

pendent in improvements on the land. *Bodwell v. Nutter*, 63 N. H. 446. "A trust founded on no consideration on the part of the *cestui que trust* will not be enforced either at law or in equity, unless executed or fully declared, and to take effect *in presenti*." *Fisher v. Hampton Transp. Co.* (Mich. 1904), 98 N. W. Rep. 1012, 10 Detroit Leg. N. 1028.

³⁰ *Heneke v. Floring*, 114 Ill. 554; *Green v. Dietrich*, 114 Ill. 636; *St. Patrick's Catholic Church v. Daly*, 116 Ill. 76; *Woodward v. Sibert*, 82 Va. 441; *Catoe v. Catoe* (S. C.), 10 S. E. Rep. 1078; *Hoover v. Hoover*, 29 Pa. St. 201; *Behm v. Molly* (Pa.), 19 Atl. Rep. 562; *Guest v. Guest*, 74 Tex. 664.

³¹ 2 R. S. N. Y. (1875) 1105, Secs. 51, 52, 53; 2 Comp. Laws Mich. (1871) 1331, Secs. 7, 8, 9; 1 R. S. Wis. 1129, Secs. 7, 8, 9; Comp. Laws Kan., p. 989, Secs. 6, 7, 8; *Moore v. Williams*, 55 N. Y. Super. Ct. 116; *Weers v. Rademacher*, 120 N. Y. 62.

³² For cases in which these statutes have been under consideration see *Reitz v. Reitz*, 80 N. Y. 538; *Siemon v. Schurck*, 29 N. Y. 598; *Weare v. Linnell*, 29 Mich. 224; *Munch v. Shabel*, 37 Mich. 166; *Derry v. Derry*, 74 Ind. 560; *Hon v. Hon*, 70 Ind. 135; *Catherwood*, 65 Ind. 576; *Graves v. Graves*, 3 Metc. 167; *Kennedy v. Taylor*, 20 Kan. 558; *Underwood v. Sutcliffe*, 77 N. Y. 51; *Traphagen v. Burt*, 67 N. Y. 30; *Bedford v. Graves* (Ky.), 1 S. W. Rep. 534.

no resulting trust.³³ But this is only a presumption of law, in rebuttal to the presumption of a trust raised by the payment of the consideration. If it is shown that the deed was taken in the name of the wife or child through a mistake of the scrivener, or the fraud of some one, or with the intention that the husband or father should have the equitable interest, the trust will result, as in any other case.³⁴

³³ It is presumed to be a gift, because the purchasers in the cases supposed, husband and father, are under a moral or *quasi* legal obligation to maintain the persons in whose names the deeds are taken, viz., wife and child. 1 Cruise Dig. 394; 1 Spence Eq. Jur. 511; Kingdom v. Bridges, 2 Vern. 67; Finch v. Finch, 15 Ves. 43; Marshall v. Crutwell, L. R. 20 Eq. 328; Livingston v. Livingston, 2 Johns. Ch. 537; Farnell v. Lloyd, 69 Pa. St. 239; Stevens v. Stevens, 70 Me. 92; Lochenour v. Lochenour, 61 Ind. 595; Read v. Huff, 40 N. J. Eq. 229; Robinson v. Robinson, 45 Ark. 481; *In re* Camp, 10 N. Y. S. 141. And the same presumption prevails wherever one purchases property in the name of another, while the former stands *in loco parentis* (between mother and child). *In re* De Visme, 2 De G., J. & S. 17; Batstone v. Salter, L. R. 19 Eq. 250. But see Murphy v. Nathans, 46 Pa. St. 508; Shaw v. Read, 47 Pa. St. 103; Flynt v. Hubbard, 57 Miss. 471 (between grandfather and grandchild); Co. Lit. 290 b, note 249, Sec. 8; Ebrand v. Dancer, 2 Chan. Cas. 26. See generally Beckford v. Beckford, Lofft. 490; Lloyd v. Read, 1 P. Wms. 607; Smith v. Patton, 12 W. Va. 541; Higdon v. Higdon, 57 Miss. 264. On the other hand there is no presumption of a gift where the deed is taken in the name of the husband or father, and the purchase-money is paid by wife or child. Howell v. Howell, 15 N. J. Eq. 77; Thomas v. Standiford, 49 Md. 181; Lofton v. Witboard, 92 Ill. 461; Moss v. Moss, 95 Ill. 449; Catherwood v. Watson, 65 Ind. 575; Cunningham v. Bell, 83 N. C. 328; Tilford v. Torrey, 53 Ala. 120; Leman v. Whitley, 4 Russ. 423; Sasser v. Sasser, 73 Ga. 275.

³⁴ Wallace v. Bowens, 28 Vt. 638; Sawyer's Appeal, 16 N. H. 414; Dickinson v. Davis, 43 N. H. 647; Jackson v. Matdurf, 11 Johns. 91; Stevenson v. Stevenson, 70 Me. 92; Springer v. Berry, 47 Me. 338; Guthrie v. Gardner, 19 Wend. 414; Williams v. Williams, 32 Beav. 370; Read v. Huff, 40 N. J. Eq. 229; Russell v. Russell (Ky.), 12 S. W. Rep. 709. It has been held that there can be no resulting trust in favor of a husband in property in the name of the wife, because the wife cannot be trustee for the husband. 1 Cruise Dig. 402; Kingdom v. Bridges, 2 Vern. 67; Alexander v. Warrance, 17 Mo. 228; Jencks v. Alexander, 11 Paige Ch. 619. This technical rule is not presumed to prevail in this country as an obstacle in the way of raising a resulting

§ 368. **Constructive trusts.**—Constructive trusts arise where the trustee or any other person holding a fiduciary position, by fraud, actual or constructive, makes an illegal disposition of trust property to the injury of the *cestui que trust* or beneficiary. The latter can, at his election, follow such trust property into whosoever hands it may come with notice of the trust.³⁵ And it matter not whether the original holding of such property was legal or illegal; if, afterwards, it becomes illegal, the same rule will apply.³⁶ The most common instances of constructive trusts are purchases by the trustee of trust property at his own sale, or an illegal conveyance by him to one having notice of the trust, or paying no valuable consideration. It is a general rule of law that a trustee cannot purchase at his own sale, and if he does he cannot acquire an absolute title. It is voidable at the elec-

trust, and certainly not in those States where the wife is treated, in respect to her property, as a *feme sole*. See cases cited, *supra*. "A resulting trust arises in favor of the wife where property is purchased by the husband with her funds, and title thereto is taken in the husband's name." *Matador Land & Cattle Co. v. Cooper* (Tex. Civ. App. 1905), 87 S. W. Rep. 235. "As between a wife and the creditors of her husband, the wife was entitled to have a resulting trust in real estate, in the absence of any estoppel, to the extent of her contribution toward the purchase price, and to the extent that her money had been used in repairs, taxes, etc., over and above her proportion of the purchase price. *Mayer v. Kane* (N. J. Ch. 1905), 61 Atl. Rep. 374. Where a minor pays a portion of the purchase price of a farm, title to which is taken in the name of his father, but with the understanding that it was not a gift to the father, a trust would result in the minor's favor to the amount paid, though the balance was not so paid as to raise a resulting trust on its account. *Crowley v. Crowley* (N. H. 1903), 56 Atl. Rep. 190.

³⁵ 2 Washburn on Real Prop. 447; 1 Spence Eq. Jur. 511; 2 Pom. Eq. Jur. 1044; Perry on Tr., Sec. 166; *Bailey v. Winn* (Mo.), 12 S. W. Rep. 1045; *Murphy v. Murphy* (Iowa), 45 N. W. Rep. 914; *Lehmann v. Rothbarth*, 111 Ill. 185; *Morgan v. Fisher's Admr.*, 82 Va. 417.

³⁶ Thus, if a mortgage is given jointly to two, and one dies, the survivor would hold the mortgage as trustee for himself and the heirs and personal representatives of the deceased. *Buck v. Swazey*, 35 Me. 41; *Randall v. Phillips*, 3 Mason 378; *Caines v. Grant*, 5 Binn. 119.

tion of the *cestui que trust*. Until an avoidance or ratification by him there is a constructive trust raised in his favor.³⁷ But this rule does not prevent him from purchasing the trust property with the consent of the *cestui que trust*, provided the latter is of age. But such transactions are closely watched, and if the consideration paid therefor be not adequate, the courts are greatly disposed to set aside the sale.³⁸ The court of equity may also authorize the trustee to buy the property in, and in that case the title of the trustee will be good against all parties.³⁹ In the same manner, if the trustee attempts to

³⁷ *Jennison v. Hapgood*, 7 Pick. 8; *Swinburne v. Swinburne*, 28 N. Y. 568; *Hubbell v. Medbury*, 53 N. Y. 98; *Charles v. Dubose*, 29 Ala. 367; *Gaerrers v. Bailleno*, 48 Cal. 118; *Newton v. Taylor*, 39 Ohio St. 399; *Rea v. Copelin*, 47 Mo. 76; *Broyles v. Nowlin*, 59 Tenn. 191; *Reickhoff v. Brecht*, 51 Iowa 633; *Pindall v. Trevor*, 30 Ark. 249; *Blauvelt v. Akerman*, 20 N. J. Eq. 141; *Barnett v. Bamber*, 81 Pa. St. 247; *Tracy v. Craig*, 55 Cal. 359; *Davis v. Creek*, 55 Cal. 359; *Reitz v. Reitz*, 80 N. Y. 538; *Smith v. Stephenson*, 45 Iowa 645; *Jones v. Dexter*, 130 Mass. 380; *Hastings v. Drew*, 76 N. Y. 9; *Bennett v. Austin*, 81 N. Y. 308; *Smith v. Frost*, 70 N. Y. 605; *Heath v. Crealock*, L. R. 18 Eq. 215; *In re Hallett's Estate*, L. R. 13 Ch. 696; *Wedderburn v. Wedderburn*, 4 My. & Cr. 41; *Great Luxembourg Ry. Co. v. Magnay*, 25 Beav. 586; *Barnes v. Addy*, L. R. 9 Ch. 244; *Bassett v. Shoemaker* (N. Y.), 20 Atl. Rep. 52. Where a grantee or devisee obtains the possession and title to land intended for another by actual fraud, on clear and convincing proof of the fraud, a trust will be raised in favor of the latter. *Moore v. Crump* (Miss. 1904), 37 So. Rep. 109. A constructive trust results in favor of a corporation where, by reason of the fraudulent acts of its managing officers and others, its property has been conveyed away and lost and wasted to the corporation and its stockholders. *Northwestern Land Assn. v. Grady* (Ala. 1903), 33 So. Rep. 874.

³⁸ *Downes v. Grazebrook*, 3 Meriv. 208; *Ex parte Lacey*, 6 Ves. 625; *Morse v. Royal*, 12 Ves. 355; *Denton v. Donner*, 23 Beav. 285; *Coles v. Trecstlick*, 9 Ves. 234; *Spencer v. Newbold's Appeal*, 80 Pa. St. 317.

³⁹ *Scholle v. Scholle*, 101 N. Y. 167; *Fisher's Appeal*, 34 Pa. St. 29; *Marshall v. Joy*, 17 Vt. 546; *Moore v. Mandlebaum*, 3 Mich. 433; *Burrell v. Bull*, 3 Sandf. Ch. 15; *Young v. Hughes*, 32 N. J. Eq. 372; *Walker v. Carrington*, 74 Ill. 446. "The beneficiary of a trust fund is entitled to all profits made thereon by the trustee in violation of his trust." *Jeffray v. Towar* (N. J. Ch. 1903), 54 Atl. Rep. 817. "Where beneficiaries suffered loss by the conduct of the trustee, their remedy

make an illegal disposition of the land, his grantee will take it bound with a constructive trust in favor of the *cestui que trust*, unless he has had no actual or constructive notice of the trust, and has paid a valuable consideration.⁴⁰ And where such grantee is a *bona fide* purchaser for value, the proceeds of sale will be subject to the constructive trust in favor of the *cestui que trust*, into whatever kind of property such proceeds may be invested, as long as the possibility of identifying them remains.⁴¹ These are only the more common instances of constructive trusts. But there are many others, and it may be stated as the invariable rule that where there has been a fraud committed in the disposition or acquisition of the property, equity will raise a constructive trust in favor of the person so defrauded, unless it will interfere with and affect the interest of innocent third persons.⁴² Thus, if one em-

is to proceed against the trustee." *Miller v. Butler* (Ga. 1905), 49 S. E. Rep. 754.

⁴⁰ *Thompson v. Wheatley*, 5 Smed. & M. 499; *Fillman v. Divers*, 31 Pa. St. 42; *Hopkinson v. Dumas*, 42 N. H. 304; *Boone v. Chiles*, 10 Pet. 177; *McVey v. Quality*, 97 Ill. 93; *Dey v. Dey*, 26 N. J. Eq. 182; *Veile v. Blodgett*, 49 Vt. 270; *Murray v. Ballou*, 1 Johns. Ch. 566; *Phelps v. Jackson*, 31 Ark. 272; *Planter's Bk. v. Prater*, 64 Ga. 609; *Dotterer v. Pike*, 60 Ga. 29; *Musham v. Musham*, 87 Ill. 80; *Newton v. Porter*, 69 N. Y. 133; *Russell v. Clark's Exrs.*, 7 Cranch 69; *Sharpe v. Goodwin*, 51 Cal. 219; *Boyd v. Brincken*, 55 Cal. 427; *McEachin v. Stewart*, 106 N. C. 336.

⁴¹ *Burks v. Burks*, 7 Baxt. 353; *Broyles v. Nowlin*, 59 Tenn. 191; *Tilford v. Torrey*, 53 Ala. 120; *Pindall v. Trevor*, 30 Ark. 249; *McDonough v. O'Neil*, 113 Mass. 92; *Tracy v. Kelley*, 52 Ind. 535; *Cookson v. Richardson*, 69 Ill. 137; *Coles v. Allen*, 64 Ala. (when no trust arises); *Dodge v. Cole*, 97 Ill. 338; *Schlaefel v. Corson*, 52 Barb. 510; *Hastings v. Drew*, 76 N. Y. 9, 16; *Taylor v. Mosely*, 57 Miss. 544; *Mich., etc., R. R. v. Mellen*, 44 Mich. 321; *Murray v. Lylburn*, 2 Johns. Ch. 441, 443; *Shaw v. Spencer*, 100 Mass. 382; *Shelton v. Lewis*, 27 Ark. 190; *Duncan v. Jaudon*, 15 Wall. 165; *Newton v. Taylor*, 32 Ohio St. 399; *Barrett v. Bamber*, 81 Pa. St. 247; *Veile v. Blodgett*, 49 Vt. 270; *Hubbard v. Burrell*, 41 Wis. 365; proceeds charged with a trust on sale to a *bona fide* purchaser.

⁴² *Lakin v. Sierra Buttes Gold Mining Co.*, 25 Fed. Rep. 337; *Boyce v. Stanton*, 15 Lea, 346; *Palmetto Lumber Co. v. Risley*, 25 S. C. 309;

bezzles money intrusted to his care and invests it in real estate, the person to whom the money belongs will have a constructive trust in such land as against every one except an innocent subsequent purchaser.⁴³ But there will not be any constructive trust unless it can be shown that specific pieces of property had been purchased with trust funds.⁴⁴ A constructive trust also arises where one procures a devise or bequest upon the fraudulent misrepresentation that he will apply such testamentary provisions to the use and benefit of another,⁴⁵ or succeeds in effecting a purchase of property

Wingerter v. Wingerter, 71 Cal. 105; *McElroy v. Hiner* (Ill.), 24 N. E. Rep. 435; *Huxley v. Rice*, 40 Mich. 73; *Phelps v. Jackson*, 31 Ark. 272; *Hendrix v. Nunn*, 46 Texas, 141; *Veile v. Blodgett*, 49 Vt. 270; *Jenkins v. Doolittle*, 69 Ill. 415; *Greenwood's Appeal*, 92 Pa. St. 181; *Barnes v. Taylor*, 30 N. J. Eq. 7; *Hollinshead v. Simms*, 51 Cal. 158; *Dewey v. Moyer*, 72 N. Y. 70, 76; *Beach v. Dyer*, 93 Ill. 295; *Dyer v. Dyer*, 1 Eq. Lead. Cas. 314, 350-364 (4th Am. ed.).

⁴³ *Foot v. Colvin*, 3 Johns. 216; *Murdock v. Hughes*, 7 Smed. & M. 219; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Robb's Appeal*, 41 Pa. 45; *Duncan v. Jandon*, 15 Wall. 165; *Hubbard v. Burrell*, 41 Wis. 365; *Barrett v. Bamber*, 81 Pa. St. 247; *McLarren v. Brewer*, 51 Me. 402; *Homer v. Homer*, 107 Mass. 82; *Jones v. Dexter*, 130 Mass. 380; *Shaw v. Spencer*, 100 Mass. 382; *Watson v. Thompson*, 12 R. I. 466; *Schlaefel v. Carson*, 52 Barb. 510; *Ferris v. Van Vechten*, 73 N. Y. 113; *Derry v. Derry*, 74 Ind. 560; *Reickhoff v. Brecht*, 51 Iowa 633; *White v. Drew*, 42 Mo. 561; *Tilford v. Torrey*, 53 Ala. 120; *Coles v. Allen*, 64 Ala. 98; *Moss v. Moss*, 95 Ill. 449; *Winkfield v. Brinkman*, 21 Kan. 689; *Thomas v. Standiford*, 49 Md. 181; *Tracy v. Kelley*, 52 Ind. 535; *Dodge v. Cole*, 97 Ill. 338; *Settembre v. Putnam*, 30 Cal. 490; *Jenkins v. Frink*, 30 Cal. 586; *Keech v. Sandford*, Sel. Cas. Ch. 61, 1 Eq. Ld. Cas. 48; *Riehl v. Evansville Founding Assn.*, 104 Ind. 70; *Paxton v. Stuart*, 80 Va. 873; *Phillips v. Overfield*, 100 Mo. 467; *McEachin v. Stewart*, 106 N. C. 336. "A constructive trust arises against one who, by falsely representing to B. that he is acting for C., obtains from B. property which B. intended to give to C.; and that trust may be enforced by C., irrespective of the question whether C. had an enforceable claim against B." *Johnston v. Reilly* (N. J. 1904), 57 Atl. Rep. 1049.

⁴⁴ *Phillips v. Overfield*, 100 Mo. 406.

⁴⁵ *Bulkley v. Wilford*, 8 Bligh. (N. S.) 111; *Chester v. Urwick*, 23 Beav. 407; *Church v. Ruland*, 64 Pa. St. 432; *McCormick v. Grogan*, L. R. 4 H. L. 82, 97, per Lord Westbury; *Podmore v. Gunning*, 7 Sim.

without the competition of one who desired to make the same purchase by fraudulently promising the latter the benefit of such purchase, if he refrains from competition.⁴⁶ But in all such cases the elements of fraud, and not the bare verbal promise, gives rise to the constructive trust, and if there be no fraud, there will be no constructive trust.⁴⁷ The invalidity of the voluntary conveyance against the creditors of the grantor may be ascribed to the application of the same principle. The creditors have a constructive trust in the property of the debtor which follows the land into the hands of the voluntary grantees.⁴⁸ A constructive trust will also arise in favor of a principal, where the agent buys property and takes a

644; *Hoge v. Hoge*, 1 Watts, 163, 213; *Dowd v. Tucker*, 41 Conn. 197; *Williams v. Vreeland*, 29 N. J. Eq. 417.

⁴⁶ *Combs v. Little*, 3 Green Ch. 410; *Marlatt v. Warwick*, 18 N. J. Eq. 108; *Merritt v. Brown*, 21 *Id.* 401, 404; *Troll v. Carter*, 15 W. Va. 567; *Wolford v. Herrington*, 86 Pa. St. 39; 1 Eq. Ld. Cas. 350-364 (4 Am. ed.); *Hunt v. Roberts*, 40 Me. 187; *Hodges v. Howard*, 5 R. I. 149; *Fraser v. Child*, 5 E. D. Smith 153; *Hoge v. Hoge*, 1 Watts, 163, 214; *Cousins v. Wall*, 3 Jones' Eq. 43; *Ryan v. Dox*, 34 N. Y. 307; and *Wheeler v. Reynolds*, 66 *Id.* 227; *Dodd v. Wakeman*, 26 N. J. Eq. 484; *Walker v. Hill's Exrs.*, 22 *Id.* 519; *Farnham v. Clements*, 51 Me. 426; *McCulloch v. Cowhed*, 5 Watts & S. 427, 430; *Kisler v. Kisler*, 2 Watts, 323.

⁴⁷ *Pattison v. Horn*, 1 Grant's Cas. (Pa.) 301; *Barnett v. Dougherty*, 32 Pa. St. 371; *Campbell v. Campbell*, 2 Jones' Eq. 364; *Chambliss v. Smith*, 30 Ala. 366; *Leman v. Whitley*, 4 Russ. 423; *Levy v. Brush*, 45 N. Y. 586; *Wheeler v. Reynolds*, 66 *Id.* 227; *Payne v. Patterson*, 77 Pa. St. 134; *Bennett v. Dollar Sav. Bank*, 87 *Id.* 382; *Hon v. Hon*, 70 Ind. 135; *Gibson v. Decius*, 82 Ill. 304; *Farnham v. Clements*, 51 Me. 426. "Though a constructive trust may be proved by parol, the evidence is insufficient unless 'it is full, clear, and convincing.'"—*Tillar v. Henry* (Ark. 1905), 88 S. W. Rep. 573.

⁴⁸ *Hill v. Eliot*, 12 Miss. 31; *Partridge v. Messer*, 14 Gray, 180; *Case v. Gerrish*, 15 Pick. 49; *Bliss v. Matteson*, 45 N. Y. 22; *Dewey v. Moyer*, 72 N. Y. 70; *Haston v. Castner*, 31 N. J. Eq. 697; *Clark v. Douglass*, 62 Pa. St. 408; *Gridley v. Watson*, 53 Ill. 186; *Fellows v. Smith*, 40 Mich. 689; *Cowen v. Alsop*, 51 Miss. 158; *Crawford v. Kirksey*, 55 Ala. 282; *Church v. Chapin*, 35 Vt. 223; *Freeman v. Burnham*, 36 Conn. 469; *Pomeroy v. Bailey*, 43 N. H. 118; *Stewart v. Rogers*, 25 Iowa, 395; see also *post*, Sec. 566.

deed in his own name, when he has been instructed to buy the property for his principal.⁴⁹ So also is there a constructive trust in favor of the wife, where a husband conveys an estate to a third person with an oral agreement that the grantee is to convey the same to the wife.⁵⁰ And it may be stated generally that whenever one is in a fiduciary relation with another, and in violation of his duties to such beneficiary, acquires property or profit, which ought to have gone to such beneficiary, the property or profit so acquired is charged with a constructive trust.⁵¹

§ 369. *Interest of the cestui que trust.*—This subject has in the main been already explained while treating of uses and trusts as they existed before the statute,⁵² and nothing more need now be done than to refer to the more important peculiarities of modern trusts, in which they differ from uses. Generally, trusts at the present day have all the characteris-

⁴⁹ *Rose v. Hayden*, 35 Kan. 106; *Reese v. Wallace*, 113 Ill. 589; *Stewart v. Duffy*, 116 Ill. 47; *Storm Lake Bank v. Mo. Val. Ins. Co.*, 66 Iowa, 617; *Hodge v. Twitchell*, 33 Minn. 389; *McLemore v. Carter* (Miss.), 7 So. Rep. 357. But see *contra*, *Bank of Springfield v. W. R. R. Co.*, 86 Mo. 75.

⁵⁰ *Fischbeck v. Gross*, 112 Ill. 208; *Hall v. Linn*, 8 Col. 264.

⁵¹ *Baker v. Whiting*, 3 Sumn. 475, 495; *Kelley v. Greenleaf*, 3 Story, 43, 101; *Huson v. Wallace*, 1 Rich. Eq. 1, 2, 3, 7; *Lacy v. Hale*, 37 Pa. 360; *Barrett v. Bamber*, 81 *Id.* 247; *Winkfield v. Brinkman*, 21 Kan. 482; *Dunlop v. Richards*, 2 E. D. Smith, 181; *Struthers v. Pearce*, 51 N. Y. 357; *Leach v. Leach*, 18 Pick. 68, 76; *Burdon v. Barkus*, 3 Giff. 412; 4 De G. F. & J. 42; *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Van Horne v. Fonda*, 5 *Id.* 388, 407; *Webster v. King*, 33 Cal. 348; *Guerrero v. Ballerino*, 48 *Id.* 118; *Tracy v. Colby*, 55 *Id.* 67; *Cookson v. Richardson*, 69 Ill. 137; *Reickhoff v. Brecht*, 51 Iowa, 633; *Treadwell v. McKeon*, 7 Baxt. 201; *Newton v. Taylor*, 32 Ohio St. 399; *Barrett v. Bamber*, 81 Pa. St. 247; *Jones v. Dexter*, 130 Mass. 380; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Grumley v. Webb*, 44 Mo. 444; *Swinburne v. Swinburne*, 28 N. Y. 568; *Bennett v. Austin*, 81 *Id.* 308; *Manning v. Hayden*, 5 Sawy. 360; *Broyler v. Nowlin*, 59 Tenn. 191; *Pindall v. Trevor*, 30 Ark. 249; *Jeffray v. Towar* (N. J. Ch. 1903), 54 Atl. Rep. 517; *Miller v. Butler* (Ga. 1905), 49 S. E. Rep. 754.

⁵² See *ante*, Secs. 324, 325, 332, 337.

tics of the ancient use. They are equitable estates, and enforceable solely in equity.⁵³

§ 370. *Liability for debts.*—For a long time, and, indeed, until within a late period, an equitable estate was not subject to liability for the debts of the beneficiary; but now in England, and in most of the States of this country, they are by statute made applicable to the satisfaction of his debts.⁵⁴ But the trust may be so limited as that it will be terminated when an attempt is made to subject it to the debts of the *cestui que trust*. The rule seems to be well established that if the trust is executory and its duration is discretionary in the trustee, or where the trust by the terms of the deed or will is to cease upon an attempted involuntary conveyance (*i. e.*, when some creditor seizes upon the estate for the payment of a debt), or an assignment in bankruptcy, or upon the insolvency of the *cestui que trust*, these are permissible limitations upon the estate of the beneficiary, and will prevent the transfer of any interest therein to the creditors, even though there be no limitation over.⁵⁵ But it will not be permitted to a man to

⁵³ Co. Lit. 290 b, note 249, Sec. 14; 2 Spence Eq. Jur. 875; 1 Prest. Est. 189; 1 Spence Eq. Jur. 497; *Cholmondeley v. Clinton*, 2 Jac. & W. 148; *Burgess v. Wheate*, 1 Eden, 223; *Orleans v. Chatham*, 2 Pick. 29; *Banks v. Sutton*, 2 P. Wms. 713; *Bush's Appeal*, 33 Pa. St. 88; *Price v. Sisson*, 13 N. J. 174; 2 Pom. Eq. Jur. Sec. 989; 2 Washburn on Real Prop. 454-457. "The interest of a *cestui que trust* is an equitable estate in the land or other thing, of which the legal title is vested in the trustee." *Laughlin v. Leigh*, 112 Ill. App. 119, judgment affirmed *Leigh v. Laughlin* (Ill. 1904), 71 N. E. Rep. 881, 211 Ill. 192. "A *cestui que trust* can maintain an action in relation to the trust property only after the trustee has refused to sue, and the complaint must show such refusal." *Woolf v. Barnes* (N. Y. Sup. 1904), 93 N. Y. S. 219.

⁵⁴ 1 Prest. Est. 144; 2 Washburn on Real Prop. 456; *Pratt v. Colt*, 2 Freem. 139; *Kip v. Bank of New York*, 10 Johns. 63; *Jackson v. Walker*, 4 Wend. 462; *Foot v. Colvin*, 3 Johns. 316; *Bush's Appeal*, 33 Pa. St. 85; *Hutchins v. Heywood*, 50 N. H. 491; *Campbell v. Foster*, 35 N. Y. 361; *Kennedy v. Nunan*, 52 Cal. 326; Wis. Rev. Stat. Ch. 134, Sec. 37; *Rudd v. Van Der Hagan* (Ky.), 5 S. W. Rep. 416.

⁵⁵ *Nichols v. Levy*, 5 Wall. 433; *Nichols v. Eaton*, 91 U. S. 716;

settle his estate in trust for himself, and so limit it that his creditors cannot touch it. The rule only extends to the settlement of such trusts by friends and relatives, whose desire is to secure means of support for the beneficiary, free from liability for his debts.⁵⁶ But a condition against liability for debts is always good, where the property is conveyed to charitable uses.⁵⁷

§ 371. Words of limitation in trusts.—Unlike legal estates at common law, in the limitation of trusts, the same technical words are not required to be used. A trust in fee may be created without using the word *heirs*, if the intention of the grantor is manifested in any other way. And such intention will be presumed if the terms of the trust cannot in any other manner be satisfied. This rule not only refers to the quantity or duration of the equitable estate in the *cestui que trust*, but if the equitable estate under this construction is larger than the legal estate in the trustee according to the ordinary legal construction, the latter estate will be enlarged by construction to meet all the demands of the trust estate, and the trustee will take a fee, even though the estate is not limited to heirs.⁵⁸

Keyser v. Mitchell, 67 Pa. St. 473; *Rife v. Geyer*, 59 Pa. St. 393; *Leavitt v. Beirne*, 21 Conn. 1, 8; *Hill v. McRae*, 27 Ala. 175; *Easterly v. Kenny*, 36 Conn. 18; *Fisher v. Taylor*, 2 Rawle 33.

⁵⁶ *Lester v. Garland*, 5 Sim. 205; *Thipps v. Lord Ennismore*, 4 Russ. 131; *Mackason's Appeal*, 6 Wright, 330; *Ashhurst's Appeal*, 77 Pa. St. 464; *Brooks v. Pearson*, 27 Beav. 181; *Partridge v. Cavender*, 96 Mo. 452; *Lampert v. Haydel*, 96 Mo. 439; *Cunningham v. Corey*, 59 Mich. 494. But see *Markham v. Guerant*, 4 Leigh, 279; *Johnston v. Zane's Trustees*, 11 Gratt. 552, and *Hill v. McRae*, 27 Ala. 175, where trusts for the benefit of the grantor and his wife or family have been supported against the claim of creditors.

⁵⁷ *Butterfield v. Wilton Academy* (Iowa), 38 N. W. Rep. 390.

⁵⁸ *Villiers v. Villiers*, 2 Atk. 71; *Oates v. Cooke*, 3 Burr. 1684; *Shaw v. Weigh*, 2 Stra. 803; *Stanley v. Colt*, 5 Wall. 168; *Neilson v. Lagow*, 12 How. 98; *Fisher v. Fields*, 10 Johns. 505; *Gould v. Lamb*, 11 Metc. 87; *Welch v. Allen*, 21 Wend. 147; *Pearce v. Savage*, 45 Me. 90; *Greene v. Wilbur*, 15 R. I. 251; *Chase v. Cartwright* (Ark.), 14 S. W. Rep. 90; *Boston, etc., Trust Co. v. Mixter*, 146 Mass. 100; *Doe v. Ladd*,

As a corollary to the above rule, it has been well established that trustees will not take any larger legal estate than is required for the purposes of the trust. If, by the express limitation of the deed, the trustee has a larger estate, as, for example, he has a fee, and the trust is only a life estate, there is a resulting use in the remainder to the grantor and his heirs, which, under the statute, will be executed, leaving in the trustee only a legal life estate.⁵⁷ But these are only rules of construction by which the character and duration of the legal and equitable estates in the trust are determined where the intention of the grantor is not clearly expressed. If the estate in the trustee is expressly limited for life, the fact that it is not altogether sufficient to support the equitable estate will not enable a court of equity to enlarge it by construction.⁵⁸ And so also if the estate in the trustee is larger than

77 Ala. 223; *Boone v. Davis*, 64 Miss. 133. Words of limitation are not now required, in a number of the States, in order to create an estate in fee. The above statement applies only to those States where the common-law rule, in respect to words of limitation, still prevails. "Where a settlor by deed conveys an equitable estate in fee simple to trustees without words of limitation, in order that the equitable fee simple may pass to them, it is necessary that the settlor should either refer to other words in that or some other deed which show an intention that the absolute interest is to pass to them, or that he should use words which show that the trustees are to take all the estate and interest that the settlor had." *In re Irwin* (Eng. 1904), 73 Law J. Ch. 832 [1904], 2 Ch. 752; *Irwin v. Parkes*, *Id.* "A deed to a religious society's trustees and their successors, in fee, without restriction or limitation, does not create a trust." *Shaeffer v. Klee* (Md. 1905), 59 Atl. Rep. 850.

⁵⁷ *Doe v. Davis*, 1 Q. B. 438; *Doe v. Barthrop*, 5 Taunt. 382; *Barker v. Greenwood*, 4 M. & W. 421; *Doe v. Ewart*, 7 A. & E. 636; *Ward v. Amory*, 1 Curtis C. Ct. 419; *Wells v. Heath*, 10 Gray, 25; *Norton v. Norton*, 2 Sandf. 296; *Bush's Appeal*, 33 Pa. St. 85; *Pearce v. Savage*, 45 Me. 90; *Renzelhausen v. Keyser*, 48 Pa. St. 351.

⁵⁸ *Waiter v. Hutchinson*, 1 B. & C. 721; *Evans v. King*, 3 Jones Eq. 387. It is possible that this strict rule would not be observed generally in this country. At any rate, even an express limitation for life to the trustees may probably be enlarged into a fee by construction, if the deed gave affirmative evidence of the donor's intention that the trustee is to

the equitable estate, but the latter is uncertain and indefinite in its duration, there will be no execution of the resulting use in the grantor until the trust has terminated, or has been rendered certain. The uncertainty of duration of the trust makes the resulting use contingent, corresponding somewhat to the legal possibility of reverter.⁶¹

§ 372. Doctrine of remainders applied to trusts.—If the future estate in a trust is contingent, and is preceded by a particular estate, the destruction of the particular estate by the act of the first *cestui que trust*, or its natural termination before the happening of the contingency, does not defeat the contingent trust, as it would have done if the future estate had been a legal contingent remainder, or one by way of use. The future estate in a trust is altogether independent of the prior estate, and need not necessarily take effect immediately upon the termination of the latter.⁶² But the rule in *Shelley's Case*, which has already been explained, applies generally to all executed trusts, so that when an estate is limited in trust to A. for life and remainder in fee to his heirs, A. will be considered *cestui que trust* in fee, but this rule does not apply to executory trusts, and wherever it is the clearly expressed intention of the grantor that the trust shall not vest in fee in the first taker, the rule will not be enforced, and the heirs will take as independent purchasers.⁶³

have as large an estate as the nature of the trust requires. "The estate of a trustee in real estate is commensurate with the powers conferred by the trust and the purposes to be effected by it." *Olcott v. Tope* (Ill. 1904), 115 Ill. App. 121; decree affirmed, 72 N. E. Rep. 751, 213 Ill. 124.

⁶¹ *Doe v. Ewart*, 7 A. & E. 636; *Doe v. Davies*, 1 Q. B. 437; *Doe v. Nichols*, 1 B. & C. 341; *Bush's Appeal*, 33 Pa. St. 85; *Morgan v. Moore*, 3 Gray, 323; *Selden v. Vermilya*, 3 Comst. 525; *Cumberland v. Graves*, 9 Bark. 595.

⁶² 2 Washburn on Real Prop. 463; *Fearne Cont. Rem.* 304; 305; 1 Spence Eq. Jur. 505; 1 Prest. Abstr. 146; *Scott v. Scarborough*, 1 Beav. 168; *Wainwright v. Sawyer*, 150 Mass. 168; *People's Sav. Bank v. Denig*, 131 Pa. St. 241; *Barnes v. Dow*, 59 Vt. 530.

⁶³ Tud. Ld. Cas. 503, 504; 2 Washburn on Real Prop. 455; 1 Spence

§ 373. **How created and assigned.**—Like uses before the statute, no particular form of words is necessary in the creation and declaration of trusts. Any words which manifest the intention that the person named shall have the beneficial interest in the estate will be sufficient.⁶⁴ And even words,

Eq. Jur. 503; *Croxall v. Shererd*, 5 Wall. 281. "The assent of a life tenant of a trust fund to an impairment of the fund cannot bind the remainderman, but they are entitled to the income from an unimpaired fund." *Bennett v. Pierce* (Mass. 1905), 74 N. E. Rep. 360, 188 Mass. 186.

⁶⁴ Co. Lit. 290 b, note 249, Sec. 14; 1 Spence Eq. Jur. 506, 507; *Gomez v. Tradesman's Bk.*, 4 Sandf. 102; *Ames v. Ashley*, 4 Pick. 71; *Scituate v. Hanover*, 16 Pick. 222; *Fisher v. Fields*, 10 Johns. 495; *Zaver v. Lyons*, 40 Iowa, 510; *Smith v. Ford*, 48 Wis. 115; *Hill v. Den*, 54 Cal. 6; *Richardson v. Inglesby*, 13 Rich. Eq. 59; *Lyle v. Burke*, 40 Mich. 499; *Morrison v. Kinstra*, 55 Miss. 71; *Kitchen v. Bedford*, 13 Wall. 413; *Russell v. Switzer*, 63 Ga. 711; *Wallace v. Wainwright*, 87 Pa. St. 263; *Selden's Appeal*, 31 Conn. 548; *McElroy v. McElroy*, 113 Mass. 509; *Wheeler v. Smith*, 9 How. 55; *Slocum v. Marshall*, 2 Wash. C. Ct. 397; *Taft v. Taft*, 130 Mass. 461; *Toms v. Williams*, 41 Mich. 552; *Whitcomb v. Cardell*, 45 Vt. 24; *O'Rourke v. Beard* (Mass.), 23 N. E. Rep. 576; *O'Riley v. McKiernan* (Ky.), 13 S. W. Rep. 360; *Walburton v. Camp*, 55 N. Y. Super. Ct. 290; *Saunderson v. Broadwell*, 82 Cal. 132; *Hellman v. McWilliams*, 70 Cal. 449; *Carter v. Gibson* (Neb.), 45 N. W. Rep. 634; *Phipard v. Phipard*, 55 Hun 433; *Gaion v. Williams*, 7 N. Y. S. 786; *Kintner v. Jones*, 122 Ind. 148; *Macy v. Williams*, 55 Hun 489. The words used not only must show clearly an intention to create a trust, but they must themselves create the trust, as *verba de presenti*. A promise to create a trust, if voluntary will not raise a trust, either express or implied, while such a promise for a valuable consideration, would raise an implied trust, which would be enforced by a court of equity. *Young v. Young*, 80 N. Y. 422; *Deliger's Appeal*, 71 Pa. St. 425; *Hays v. Quay*, 68 Pa. St. 263; *Martin v. Funk*, 75 N. Y. 134; *Olney v. Howe*, 89 Ill. 556; *Andrews v. Hobson*, 23 Ala. 219; *Wyble v. McPheters*, 52 Ind. 393; *Estate of Webb*, 49 Cal. 541; *Neves v. Scott*, 9 How. 196; *Blanchard v. Sheldon*, 43 Vt. 512; *Minor v. Rogers*, 40 Conn. 512; *Adams v. Adams*, 21 Wall. 185; *Taylor v. Henry*, 48 Md. 550; *Owens v. Owens*, 23 N. J. Eq. 60; *McNulty v. Cooper*, 3 Gill. & J. 214; *Davis v. Ney*, 125 Mass. 590. "An intended, but imperfect, gift cannot be enforced as a trust, where the essential elements of a declaration of trust cannot be fairly inferred." *Brown v. Crafts* (Me. 1903), 56 Atl. Rep. 213, 98 Me. 40. "A will devising land to testator's wife for life, 'in trust by her for the bene-

which in their ordinary acceptation are precatory instead of being mandatory, when used by a testator in respect to the estate devised, will be sufficient to raise a trust, if from the whole will a clear intention to create a trust may be gathered. Thus, the words *entreat*, *desire*, *hope*, *recommend*, etc., have been held to declare a trust. But there must be no doubt or uncertainty as to the person who is to be benefited, or as to the property to be subjected to the trust, and the intention of the testator must be fully established by a fair construction of the will.⁶⁵ It has also been held that no trust is created in the children of the devisee, where the devise was made to her "for the sole use of herself and children," where the intention was to make them tenants in common or remaindermen with the mother, is not more clearly manifested in the will.⁶⁶ The declaration must, and can only, be made by the owner of the legal estate; but for the creation of the trust it

fit of' certain beneficiaries, and directing that after her death it be sold and the proceeds divided between the beneficiaries, but not naming any purpose of a trust, does not create a trust." *Bank of Ukiah v. Rice* (Cal. 1904), 76 Pac. Rep. 1020.

⁶⁵ *Pennock's Estate*, 20 Pa. St. 274-280; *Foose v. Whitmore*, 82 N. Y. 405; *Dresser v. Dresser*, 46 Me. 48; *Spooner v. Lovejoy*, 108 Mass. 529; *Parsley's Appeal*, 70 Pa. St. 153; *Williams v. Worthington*, 49 Md. 572; *Cook v. Ellington*, 6 Jones Eq. 371; *Tolson v. Tolson*, 10 Gill. & J. 159; *Young v. Young*, 69 N. C. 309; *McKee's Admrs. v. Means*, 34 Fla. 349; *Enders v. Tasco* (Ky.), 11 S. W. Rep. 818; *Baker v. Brown*, 146 Mass. 369; *Noe v. Kern*, 93 Mo. 367; *Wood v. Camden*, etc., *Trust Co.* (N. J.), 14 Atl. Rep. 885; *Colton v. Colton*, 127 U. S. 300; *Taylor v. Martin* (Pa.), 8 Atl. Rep. 928; *Solomon v. Lawrence*, 52 N. Y. Super. Ct. 164; *McClernan v. McClernan* (Md.), 20 Atl. Rep. 908; *Rose v. Hatch*, 125 N. Y. 427; *Ingersoll's Wills*, 59 Hun 571; *Whitcomb's Estate*, 86 Cal. 265. See also 2 Pom. Eq. Jur., Secs. 1014-1017. But see *Phillips v. Phillips*, 112 N. Y. 197; *Fullenwider v. Watson*, 113 Ind. 18; *Sturgis v. Paine*, 146 Mass. 354; *In re Haven's Estate*, 6 Dem. 456; *Sale v. Thornsberry* (Ky.), 5 S. W. Rep. 468; *Lawrence v. Cooke*, 104 N. Y. 632; *Balfer v. Willigord*, 70 Iowa 620; *Rose v. Porter*, 141 Mass. 309; *Hopkins v. Glunt*, 111 Pa. St. 287; *Corby v. Corby*, 85 Mo. 371; *Zimmer v. Sennott* (Ill.), 25 N. E. Rep. 774; *Randall v. Randall*, (Ill.), 25 N. E. Rep. 780.

⁶⁶ *Small v. Field*, 102 Mo. 104.

is not necessary to transfer the legal estate to a third person as trustee. A simple declaration by the owner of the land that he holds it in trust for another, will transfer the beneficial interest to the latter, and convert the legal owner into a trustee, provided the requisite consideration is present in the grant.⁶⁷ And it is not even necessary that the declaration should be made to the proposed *cestui que trust*. It may be made without his knowledge and yet be good, if he accepts it within a reasonable time after he has heard of its existence⁶⁸ The declaration must of course, particularly where it is testamentary, contain words of description sufficient to identify the *cestui que trust*.⁶⁹ So, also, a trust cannot be created in a deed by a declaration that a third party shall hold in trust for the grantee the property which is formally conveyed by the deed to the grantee.⁷⁰ It is different in the cases of devises where the special intent of the testator to make a trust could be carried out.⁷¹

⁶⁷ 1 Spence Eq. Jur. 507; *Crop. v. Norton*, 2 Atk. 76; *Suarez v. Pompelly*, 2 Sandf. Ch. 336; *Morrison v. Beirer*, 2 Watts & S. 81; *Uraun v. Coats*, 109 Mass. 581; *Young v. Young*, 80 N. Y. 422; *Tanner v. Skinner*, 11 Bush. 120; *Taylor v. Henry*, 48 Md. 550; *Ray v. Simmons*, 11 R. I. 266; *Minor v. Rodgers*, 40 Conn. 512; *Boykin v. Pace's Exr.*, 64 Ala. 68; *Hill v. Den*, 54 Cal. 6; *Baldwin v. Humphrey*, 44 N. H. 609; *Bond v. Bunting*, 78 Pa. St. 210; *Titchenell v. Jackson*, 26 W. Va. 460. But see *Scales v. Maude*, 6 De G. M. & G. 43; *Warriner v. Rogers*, L. R. 16 Eq. 340.

⁶⁸ *Barrell v. Joy*, 10 Mass. 221; *Ward v. Lewis*, 4 Pick. 521; *Beyant v. Russell*, 23 Pick. 508; *Berly v. Taylor*, 5 Hill 377; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Scull v. Reeves*, 2 Green Ch. 84; *Skipwith's Ex'rs. v. Cunningham*, 8 Leigh 271.

⁶⁹ *Read v. Williams*, 8 N. Y. S. 24; *In re Foley's Will*, 10 N. Y. S. 12. "In the creation of a trust by will or deed the beneficiary must be a definite, certain, ascertainable person, natural or corporate, otherwise the trust must fail." *Weaver v. Spurr* (W. Va. 1904), 48 S. E. Rep. 852. "A trust will not fail merely because of uncertainty in whom the fee will vest in case the first beneficiary dies leaving issue—a contingency which may not arise." *Orr v. Yates* (Ill. 1904), 70 N. E. Rep. 731, 209 Ill. 222.

⁷⁰ *Annis v. Wilson*, 15 Col. 236.

⁷¹ But see *Pebbling's Estate*, 138 Pa. St. 442.

§ 374. **Statute of Frauds.**—Before the Statute of Frauds a trust could be created or transferred by an oral declaration. No writing was necessary for its valid creation. But the Statute of Frauds requires that all *declarations* or *creations* of trusts should be *manifested* and *proved* by some instrument in writing signed by the party creating the trust. But the statute necessarily does not apply to implied, resulting and constructive trusts, and the original English statute expressly excepted them from its operation. These trusts may, therefore, be proved by parol evidence.⁷² The statute, however, covers all express trusts, and these must invariably be proved by some writing.⁷³ But it is not required that the trust shall be created by some instrument in writing. The writing is only necessary for its proof. Therefore the writing need not have been made for the purpose of creating or declaring a trust; it can act by way of an admission, as evidence of an existing trust.⁷⁴ The statute only requires the writing to

⁷² 2 Washburn on Real Prop. 445, 446, 447; 1 Spence Eq. Jur. 497, 512. See *ante*, Secs. 364, 368. "Under the express provisions of Rev. St. Mo. 1899, Sec 3417, the statute of frauds has no application to an action to establish a resulting trust relating to lands." *McMurray v. McMurray* (Mo. 1904), 79 S. W. Rep. 701. "Constructive trusts are not within the statute of frauds." *Avery v. Stewart* (N. C. 1904), 48 S. E. Rep. 775.

⁷³ *Hall v. Young*, 47 N. H. 134; *Bartlett v. Bartlett*, 14 Gray 278; *Bragg v. Paulk*, 42 Me. 502; *Moore v. Moore*, 38 N. H. 382; *Hear v. Pujol*, 44 Cal. 230; *Movan v. Hays*, 1 Johns. Ch. 339; *Lynch v. Clements*, 24 N. J. Eq. 431; *Patton v. Beecher*, 62 Ala. 599; *Cornelius v. Smith*, 55 Mo. 528; *Ambrose v. Otty*, 1 P. Wms. 322; *Wolford v. Farnham*, 44 Minn. 159. See *Shelton v. Shelton*, 5 Jones Eq. 292; *Osterman v. Baldwin*, 6 Wall. 116; *Bates v. Hurd*, 65 Me. 180; *Homer v. Homer*, 107 Mass. 82; *Faxon v. Folvey*, 110 Mass. 392; *Fordyce v. Willis*, 3 Bro. Ch. 577; *Wallace v. Wainwright*, 87 Pa. St. 263; *Barnes v. Taylor*, 27 N. J. Eq. 259; *Packard v. Putnam*, 57 N. H. 43; *De-Laurengel v. De Boom*, 48 Cal. 581; *Reid v. Reid*, 12 Rich. Eq. 213; *Kingsbury v. Burnside*, 58 Ill. 310; *Gibson v. Foote*, 40 Miss. 788.

⁷⁴ 1 Cruise Dig. 390; *Foster v. Vale*, 3 Ves. 707; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Davis v. Otty*, 33 Beav. 540; *Steer v. Steer*, 5 Johns. Ch. 1; *Jackson v. Moore*, 6 Cow. 706; *McClellan v. McClellan*, 65 Me. 500; *Movan v. Hays*, 1 Johns. Ch. 339; *Pinney v. Fellows*, 51 Vt.

show that there is a trust, and to give its limitations. If the writing is but an imperfect presentation of the trust and the terms there stated are uncertain, the trust will not be enforced. Parol evidence is not admissible to supply what has been omitted.⁷⁵ Letters, indorsements on envelopes, acknowledgments and admissions in equity pleadings have been held sufficient writing for the proof of a trust.⁷⁶ But they are not conclusive.⁷⁷ The foregoing statements in respect to the informality, which is permissible in the declaration of trusts, have reference only to transactions of this sort *inter vivos*. If the trust is declared *animo testandi*, all the formalities required

525; *Cornelius v. Smith*, 55 Mo. 528. But the evidence must in that case be clear and free from doubt. *Rogers v. Rogers*, 87 Mo. 251.

⁷⁵ *Foster v. Vale*, 3 Ves. 707; *Wright v. Wright*, 1 Ves. Sr. 409; *Brydges v. Brydges*, 3 Ves. 120; *Steere v. Steere*, 5 Johns. Ch. 1; *Parkhurst v. Van Courtlandt*, 1 Johns. Ch. 273; *Abeel v. Radcliffe*, 13 Johns. 297; *Patton v. Beecher*, 62 Ala. 579; *Russell v. Switzer*, 63 Ga. 711; *Wheeler v. Smith*, 9 How. 55, 2 Pom. Eq. Jur., Sec. 1009. "A mere parol agreement to convey land to another raises no trust in the latter's favor, and comes within the provisions of the statute of frauds." *Avery v. Stewart* (N. C. 1904), 48 S. E. Rep. 775. "To take an oral trust out of the statute of frauds on the ground of the obtention of the legal title through fraud, an element of positive fraud must be shown." *Ammonette v. Black* (Ark. 1904), 83 S. W. Rep. 910.

⁷⁶ *Foster v. Vale*, 3 Ves. 696; *Smith v. Mathews*, 3 De G. F. & J. 139; *Montague v. Hayes*, 10 Gray, 609; *Pratt v. Ayer*, 3 Chand. 265; *Fisher v. Fields*, 10 Johns. 495; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267; *De Laurencel v. De Boom*, 48 Cal. 581; *Moore v. Pickett*, 62 Ill. 158; *Kingsbury v. Burnside*, 58 Ill. 319; *McClellan v. McClellan*, 65 Me. 500; *Bates v. Hurd*, 65 Me. 180; *Packard v. Putnam*, 57 N. H. 43; *Baldwin v. Humphrey*, 44 N. Y. 609; *Ivory v. Burns*, 56 Pa. St. 300; *Johnson v. Delaney*, 35 Texas, 42; *Patton v. Chamberlain*, 44 Mich. 5; *Broadrup v. Woodman*, 27 Ohio St. 553; *Loring v. Palmer*, 118 U. S. 321; *Weaver v. Emigrant, etc., Sav. Bank*, 17 Abb. N. C. 82; *Titchenell v. Jackson*, 26 W. Va. 754; *McCandless v. Warner*, 26 W. Va. 754; *Macy v. Williams*, 8 N. Y. S. 658; 55 Hun 489; *Fowler v. Bowery Sav. Bank*, 47 Hun 390.

⁷⁷ *Parkham v. Suffolk Sav. Bank* (Mass.), 24 N. E. Rep. 43; *Beaver v. Beaver*, 117 N. Y. 421.

in the execution of wills, must here be observed in the declaration of the trust.⁷⁸

§ 375. **How affected by want of a trustee.**—The trust is never allowed to fail because there is no trustee to hold the legal estate. And it matters not from what cause the failure of the trustee may arise, equity follows the land into whose-soever hands it may fall, and compels them to hold the legal estate subject to the trust. The court will either compel the owner of the legal estate to perform the trust, or it will appoint another to act as trustee, and direct a conveyance to him.⁷⁹

§ 376. **Removal of trustees.**—The court of equity has the general power to appoint new trustees whenever the interests of the *cestui que trust* demand such appointment. If the trustee leaves the State, loses his mind, becomes insolvent, or does anything else which makes it prejudicial to the *cestui que trust* for him to remain in charge of the trust, the court may remove him and appoint another in his stead.⁸⁰ And

⁷⁸ Chase v. Stockett (Md.), 19 Atl. Rep. 761. "Under the express provision of Civ. Code 1895, Sec. 3153, all express trusts must be in writing." Eaton v. Barnes (Ga. 1904), 49 S. E. Rep. 593. "A deed conveying property to be held in trust for a third party, where such trust is in parol, is void under the statute of frauds, and cannot be enforced against the grantee." Rogers v. Richards (Kan. 1903), 74 Pac. Rep. 255. "A written declaration of trust, made after a conveyance of real estate upon a parol trust agreement, is valid and enforceable." Gallagher v. Northrup (Ill. App. 1904), 114 Ill. App. 368.

⁷⁹ Co. Lit. 290 b, note 249, Sec. 4; 1 Cruise Dig. 403, 460; Wilson v. Towle, 36 N. H. 129; Shepherd v. McEvers, 4 Johns. Ch. 136; Adams v. Adams, 21 Wall. 185; Peter v. Beverly, 10 Pet. 532; Crocheron v. Jaques, 3 Edw. Ch. 207; Druid Park, etc., Co. v. Dettinger, 53 Md. 46; Cloud v. Calhoun, 10 Rich. Eq. 358; Mills v. Haines, 3 Head, 335; White v. Hampton, 10 Iowa, 244; s. c. 13 Iowa, 261; Schlessenger v. Mallard, 70 Cal. 326; Kenady v. Edwards, 134 U. S. 117; Chesnutt v. Gann, 76 Tex. 150.

⁸⁰ 2 Washburn on Real Prop. 475; Sparhawk v. Sparhawk, 114 Mass. 356; Scott v. Rand, 118 Mass. 215; Shepherd v. McEvers, 4 Johns. Ch. 136; Bloomer's Appeal, 83 Pa. St. 45; McPherson v. Cox, 96 U. S. 404;

although at common law the legal estate in trust, upon the death of the trustee, descended to his heirs to be administered by them, and this is still the general rule, yet if it would be beneficial to the estate that a new trustee be appointed, the court may do so.⁸¹ By recent statutes in England, and in some States, the appointment of a new trustee is made to operate upon the legal title, and pass it to him from the former trustee.⁸² But where there is no statute of that kind the appointment does not effect a transfer of the legal estate. A court of equity, in making the appointment, at the same time decrees a conveyance to the new trustee, and will punish for contempt of court if the holder of the legal title refuses.⁸³

Satterfield v. John, 53 Ala. 121; *No. Ca. R. R. v. Wilson*, 81 N. C. 223; *Preston v. Wilcox*, 38 Mich. 578; *Green v. Blackwell*, 31 N. J. Eq. 37; *Re Mayfield*, 17 Mo. App. 684; *City Council v. Walton*, 77 Ga. 517; *Loveman v. Taylor*, 85 Tenn. 1; *Morgan's Estate*, 8 Pa. Co. Ct. 260. Insolvency does not, however, incapacitate the trustee to act as long as the court does not remove him. *Rankin v. Barcroft*, 114 Ill. 441.

⁸¹ 2 Washburn on Real Prop. 476, 477; 3 Kent's Com. 311; *Lewin on Tr.* 303; *Boone v. Childe*, 10 Pet. 213; *Berrien v. McLane*, Hoffm. Ch. 420; *Clark v. Taintor*, 7 Cush. 567; *Warden v. Richards*, 11 Gray, 277; *Evans v. Shew*, 71 Pa. St. 47; *Gray v. Henderson*, 71 Pa. St. 368; *Dunning v. Ocean Nat. Bk.*, 6 Lans. 396. In New York, by statute the trust is made to vest in the Supreme Court, instead of descending to the heirs of the deceased trustees. 1 R. S. N. Y. 730, Sec. 68. See *Ross v. Roberts*, 2 Hun 90; *Clark v. Crego*, 51 N. Y. 647. Such seems also to be the statutory rule in Michigan and Wisconsin; 2 Washburn on Real Prop. 476. If the trustee devises his trust-estate, as he may do if not prohibited by statute, his devisee takes the place of his heir, and may perform the trust. *Marlow v. Smith*, P. Wms. 198; *Titley v. Wolstenholme*, 7 Beav. 425.

⁸² Stat. 15, 16, Vict. Ch. 55, Sec. 1; *Parker v. Converse*, 5 Gray, 336; *McNish v. Guerard*, 4 Strobb. Eq. 66; *Rev. Stat. Conn. Tit. 12; Sec. 22*; *King v. Bell*, 28 Conn. 598.

⁸³ *O'Keefe v. Calthorpe*, 1 Atk. 17; *Ex parte Greenhouse*, 1 Madd. 109; *Berrier v. McLane*, Hoffm. Ch. 420; *Webster v. Vandeventer*, 6 Gray, 428; *Wallace v. Wilson*, 34 Miss. 357; *Young v. Young*, 4 Cranch, 499. "The power of a court of chancery to appoint a trustee in place of a single trustee, who is totally disabled from the performance of the duties of the trust, includes power to appoint a co-trustee with

§ 377. *Refusal of trustee to serve.*—No one, by the unauthorized appointment of another, can be compelled to act as trustee. To make the performance of the trust obligatory, he must accept the trust expressly, or so interfere with the trust property as to raise the presumption that he has accepted.⁸⁴ But when he has accepted it expressly or impliedly, he cannot of his own motion abandon it, or refuse to perform the duties. The court may, in the exercise of its discretion, relieve him from his obligation or compel him to serve, whichever course best subserves the interests of the *cestui que* trust property as to raise the presumption that he has accepted greater effect upon the validity of the trust than would his death, or a failure to name a trustee in the deed creating the trust. Another trustee would be appointed to take his place. But the refusal must be a positive disclaimer of the trust; for otherwise the law will presume that the trust is beneficial to the trustee as well as the *cestui que* trust, and that they both have accepted it. A mere oral declination will not prevent the declining trustee from subsequently entering upon the

him to aid in the performance of those duties." *Force v. Force* (N. J. Ch. 1904), 57 Atl. Rep. 973. "Mere unfriendliness of the *cestui que* trust and the trustee is not sufficient ground *per se* for the trustee's removal." *Polk v. Linthicum* (Md. 1905), 60 Atl. Rep. 455. "The refusal of a trustee to give full information to the *cestui que* trust as to the condition of the trust is a violation of the relation." *Woolf v. Barnes* (N. Y. Sup. 1905), 93 N. Y. S. 219.

⁸⁴ *Baldwin v. Porter*, 12 Conn. 473; *Scull v. Reeves*, 2 Green Ch. 4; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Lewis v. Baird*, 3 McLean, 58; *Flint v. Clinton Co.*, 82 N. H. 430; *Lyle v. Burke*, 40 Mich. 499; *Hearst v. Pojol*, 44 Cal. 230; *Adams v. Adams*, 21 Wall. 185; *Armstrong v. Morrill*, 14 Wall. 120; *Montford v. Cadogan*, 17 Ves. 485; *Urch v. Walker*, 3 My. & Cr. 702; *Barclay v. Goodloe's Excr.*, 83 Ky. 493.

⁸⁵ *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Tainter v. Clark*, 5 Allen, 66; *Cruger v. Halliday*, 11 Paige, 319; *Bowditch v. Banuelos*, 1 Gray, 220; *Filchirst v. Stevenson*, 9 Barb. 9; *Forshaw v. Higginson*, 20 Beav. 485; *Tilden v. Fiske*, 4 Dem. 356; *Barclay v. Goodloe's Exr.*, 83 Ky. 493. "A trustee has no authority to appoint his successor unless such authority is expressly conferred on him." *Whitehead v. Whitehead*, (Ala. 1904), 37 So. Rep. 929.

performance of the trust, if his place has not actually been filled by the appointment of another; and, as a general rule, the court will not make such an appointment until the trustee has made a more formal disclaimer.⁸⁶

§ 378. *Survivorship.*—If there are more than one trustee they take and hold the legal estate in joint-tenancy. If, therefore, one of them dies, the estate vests in the survivors to the exclusion of the heirs of the deceased trustee, and they are generally competent to administer the trust. This rule is without limitation when applied to executed trusts, but whether an executory trust survives depends upon the amount of personal confidence reposed in them all as one body.⁸⁷ If the special powers in an executory trust are granted to the trustees *ratione officii*, i. e., given in general terms to “my trustees,” the ordinary construction is that such trust powers survive.⁸⁸ But if they are granted to them *nominatim*, indicating a personal confidence in the discretion of each, there will be no survivorship.⁸⁹ The same rule governs the right to exercise trust powers by the new trustee appointed by the court. Ordinary trust powers may be exercised by him, but

⁸⁶ *Tainter v. Clarke*, 13 Metc. 220; *Judson v. Gibbons*, 5 Wend. 224; *Cloud v. Calhoun*, 10 Rich. Eq. 358; *Adams v. Adams*, 21 Wall. 185; *Lyle v. Burke*, 40 Mich. 499; *King v. Donnelly*, 5 Paige 46; *Putnam's Free School v. Fisher*, 30 Me. 526; *Jones v. Moffett*, 5 Serg. & R. 523.

⁸⁷ *Lane v. Debenham*, 11 Hare, 188; *Cole v. Wade*, 16 Ves. 28; *Warburton v. Sands*, 14 Sim. 622; *Franklin v. Osgood*, 14 Johns. 553; *Peter v. Beverly*, 10 Pet. 564; *Jackson v. Schaubert*, 7 Cow. 194; *Saunders v. Schmaelzle*, 49 Cal. 59. In New York, if one of two or more trustees resign, the others have not the power to execute the trust, in the same manner as if he were dead. Another trustee must be appointed in his place. *Van Wick's Petition*, 1 Barb. Cr. 570.

⁸⁸ *Peter v. Beverly*, 10 Pet. 564; *Jackson v. Given*, 16 Johns. 167; *Tainter v. Clarke*, 13 Metc. 220; *Franklin v. Osgood*, 14 Johns. 553; *Co. Lit.* 113 a, note, 146; *Story's Eq. Jur.*, Sec. 1062; *Cole v. Wade*, 16 Ves. 28; *Wells v. Lewis*, 4 Metc. (Ky.) 271, *Lewin on Tr.* 239.

⁸⁹ See preceding note, and *post*, Sec. 410.

those involving a personal confidence die with the removal of the trustee, in whom the confidence was reposed.⁹⁰

§ 379. **Merger of interests.**—If the legal and equitable estates of a trust become lawfully united in one person, the equitable is merged in the legal estate, in accordance with the general law of merger. But the conjunction of the two estates in one person will not produce a merger, if it would be prejudicial to the rights of any one lawfully interested in the trust property. As a general rule, it is necessary that the equitable estate should be of equal extent with the legal estate, so that a merger might take place.⁹¹

§ 380. **Rights and powers of trustees.**—Their rights and powers must necessarily vary materially with the character and terms of the trust. So, also, do the rights and powers of the *cestui que trust*. The authority of the former is greatest and the powers of the latter are least in the case of executory trusts, while the converse is true of passive trusts. The powers, that either may have in active trusts, and which are peculiar to such trusts, are wholly dependent upon the particular provisions of each trust, and no general rules can be laid down in explanation of them.⁹² It may be said of every

⁹⁰ *Cole v. Wade*, 16 Ves. 44; *Hibbard v. Lamb*, Ambl. 309; *Doyley v. Atty.-Gen.*, 1 Eq. Cas. Abr. 195; *Burrill v. Shield*, 2 Barb. 457; *Lewin on Tr.* 239.

⁹¹ 3 Prest. Conv., 1 Spence Eq. Jur. 508, 572; *Nicholson v. Halsey*, 7 Johns. Ch. 422; *Rogers v. Rogers*, 18 Hun 409; *Gardner v. Gardner*, 3 Johns. Ch. 53; *Hopkinson v. Dumas*, 42 N. H. 307; *Bolles v. State Trust Co.*, 27 N. J. Eq. 308; *Cooper v. Cooper*, 1 Halst. Ch. 9; *James v. Morey*, 2 Cow. 284; *Badgett v. Keating*, 31 Ark. 400; *Hunt v. Hunt*, 14 Pick. 374; *Selby v. Alston*, 3 Ves. 339; *Wade v. Paget*, 1 Bev. Ch. 363; *Butler v. Godley*, 1 Dev. 94. "A merger of legal and equitable estates takes place only when the trustee is the sole beneficiary." *Robb v. Washington and Jefferson College* (N. Y. Sup. 1905), 93 N. Y. S. 92.

⁹² See *Morse v. Morrell*, 82 Me. 80; *In re Roe*, 119 N. Y. 509; *Kenady v. Edwards*, 130 U. S. 117; *Harris v. Petty*, 66 Tex. 514; *Kintner v. Jones*, 122 Ind. 148.

species of trusts that possessory actions, and actions for the protection of the legal estate, must be brought by the trustee. The *cestui que trust* cannot maintain them. In a court of law the trustee is deemed to be entitled to the possession of the land, and may even oust the *cestui que trust* from possession. The latter, if in possession, holds it merely as a tenant at sufferance or at will.⁹³ Where there are two or more trustees, all must join in any formal act under the trust, particularly if the exercise of discretion is required, as in the case of a sale of the trust property.⁹⁴ In ordinary informal proceedings, the act of one is deemed to be the act of all. But they are not responsible for the unlawful acts of each other unless they participate in the wrongful acts, or are guilty of negligence in the discharge of their duties, and the wrongful act could have been prevented by the exercise of ordinary care.⁹⁵ Whenever the trustees violate the rights of

⁹³ 1 Cruise Dig. 414; 2 Pom. Eq. Jur., Sec. 991; *Russell v. Lewis*, 2 Pick. 508; *Woodman v. Good*, 6 Watts & S. 169; *Newton v. McLean*, 41 Barb. 289; *Trustees, etc., v. Stewart*, 27 Barb. 553; *Jackson v. Van Slick*, 8 Johns. 487; *Beach v. Beach*, 14 Vt. 28; *Williams Appeal*, 83 Pa. St. 377. And as legal owner of the land, he is bound to use all proper diligence in collecting rents and profits, and paying off all taxes and other charges against the estate. *Story's Eq. Jur.*, Sec. 1280. A fiduciary is bound to exercise the diligence of a prudent man in preventing trust property in his charge from being sold for taxes. *Bourquin v. Bourquin* (Ga. 1904), 47 S. E. Rep. 639.

⁹⁴ If, however, the trust is a public one, the rule does not apply. In public trusts, in the absence of any special rule or law, a majority of the trustees are competent to act. *Wilkinson v. Mann*, 2 Tyrwh. 586; *Chambers v. Perry*, 17 Ala. 726.

⁹⁵ The trustee cannot leave the entire estate in the hands of his co-trustees. And, if such a thing does occur it is in itself a clear neglect of duty; if the co-trustee has been enabled to violate the trust, the former will be responsible for the wrongful acts of the latter, whether they be acts of commission or omission. *Kip v. Deniston*, 4 Johns. 23; *Ward v. Lewis*, 4 Pick. 518; *Towne v. Ammidon*, 20 Pick. 535; *Spencer v. Spencer*, 11 Paige 299; *Pim v. Downing*, 11 Serg. & R. 66; *Jones' Appeal*, 8 Watts & S. 143; *State v. Guilford*, 15 Ohio 593; *Rayall's Admr. v. McKenzie*, 25 Ala. 363; *Edmonds v. Crenshaw*, 14 Pet. 166; *Irwin's Appeal*, 35 Pa. St. 294; *Graham v. Davidson*, 2 Dev.

the *cestui que trust*, or fail or refuse to perform their duty, courts of equity are the proper courts to apply to for relief and the decrees of those courts are paramount in all questions relating to the powers and duties of the parties to a trust.⁹⁶ But third parties cannot avoid their contracts with trustees on account of the want of power of the trustee, if they have been ratified by the *cestui que trust*.⁹⁷ An injunction will lie against a trustee for committing waste.⁹⁸

§ 381. Rights and powers of *cestuis que trust*.— Where it is a passive trust, the rights of the *cestui que trust* are in equity almost equivalent to legal ownership. The trustee has the bare legal title, and may be compelled by chancery to do

& B. Eq. 155. But if he is not the acting trustee, and merely joins in the execution of the trust in some particular matter for the sake of formality, as where he signs a receipt for money paid to the co-trustee, he will not be liable for a misappropriation by the co-trustee. *Brice v. Stokes*, 11 Ves. 319; *Ingle v. Partridge*, 32 Beav. 661; *Peter v. Beverly*, 10 Pet. 531; 1 How. 134; *Taylor v. Benham*, 5 How. 233; *Sinclair v. Jackson*, 8 Cow. 543. See *Ormiston v. Olcott*, 84 N. Y. 339; *Brice v. Stokes*, 2 Eq. Ld. Cas. 1748-1805.

⁹⁶ *Jones v. Dougherty*, 10 Ga. 373; *Tucker v. Palmer*, 3 Brev. 47; *Bush v. Bush*, 1 Strobb. Eq. 377; *Den v. Troutman*, 7 Ired. 155; *James v. Cowing*, 82 N. Y. 449; *Williams v. Dwinelle*, 51 Cal. 442. If the duty of the trustee be purely discretionary, the court will not compel an execution. *Stanley v. Colt*, 5 Wall. 168; see *post*, Sec. 418. Nor will the court attempt to control the discretion of a trustee in any manner, except to prevent an unreasonable exercise of it, which, on account of the injury to the beneficiaries, could not have been intended by the donor. *Arnold v. Gilbert*, 3 Sandf. Ch. 531; *Zabriskie's Exrs. v. Wetmore*, 26 N. J. Eq. 18; *Pulpress v. African Ch.*, 48 Pa. St. 204; *Starr v. Moulton*, 97 Ill. 525; *Vallette v. Bennett*, 69 Ill. 632; *Phelps v. Harria*, 51 Miss. 789; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *In re Strutt's Trusts*, L. R. 16 Eq. 629; *Evans v. Bear*, L. R. 10 Ch. 76; *Iles v. Martin*, 69 Ind. 114.

⁹⁷ *Matheney v. Sandford*, 26 W. Va. 336. "Where plaintiff sues as trustee of an express trust concerning lands, defendant, a stranger to the agreement relating to the trust, has no standing to contend that it is void because not created in writing." *Mallory v. Thomas* (Kan. 1905), 81 Pac. Rep. 194.

⁹⁸ *Moses v. Johnson*, 88 Ala. 517.

whatever in respect to the legal title is necessary for the beneficial enjoyment of the property by the *cestui que trust*. The latter is entitled to the possession, can collect the rents and profits and apply them to his use. But the *cestui que trust* can only acquire possession against the will of the trustee by means of a decree in equity. A court of law would sustain an action of ejectment by the trustee. A court of equity will grant the possession to the *cestui que trust* if consistent with the trust, and for a further protection may enjoin the trustee from proceeding at law in ejectment.⁹⁹ Wherever the code of procedure is in force, as a matter of course, these distinctions as to the relative standing of the trustee and *cestui que trust*, in courts of law and of equity, have been necessarily abolished, and every one finds an appropriate remedy in the same civil action, and in the same court.

§ 382. Alienation of trust estate.—It is also a well established rule that the trustee of a dry or passive trust may be compelled by decree in chancery to convey the estate as the *cestui que trust* may direct. And this rule, it would seem, applies to every species of trust where such a decree is not inconsistent with the express terms of the trust. Equity will give to the *cestui que trust* the full power to dispose of the estate, whenever it can do so without violating the express or implied purpose of the trust, and without doing injury to any one interested therein. Where there is no prohibition against alienation, the execution of the deed of conveyance by

⁹⁹ Lewin on Tr. 23, 470, 480; Shankland's Appeal, 47 Pa. St. 113; Harris v. McElroy, 45 Pa. St. 216; Stevenson v. Lesley, 70 N. Y. 512; Heard v. Baird, 40 Miss. 800; Barkley v. Dossier, 15 Lea, 529. See Watts v. Ball, 1 P. Wms. 108; Lewis v. Lewis, 1 Car. 102; Cholmondeley v. Clinton, 4 Bligh 115. But if there are other persons interested in the estate the court may either refuse to decree the possession to the *cestui que trust*, or impose such conditions and restrictions as may be necessary for the protection of the other beneficiaries. Shankland's Appeal, *supra*; Harris v. McElroy, *supra*; Battle v. Petway, *supra*; Williamson v. Wilkins, *supra*; Barkley v. Dossier, *supra*.

trustee and *cestui que trust* passes the absolute title, and the trust is destroyed by the consequent merger of interests.¹ To what extent these general powers exist in an active trust must depend upon the peculiar limitations of such trust. Wherever the power of the trustee involves the exercise of a proprietary authority over the property, equity will regard him as the owner so far as it is necessary for the performance of the trust. And to that extent will the rights and powers of the *cestui que trust* be curtailed.² In New York, and other States in which the New York statutes on the subject of trusts

¹ 1 Cruise Dig. 448; Lewin on Tr. 470; Vaux v. Parke, 7 W. & S. 19; Harris v. McElroy, 45 Pa. St. 216; Barnett's Appeal, 46 Pa. St. 399; Battle v. Petway, 5 Ired. 576. But see *ante*, Sec. 348, where it is claimed that in the case of a passive trust to a married woman, the conveyance of the equitable estate by her without the co-operation of the trustee, will pass the legal title as well.

² Lewin on Tr. 470; Barnett's Appeal, 46 Pa. St. 399; McCosker v. Brady, 1 Barb. Ch. 329; 1 Spence Eq. Jur. 496, 497; Culbertson's Appeal, 76 Pa. St. 145; Williams' Appeal, 83 Pa. St. 377; Smith v. Harrington, 4 Allen 566; Bowditch v. Andrew, 8 Allen 339; Douglas v. Cruger, 80 N. Y. 15. But when the duties which have made the trust active have been performed the trust again becomes passive, and if it is not executed by the Statute of Uses, the court may direct a conveyance by the trustee in accordance with the desires of the *cestui que trust*. Welles v. Castles, 3 Gray 323; Sherman v. Dodge, 28 Vt. 26; Waring v. Waring, 10 B. Mon. 331; Leonard's Lessee v. Diamond, 31 Md. 536; Perry on Tr., Sec. 351. "A trustee has power to mortgage real estate, where he is given the power to 'take charge of, manage, and control the same for the use and benefit of' a person designated." Ely v. Pike (Ill. App. 1904), 115 App. 284. "Where a trust provided for a sale and re-investment of the trust estate, on agreement between the trustee and the beneficiaries, the power of sale was a special personal trust which did not pass to a successor." Luquire v. Lee (Ga. 1905), 49 S. E. Rep. 834. "Where a power to sell and convey real property is conferred upon several executors or trustees, it continues to a single survivor, and may be exercised by him alone after the death of his co-trustee, unless the contrary intent is manifest from the instrument creating the trust." Haggart v. Ranney (Ark. 1904), 84 S. W. Rep. 703. Trustees, in making sales of the trust estate, must, with a view of obtaining the best terms, act with the diligence a prudent owner would observe in the sale of his own property. Callaway v. Hubner (Md. 1904), 58 Atl. Rep. 362.

have been substantially followed, the *cestui que trust* is now possessed of no interest which he may assign, where the trustee is charged with the collection and payment of the rents and profits of the estate to the *cestui que trust*.

§ 383. **Liability of third persons for performance of the trust.**—It has been held in England and in some of the American States, where a trustee has a power of sale, that the land in the hands of purchasers is subjected to a constructive trust, which compels the purchasers to see to the proper application of the purchase-money. This doctrine has been warmly contested and denied in many of the States, and presumably the rule is generally limited to such cases where the trust is special and the sale is for a special purpose, as for the satisfaction of a particular debt or claim. Where the trust is general it is impossible for the purchaser to secure a proper application of the purchase money, and he is not held liable for any misappropriation by the trustee.³

§ 384. **Compensation of trustee.**—Formerly the trustee was not entitled to any compensation for his services, it being considered a matter of honor. The policy of the law in respect thereto has since been changed, and it is now almost the universal rule that trustees receive a reasonable percentage—usually five per cent.—upon all disbursements made by them. But they are not permitted to make any further charge against the trust estate, even though the services rendered may be unusual, and for the performance of which they have hired others.⁴ If the estate is held in trust for the life of the

³ Story Eq. Jur., Secs. 1127, 1130; 1 Cruise Dig. 450; *Potter v. Gardner*, 12 Wheat. 498; *Duffy v. Calvert*, 6 Gill 487; *Dunch v. Kent*, 1 Vern. 260; *Spalding v. Shalmer*, 1 Vern. 301; *Andrews v. Sparhawk*, 13 Pick. 393; *Davis v. Christian*, 15 Gratt. 11; *Stall v. Cincinnati*, 16 Ohio St. 169.

⁴ Story Eq. Jur., Sec. 1266; 1 Cruise Dig. 451; *Robinson v. Pett*, 2 Eq. L.d. Cas. 512, 538-600 (4 Am. ed.); *Meacham v. Starnes*, 9 Paige Ch. 398; In the matter of *Schell*, 53 N. Y. 9 Paige 263; *Hall v. Hall*,

cestui que trust, and provides for a distribution of the property at her death the cost of administration, including the compensation of the trustee, should be charged up to the account of the *cestui que trust* for life.⁵

78 N. Y. 535; *Warbass v. Armstrong*, 2 Stockt. Ch. 263; *Wagstaff v. Lowerne*, 23 Barb. 209. But see *Constant v. Matteson*, 22 Ill. 546; *Mayor v. Galluchat*, 6 Rich. Eq. 1.

⁵ *Cammann v. Cammann*, 2 Demarest (N. Y.) 211. "Under Rev. Laws (Mass.), Ch. 150, Sec. 14, providing that a trustee shall have such compensation for his services as the court may allow, compensation is to be just and reasonable in each case considered by it; and a trustee is not entitled to any certain commission for changing investments, or for any service without regard to other circumstances." *Parker v. Hill* (Mass. 1904), 69 N. E. Rep. 336. "Assumpsit cannot be maintained to recover compensation for trustees' services, such services being within the exclusive jurisdiction of equity." *Hazard v. Coyle* (R. I. 1904), 58 Atl. Rep. 987, 26 R. I. 361. "Where leases executed by trustees contain a provision that the tenants are to pay the taxes, the trustees are entitled to a commission of 5 per cent. on the gross amount the tenants are required to pay." *In re McCallum's Estate* (Pa. 1905), 60 Atl. Rep. 903, 211 Pa. 205. "Trustees of an estate are entitled to receive commissions for the collection of accruing interest payable to the estate." *Kennedy v. Dickey* (Md. 1904), 57 Atl. Rep. 621; *Dickey v. Kennedy*, *Id.*

CHAPTER XV.

EXECUTORY DEVISES.

SECTION 385. Nature and origin.

- 386. Executory devises, vested or contingent.
- 387. Classes of executory devises.
- 388. Distinguished from devises *in presenti*.
- 389. Reversion of estate undisposed of.
- 390. Distinguished from uses.
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- 392. Same — Limitation after a fee.
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- 394. Same — Where first limitation lapses.
- 395. Same — Limitations after an executory devise.
- 396. Indestructibility of executory devises.
- 397. Limitation upon failure of issue.
- 398. Same — In deeds.
- 399. Doctrine of perpetuity.
- 400. Rule against accumulation of profits.
- 401. Executory devises of chattel interests.

§ 385. **Nature and origin.**— An executory devise is a future interest or estate in lands limited in a will in such a manner that it cannot take effect as a remainder or as a future use. The law of executory devises has been evolved by a course of judicial legislation based upon the Statute of Wills enacted in the reign of Henry VIII.¹ The cardinal rule for the construction of wills is that the intention of the testator must be carried out, if at all possible. In conformity with this liberal rule of construction, the common-law rules for the limitation of future interests in real property were discarded, and estates or interests were created and recognized under the name of executory devises, which could not have been created at common law by deed. Mr. Fearne defines an executory

¹ See *post*, Sec. 628.

devise to be "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law."² A remainder, the only common-law estate which could be directly created by conveyance, has been defined to be a future estate in lands which is preceded and supported by a particular estate in possession, which takes effect in possession immediately upon the determination of the prior or particular estate, and which is created at the same time and by the same conveyance.³ It follows, therefore, that every devise of a future estate, which is not preceded by a particular estate created by the same instrument, or which, if there is such a prior limitation, takes effect in possession *before* or *after* the natural expiration of the prior limitation, is an executory devise.⁴ An executory devise was once held to be an interest somewhat different from an estate, although not a mere naked possibility.⁵ But whatever need there may have been for such refined distinctions in the incipient stages of the growth of those interests, none exists now, and for all practical purposes executory devises may be considered as estates in land, having all the characteristics and appurtenances of a common-law estate, differing from the latter only in the mode of creation and limitation. They are alienable and devisable in equity, whether the devisees are vested with title

² Fearne Cont. Rem. 386; 2 Washburn on Real Prop. 680; 2 Bla. Com. 172; 4 Kent's Com. 264; 2 Jar. on Wills (5 Am. ed) 483; McRee's Adms. v. Means, 34 Ala. 349.

³ See *ante*, Sec. 296.

⁴ Moore v. Parker, 1 Ld. Raym. 37; Doe v. Scarborough, 3 Ad. & El. 2, 897; Key v. Gamble, 2 Jones 123; Gore v. Gore, 2 P. Wms. 28; Harris v. Barnes, 4 Burr. 2157; Doe v. Morgan, 3 T. R. 763; Bullock v. Stone, 2 Ves. 521.

⁵ In Jones v. Roe, 3 T. R. 88, Chief Justice Willes says: "Executory devises are not naked possibilities, but are in the nature of contingent remainders." See Wright v. Wright, 1 Ves. Sr. 411; Hammington v. Rudgard, 10 Rep. 52 b. See Shaw v. English, 81 N. Y. S. 169; Platt v. Brannan, 81 Pac. Rep. 755 (Colo. 1905); *In re Moran's Will* (Wis. 1903), 96 N. W. Rep. 367.

or it is contingent, and descendible to the devisee's heirs, if he should die before the devise vests in possession.⁶

§ 386. **Executory devises, vested or contingent.**—The devise is vested where the person who is to take is *in esse*, and is ascertained, and where the event upon which he is to take is also certain. Such a devisee takes a vested, future estate. Where the estate is to vest upon an uncertain event or in a person not definitely ascertained, the executory devise is contingent, and partakes of the nature of a contingent remainder.⁷

§ 387. **Classes of executory devises.**—Some of the writers have indulged in a minute subdivision of executory devises, but it tends apparently to obscure and mystify, rather than to classify, the subject, and it will be disregarded, and the following simple subdivision employed in its stead: *First*, where the devise takes effect in the future without a sufficient preceding limitation to support it; *secondly*, where the devise vests in derogation of a preceding limitation, and *thirdly*, where the devise is a future limitation in a chattel interest.⁸ The third

⁶ *Purefoy v. Rogers*, 2 Wm. Saund. 388; *Wright v. Wright*, 1 Ves. Sr. 409; *Jones v. Roe*, 3 T. R. 88; *Proprietors Brattle Sq. Church v. Grant*, 3 Gray 161; *Edwards v. Varick*, 5 Denio 664; *Stover v. Eycle-shimer*, 46 Barb. 87; *Den v. Manners*, 1 Spence 142; *Kean v. Hoffecker*, 2 Harr. 103; *Hall v. Robinson*, 3 Jones Eq. 348. Mr. Washburn states that executory devises are alienable only when the devisee is an ascertained person (2 Washburn on Real Prop. 681), and this seems to be the generally accepted doctrine. But, as has been stated in respect to the alienability of contingent remainders (see *ante*, Sec. 307, note), since the conveyance of a future contingent interest only operates in equity by way of estoppel, if a grant of the executory devise is made by one who, although not yet ascertained to be the devisee, becomes the devisee subsequently, by the happening of the contingency by which the devisee is to be ascertained, his grant would, by estoppel, convey to his grantee the interest which he thus subsequently acquires. See *post*, Secs. 511, 514, incl.

⁷ *Shaw v. English*, 81 N. Y. S. 169.

⁸ This is the subdivision employed by Mr. Fearne, Mr. Cruise, and

class will be considered in a subsequent paragraph. The first class would not only include those cases where the future limitation is not preceded by any particular limitation, but also those where the preceding limitation is not sufficient to support the future estate as a remainder. Where the executory devise is vested, the preceding limitation may be insufficient, by terminating naturally before the former is to take effect. And where the devise is contingent, the preceding limitation would be insufficient, not only for the cause just mentioned, but also when it is not a freehold estate. In any one of these cases the future limitations, whether vested or contingent, will take effect as executory devises.⁹ The second class includes all future estate, which by vesting, defeat or curtail a prior limitation.¹⁰ This class is also called conditional limitations, and corresponds to shifting uses, while the first class is similar to springing uses, but containing other cases, which, as uses, would be void contingent uses, viz. : where the preceding limitation is not sufficient to support the future estate.¹¹

§ 388. *Distinguished from devises in præsentī.*— Ordinary devises vest at the death of the testator, and if for any cause

Mr. Washburn. *Fearne Cont. Rem.* 339; 6 *Cruise Dig.* 366; 2 *Washburn on Real Prop.* 683. See *Scatterwood v. Edge*, 1 *Salk.* 229; *Nightingale v. Burrell*, 15 *Pick.* 104.

⁹ 2 *Washburn on Real Prop.* 684; *Fearne Cont. Rem.* 400; 2 *Bla. Com.* 173; *Leslie v. Marshall*, 31 *Barb.* 566; *Chambers v. Wilson*, 2 *Watts* 495; *Reding v. Stone*, 8 *Vin. Abr.* 215, pl. 5; *Key v. Gamble*, 2 *Jones* 123; *Doe v. Scarborough*, 3 *Ad. & El.* 2, 897; *Whiting v. Whiting*, 42 *Minn.* 548; *Tilden v. Green*, 54 *Hun* 231; *Clough v. Clough*, 64 *N. H.* 509.

¹⁰ *Loe v. Fonnereau*, 1 *Dougl.* 487; *Marks v. Marks*, 10 *Mod.* 423; *Stanley v. Stanley*, 16 *Ves.* 491; *Doe v. Beauclerk*, 11 *East* 657; *Proprietors Brattle Sq. Church v. Grant*, 3 *Gray* 146; *Brightman v. Brightman*, 100 *Mass.* 238; *Jackson v. Blanshau*, 3 *Johns.* 299; *Hatfield v. Sneden*, 42 *Barb.* 615; *s. c.* 54 *N. Y.* 285; *Hilliary v. Hilliary's Lessee*, 26 *Md.* 274; *Gaven v. Allen*, 100 *Mo.* 293; *Suydam v. Thayer*, 94 *Mo.* 49.

¹¹ See *ante*, Secs. 354, 356, 359; *May v. Lewis* (*N. C.* 1903), 43 *S. E. Rep.* 550.

the devisee is unable to take at that time, the devise lapses. Its vesting will not be suspended, nor will it be kept alive as an executory devise, until the devisee is able to take. Where, therefore, the devise is, in express words or by necessary implication, to vest immediately upon the death of the testator, it cannot under any circumstances be construed to be a future or executory devise, in order to carry out the supposed intention of the testator that the devise shall at all events take effect. A devise to children without words of qualification would be a devise *in præsenti*, and so, also, it has been held that, a devise to the heirs of A., standing alone, would be considered a devise *in præsenti*, and if A. should be living at the testator's death, the devise would lapse for the want of some ascertained person in being. In order to make such a devise executory, it must expressly or by implication refer to the death of A., as the time when the devise is to take effect.¹² But this decision would probably be different now; for at present the courts will avail themselves of very slight circumstances in order to reach the conclusion that a devise, which otherwise would fail, was intended to be an executory devise.¹³ But where there are

¹² 2 Washburn on Real Prop. 685; 6 Cruise Dig. 422; Doe v. Carleton, 1 Wils. 225; Goodright v. Cornish, 1 Salk. 226; Porter's Case, 1 Rep. 24; Ingliss v. Trustees, etc., 3 Pet. 99; Leslie v. Marshall, 31 Barb. 565. See *post*, Secs. 638, 641.

¹³ Goodright v. Cornish, 1 Salk. 226; Harris v. Barnes, 4 Burr. 2157; Yeaton v. Roberts, 28 N. H. 465; Holderby v. Walker, 3 Jones Eq. 46; Thompson v. Hoop, 6 Ohio St. 480; Darcus v. Crump, 6 B. Mon. 365. Thus, if there is a devise to the children of A. *to be begotten*, although the devise would, without the words in italics, have been construed as a devise *in præsenti*, and would have been confined to the children born at the testator's death, the presence of the words *to be begotten*, or other words of similar import, would be sufficient evidence of the intention of the testator to include all the children of A., whether they are born *before* or *after* his death, and the devise would, therefore be executory. Mogg v. Mogg, 1 Meriv. 654; Newill v. Newill, L. R. 12 Eq. 432; Eldowes v. Eldowes, 30 Beav. 603; Annable v. Patch, 3 Pick. 360; Hoge v. Hoge, 1 Serg. & R. 144; Rupp v. Eberly, 79 Pa. St. 141; Napier v. Howard, 3 Ga. 202; Dunn v. Bk. of Mobile, 2 Ala. 152. And where there are no persons *in esse*, who would come under the class of devi-

persons in being who have the capacity to take the devise, it will be considered that it will be a devise *in præsentia*, and not an executory devise, if this construction is not rendered impossible by the other provisions of the will.¹⁴ And this rule has been followed even in the case of an alternate devise which is to take effect upon the death of the first devisee without children or issue. The presumption would be that the contingency referred to the death of the first devisee during the life of the testator.¹⁵

§ 389. **Reversion of estate undisposed of.**—Where there is no limitation preceding the executory devise, the estate descends to the testator's heirs and remains in them until the event happens, when the devise is to take effect. And if the executory devise is an estate less than a fee simple, the land will revert to the heirs upon its termination.¹⁶ If the preced-

sees named at the time of the testator's death, nor had there been any before his death, it seems to be the presumption of law that the testator intended to create an executory devise. *Shepherd v. Ingram*, Amb. 448; *Weld v. Bradbury*, 2 Vern. 705; *Doe v. Carleton*, 1 Wils. 225; *Haughton v. Harrison*, 2 Atk. 329; *Ross v. Adama*, 28 N. J. L. 160. And where there is a devise to children, or some other definite class of persons, and some of them are born and others are unborn at the death of the testator, or where none are born then, but some come into being afterwards, leaving others which are subsequently born, those who are in being take vested estates, and are entitled to the whole income until the others are born, when the devise opens and lets them in. These executory devises have a close resemblance to *remainders to a class*. *Shepherd v. Ingram*, Amb. 448; *Mainwaring v. Beevor*, 8 Hare 44; *Shawe v. Cunliffe*, 4 B. C. 144; *Mills v. Norris*, 5 Ves. 335; *Stone v. Harrison*, 2 Call. 715. See *ante*, Sec. 360.

¹⁴ *Webster v. Welton*, 53 Conn. 183; *Kouvalinka v. Geibel*, 40 N. J. Eq. 443; *Toner v. Collins*, 67 Iowa 369; *s. o.* 56 Am. Rep. 346; *Scott v. West*, 63 Wis. 529.

¹⁵ *Carroll v. Conley* (N. Y.), 9 N. Y. S. 865; *Jones v. Webb*, 5 Del. Ch. 132; *Burdge v. Walling* (N. J.), 16 Atl. Rep. 51.

¹⁶ 2 Washburn on Real Prop. 686, 687; 2 Prest. Abst. 120; 4 Kent's Com. 268. See *Boggs v. Boggs* (N. J. Ch. 1905), 60 Atl. Rep. 1114; *May v. Lewis* (N. C. 1903), 43 S. E. Rep. 550; *Reynolds v. Reynolds* (S. C. 1903), 43 S. E. Rep. 878.

ing limitation is not sufficient to support the future limitation as a contingent remainder, and the former expires before the latter vests, there will be an intermediate reversion of the estate to the heirs. The same general principles would apply to executory devises of the second class. The only difficulty experienced in applying them is when the vesting and enjoyment of the executory devise do not absolutely require the destruction of the entire preceding estate, as where the former is a particular estate and the latter is a fee. Thus, where the land is devised to A. and his heirs, and, upon the happening of some contingency to B. for life, it is a mooted question—both sides being sustained by eminent authority—whether the estate in A. would be destroyed altogether by the vesting of B.'s estate for life, or whether A. is only divested of his estate during the continuance of B.'s estate, and retains the reversion in him and his heirs. Mr. Fearne supports the former view, while the latter is maintained by Mr. Preston, Mr. Powell, and Mr. Washburn.¹⁷ The intention of the testator certainly must govern in such a case. If a fee simple be devised to one, there is a manifest intention on the part of the testator to deprive his own heirs of any interest in the land. If he attaches thereto an executory devise to B. for life, in the absence of any express evidence to the contrary, it only so far negatives the presumed intention that A. should have the fee as is required to give to B. an estate for his life. Upon the vesting of B.'s estate the present estate in A. would be only suspended until B's death, when the estate will revert to him and his heirs.¹⁸

¹⁷ 2 Washburn on Real Prop. 686; Fearne Cont. Rem. 251; 2 Prest. Abst. 140; 2 Pow. Dev. 241. Mr. Washburn states that a case, involving this question, is said to have arisen in the Delaware courts, p. 687. See to the same effect, *Thomas v. Thomas* (N. J.), 18 Atl. Rep. 355.

¹⁸ Mr. Powell says: "To this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it, for the books do not furnish a

§ 390. *Distinguished from uses.*—Uses may be created by devise as well as by deed, and a future limitation in a will will not be construed as an executory devise if it is limited as a use, especially if there is a seisin raised by the will to support the use. Thus, where the devise is to A. to the use of B., the Statute of Uses would be required to operate upon the devise and transfer the legal estate from A. to B.¹⁹ But the mere expression “to the use of” appearing in a devise will not necessarily convert the devise into a use, and it is held that a simple devise to the use of A. will take effect as an executory devise.²⁰

§ 391. *Distinguished from remainders.*—Whenever a future limitation in a devise can take effect as a remainder, it will be construed as such. It cannot operate as an executory devise. This rule of construction arises from the desire of the courts to confine themselves to common-law estates and the rules governing them; and the doctrine of executory devises is recognized and applied only when the intention of the testator cannot otherwise be effectuated.²¹ What are the

single example of its application.” 2 Pow. Dev. 241. “A limitation in a will providing that, if the devisee should die without heirs, the land should ‘revert back to his next of kin,’ is a valid executory devise.” *May v. Lewis* (N. C. 1903), 43 S. E. Rep. 550.

¹⁹ Co. Lit. 271 b, note 231, Sec. 3; Sandf. on Uses 243; 2 Washburn on Real Prop. 433, 434. Whether the use will be executed by the statute, or remain a trust, leaving the legal title in the devisee as trustee, is governed by the same rules which apply to uses created by act *inter vivos*. See *Doe v. Field*, 2 B. & Ad. 564; *Doe v. Homfray*, 6 A. & E. 206; *Norton v. Leonard*, 12 Pick. 152; *Ayer v. Ayer*, 16 Pick. 327; *Upham v. Varney*, 15 N. H. 467; *Wood v. Wood*, 5 Paige Ch. 596.

²⁰ 1 Sugden on Pow. 2, 3. See *Shaw v. English* (N. Y. 1903), 81 N. Y. S. 169.

²¹ *Purefoy v. Rogers*, 2 Wm. Saund. 388; *Doe v. Morgan*, 3 T. R. 763; *Doe v. Fonnereau*, Dougl. 487; *Doe v. Considine*, 6 Wall. 475; *Nightingale v. Burrell*, 15 Pick. 104; *Terry v. Briggs*, 12 Metc. 17; *Hall v. Priest*, 6 Gray 18; *Manderson v. Lukens*, 23 Pa. St. 31. In *Purefoy v. Rogers*, the rule was stated thus: “Where a contingency is limited to depend upon an estate of freehold, which is capable of sup-

requisites and characteristics of remainders have been already discussed, and it will be necessary to mention here only certain important cases in which doubt may arise. In respect to the first class of executory devises where there is no sufficient particular estate, or none at all, no question can arise as to the proper construction. The difficulty is presented in the second class, in determining whether the second limitation takes effect in derogation of the prior estate. In New York, Michigan, Wisconsin, Minnesota, California and Dakota, it is provided by statute that no contingent remainder is defeated by the termination of the preceding estate before the happening of the contingency; but that it will take effect thereafter, whenever the contingency happens. This is a practical abrogation of all distinction between contingent remainders and executory devises. So, also, in Alabama, all contingent remainders are abolished, and all estates in expectancy declared to have the effect of executory devises.

§ 392. *Same — Limitation after a fee.*— It has been seen that a remainder cannot be limited after a fee.²² And where the preceding estate is in fact a fee, whether it is vested or contingent, a subsequent limitation, which is made to defeat the preceding estate after it has vested, is an executory devise and not a remainder. But the fact that there is a preceding limitation of the fee will not necessarily make the subsequent limitation an executory devise. If the subsequent limitation defeats and takes the place of the preceding limitation upon the breach of a condition, subsequent to the vesting of the first estate, the second limitation is an executory devise.²³ But

porting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only." *Goodright v. Cornish*, 4 Mod. 258; *Reeve v. Long*, Carth. 310; *Doe v. Scarborough*, 3 Ad. & El. 2, 897; *Gore v. Gore*, 2 P. Wms. 28; *Harris v. Barnes*, 4 Burr. 2157.

²² See *ante*, Secs. 296, 298, 313. See *Simmons v. Cabanne* (Mo. 1903), 76 S. W. Rep. 618.

²³ *Gulliver v. Wicketts*, 1 Wils. 105; *Fonnereau v. Fonnereau*, 3 Atk. 315; *Nightingale v. Burrell*, 15 Pick. 104; *Doe v. Beauclerk*, 11 East

if the subsequent limitation is merely an alternate devise which depends upon a condition precedent to the first, and which must vest, if at all, before the first, then it is a contingent remainder and not an executory devise. It is an alternate remainder, or a remainder with a double aspect.²⁴

§ 393. Same — Limitation after an estate tail.— A remainder can be limited after an estate tail, which is to take effect upon the failure of issue.²⁵ But it is often difficult in a devise to one and his heirs, and a limitation over in case of a failure of issue, to discover whether it was the intention of the testator to give to the first taker an estate tail, or only that his estate of inheritance should cease when there should be a failure of issue, the failure of issue being the contingency, when the limitation over should take effect. If it was his intention to create an estate tail, the limitation over is a remainder;²⁶ but if such an intention cannot be gathered

657; *Doe v. Heneage*, 4 T. R. 13; *Nicholl v. Nicholl*, 2 W. Bl. 1159; *Barney v. Arnold*, 15 R. I. 78; *Shadden v. Hembree* (Ore.), 18 Pac. Rep. 572. "Where testator devises his lands to his daughter in fee simple, a subsequent clause in the will by which he attempts to devise over to others so much of the land as his daughter had not alienated, if she dies without issue, is void." *Spencer v. Scovil* (Neb. 1903), 96 N. W. Rep. 1016. See *Cox v. Anderson's Admr.* (Ky. 1902), 70 S. W. Rep. 839.

²⁴ *Luddington v. Kime*, 1 Ld. Raym. 203; *Goodwright v. Dunham*, 1 Dougl. 265; *Taylor v. Taylor*, 63 Pa. St. 481, 3 Am. Rep. 565; *Wilson v. White*, 109 N. Y. 59. See *ante*, Sec. 310.

²⁵ 2 Washburn on Real Prop. 690; *Wiscot's Case* 2 Rep. 61; *Roe v. Baldwere*, 5 T. R. 110; *Page v. Hayward*, 2 Salk. 570; *Wilkes v. Lion*, 2 Cow. 392; *Hall v. Priest*, 6 Gray 18; *Poole v. Morris*, 26 Ga. 374. See *ante*, Sec. 298.

²⁶ *Parker v. Parker*, 5 Metc. 134; *Nightingale v. Burrill*, 15 Pick. 104; *Allen v. Trustees*, 102 Mass. 263; *Hannau v. Osborn*, 4 Paige Ch. 336; *Morehouse v. Cotheal*, 21 N. J. L. 480; *Taylor v. Taylor*, 63 Pa. St. 481, 3 Am. Rep. 565; *Hill v. Hill*, 74 Pa. St. 173, 15 Am. Rep. 545; *Richardson v. Richardson*, 80 Me. 585; *East v. Garrett*, 84 Va. 523; *Summers v. Smith*, 127 Ill. 645; *Reinsehl v. Shirk*, 119 Pa. St. 108; *Titsell v. Cochran* (Pa.), 10 Atl. Rep. 9; *Knoderer v. Merriman* (Pa.), 7 Atl. Rep. 152. And at common law the limitation over upon failure

from the language used, the limitation over will be held to be an executory devise.²⁷

§ 394. Same — Where first limitation lapses.— The will goes into effect at the testator's death, and is construed according to the circumstances surrounding the testator at that time. No change of circumstances can affect the will which occurs

of issue is always presumed to be a remainder after an estate tail, unless there is something in the context to the contrary, in conformity with the general rule requiring a future limitation to be construed as a remainder, if it can take effect as such. *Hawley v. Northampton*, 8 Mass. 3; *Parker v. Parker*, 5 Metc. 134; *Vedder v. Evertson*, 3 Paige 281; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *Stehman v. Stehman*, 1 Watts 466; *Wall v. Maguire*, 21 Pa. St. 248; *Manderson v. Lukens*, 23 Pa. St. 31. But it must be remembered that estates tail have now been abolished in very many of the States; in some they are converted into fees simple, while in others the first taker has an estate for life, and the rest of the estate constitutes a contingent remainder in fee in the first taker's issue and their descendants. See *ante*, Sec. 296. In both classes of States the doctrine that a remainder can be limited after a fee tail has become obsolete and impossible through the inability to create an estate tail. If there is, in one of these States, a devise to A. and the heirs of his body, with a limitation over upon failure of issue, the limitation over can only take effect as an executory devise, and will be a good or a void limitation, according as the testator is construed to intend a definite or indefinite failure of issue. See *post*, Sec. 397.

²⁷*Jackson v. Chew*, 12 Wheat. 153; *Jackson v. Elmendorf*, 3 Wend. 222; *Jackson v. Thompson*, 6 Cow. 178; *Jackson v. Staats*, 11 Johns. 337; *Lyon v. Burtiss*, 20 Johns. 483; *Nicholson v. Bettie*, 57 Pa. St. 384; *Morris v. Potter*, 10 R. I. 58; *Wilson v. Wilson* (N. J.), 19 Atl. Rep. 132; *Gordon v. Gordon* (S. C.), 11 S. E. Rep. 334; *Pate v. French*, 122 Ind. 10; *Fields v. Whitfield* (N. C.), 7 S. E. 780; *In re Swinburne* (R. I.), 14 Atl. Rep. 850; *Martin v. Renaker* (Ky.), 9 S. W. Rep. 419; *Buchanan v. Buchanan*, 99 N. C. 308; *Galloway v. Carter*, 100 N. C. 111; *Henley v. Robb, Pickle* (Tenn.) 474; *Williams v. Lewis*, 100 N. C. 142; *Matthews v. Hudson* (Ga.), 7 S. E. Rep. 286; *Henderson v. Kinard* (S. C.), 6 S. E. Rep. 853; *Stokes v. Van Wick*, 83 Va. 724; *O'Brien v. O'Leary*, 64 N. C. 332; *Johnson's Exr. v. Citizens' Bank*, 83 Va. 65; *Goddard v. Whitney*, 140 Mass. 92; *Trexler v. Holler*, 107 N. C. 617; *Prosser v. Hardesty*, 101 Mo. 593. Generally the construction depends upon the express words of the testator used in limiting the estate. But if they leave the character of the limitation doubtful, then resort must be had to the context; and if it appears from the context that it was the intention of the testator to create an executory devise,

afterwards. If, therefore, there be a sufficient particular estate to support the future contingent limitation at the death of the testator, it will take effect as a contingent remainder, and any subsequent lapse of the particular estate, before the future estate vested, would defeat such contingent estate. Once a remainder, always a remainder. But if the particular estate is void or lapses because of a change of circumstances, occurring between the execution of the will and the testator's death, the devise will be construed as if there had been no preceding limitation, and the contingent limitation will be supported as an executory devise.²⁸ But the testator may expressly provide that the remainder is to take effect only when the particular estate vests, as where it is provided that the estate shall go to a certain person at the death of the devisee for life. In the event that such devisee did not sur-

it will be held to be one, notwithstanding the ordinary presumption that such a limitation is a remainder. The presumption prevails only when it is absolutely impossible to ascertain the intention of the testator. *Ferson v. Dodge*, 23 Pick. 287; *Armstrong v. Kent*, 21 N. J. L. 509; *Kennedy v. Kennedy*, 29 N. J. L. 185; *Berg v. Anderson*, 72 Pa. St. 87; *Hill v. Hill*, 74 Pa. St. 173, 15 Am. Rep. 545; *Summers v. Smith*, 127 Ill. 645; *Devecmon v. Shaw*, 70 Md. 219; *Chaplin v. Doty* (Vt.), 15 Atl. Rep. 362. So, also, where a statute makes all limitations over upon failure of issue, refer to a *definite* failure of issue, the limitation will be construed ordinarily to be an executory devise. *Pinkham v. Blair*, 57 N. H. 226; *Macombe v. Miller*, 26 Wend. 229; *Wilson v. Wilson*, 32 Barb. 328; *McKee v. Means*, 34 Ala. 349; *Black v. Williams*, 51 Hun 280; *In re N. Y., L. & W. Ry.*, 105 N. Y. 91. See *post*, Sec. 397, for a discussion of the question, when a "failure of issue" will be construed to mean a *definite* failure of issue, and what would be the effect upon the executory devise of the construction that it means an *indefinite* failure of issue.

²⁸ 2 Washburn on Real Prop. 691; 6 Cruise Dig. 422; *Fearne Cont. Rem.* 625, 626; *Bullock v. Bennett*, 31 Eng. L. & Eq. 463; *Crozier v. Bray*, 39 Hun 121; *Sauter v. Muller*, 4 Dem. 389. So, also, if the prior devise should fail by a refusal of the devisee to accept it, the future limitation, which would otherwise be a contingent remainder, will take effect as an executory devise. *Yeaton v. Roberts*, 28 N. H. 459; *Thompson v. Hoop*, 6 Ohio St. 480; *Reynolds v. Reynolds* (S. C. 1903), 43 S. E. Rep. 878; *May v. Lewis* (N. C. 1903), 43 S. E. Rep. 550.

vive the testator, the remainder could not, on the lapse of the first devise, take effect as an executory devise.²⁹

§ 395. *Same*.—*Limitations after an executory devise.*—If there are successive limitations which take effect after an executory devise, they are all executory devises until the first limitation takes effect in possession. But upon the happening of that event they will become and be construed as remainders, if they are capable of sustaining that relation to the preceding limitation. Such would be the case, if the devise was to A. for life, six months after the testator's death, remainder to B. in fee. During the six months, both limitations would have the character of executory devises in respect to the rights of the testator's heirs, but B.'s estate would be a remainder in respect to A.³⁰ And in limitations of this character the first executory devise may be contingent, while the second is certain and vested. Until the first is vested the second is vested, subject to be opened and to let in the first, when it vests.³¹ And if the first limitation lapses, the second takes effect in possession as an executory devise, as if there had been no preceding limitations.³²

§ 396. *Indestructibility of executory devises.*—Since executory devises are not dependent for support upon any preceding estate, they cannot be altered or defeated by any act of the first taker, unless such act is made by the terms of the will the occasion of defeating the devise. Feoffment by the first taker will not otherwise destroy the executory devise, as it would a contingent remainder.³³ In England an exception

²⁹ *Gibson v. Seymour*, 102 Ind. 485; *s. c.* 52 Am. Rep. 688.

³⁰ 2 Washburn on Real Prop. 691, 692; 2 Prest. Abst. 173; *Purefoy v. Rogers*, 2 Wm. Saund. 388, note; *Fearne Cont. Rem.* 503; *Pay's Case*, Cro. Eliz. 878.

³¹ 2 Washburn on Real Prop. 693; *Fearne Cont. Rem.* 506.

³² See *ante*, Sec. 394. See, *In re Lewis*, 73 Law, J., Ch. 748 (1904), 2 Ch. 656, 91 Law., J., 242.

³³ 2 Washburn 698, 699; 2 Bla. Com. 173; *Fearne Cont. Rem.* 418;

seems to have been made in the case of an executory devise taking effect in derogation of an estate tail, where a recovery suffered by the tenant in tail would also defeat the devise.³⁴ As recoveries do not obtain in this country this exception is of no importance to an American lawyer.

§ 397. *Limitation upon failure of issue.*—In determining whether a future limitation vesting upon a failure of issue is a remainder or an executory devise, two points are to be considered. The first is whether the failure relates to the issue of the first taker, or to that of a stranger. In the first instance the second limitation, in the absence of an express contrary intention, will so limit the prior devise as to convert it into an estate tail, thereby making the second limitation a remainder after an estate tail. If it be the issue of a stranger it will not reduce the prior devise to an estate tail, and hence the second limitation can only take effect as an executory devise.³⁵ The second point is whether the failure means an indefinite failure of issue, *i. e.*, that the second limitation is to take effect at any future time, when there shall be a failure of heirs in the direct line of descent from the first taker, or whether it refers to a failure of issue within any particular period, as at the death of the first taker. The common-law rule was, and it still obtains in the absence of statutory changes, that where failure of issue was made the contingency upon which the second limitation was to vest, without any express reference to the kind of issue meant, or where the kind of issue could not be determined by a reference to the context, it was an

Props. *Brattle Sq. Church v. Grant*, 3 Gray 146; *McRee's Admrs. v. Means*, 34 Ala. 349.

³⁴ 2 Washburn on Real Prop. 699; 2 Prest. Abst. 120; Fearn's Cont. Rem. 423, 424. See *ante*, Secs. 42, 298.

³⁵ *Grumble v. Jones*, 11 Mod. 207; *Badger v. Lloyd*, 1 Ld. Raym. 526; *s. c.* 1 Salk. 233; *Atty.-Gen. v. Gill*, 2 P. Wms. 369; *Terry v. Briggs*, 12 Metc. 22. But see *ante*, Sec. 393, notes. See *Teit v. Richard* (N. J. Ch. 1902), 53 Atl. Rep. 824; *May v. Lewis* (S. C. 1903), 43 S. E. Rep. 550.

indefinite failure of issue,³⁶ which, as will be shown in a subsequent paragraph, would make the second limitation good, if it could take effect as a remainder after an estate tail, as above explained,³⁷ and void, if it could only take effect as an executory devise.³⁸ The tendency in this country at the present time is to change this rule of construction, by statute or by judicial legislation, wherever possible, so that a failure of issue would mean a failure upon death of the first taker.³⁹

³⁶ *Cole v. Goble*, 13 C. B. 445; *Pleydell v. Pleydell*, 1 P. Wms. 748; *Williamson v. Daniel*, 12 Wheat. 568; *Brattleboro' v. Mead*, 43 Vt. 556; *Nightingale v. Burrill*, 15 Pick. 104; *Jackson v. Billinger*, 18 Johns. 368; *Miller v. Macomb*, 26 Wend. 229; *Moore v. Rake*, 26 N. J. L. 574; *Kleppner v. Laverty*, 70 Pa. St. 70; *Ingersoll's Appeal*, 86 Pa. St. 240; *Voris v. Sloan*, 68 Ill. 588; *Pennington v. Pennington*, 70 Md. 418; *Hackney v. Tracy*, 137 Pa. St. 53. A more liberal rule prevailed in respect to personal property and chattel interests in real property, and very slight evidence was sufficient to make the "failure of issue" mean a definite failure. *Allender v. Sussan*, 33 Md. 11, 3 Am. Rep. 171; *Morehouse v. Cotheal*, 22 N. J. L. 430. In *Brummet v. Barber*, 2 Hill (S. C.) 543, Judge O'Neill says: "Although there is no *such positive and substantial legal distinction*, yet there is no doubt that the court is not so strictly bound down to an artificial rule of construction in personal as in real estate, and that in the former they will lay hold of words to tie up the generality of the expression 'dying without issue' and confine it to dying without issue, living at the time of the first taker's death, which would not have that effect in the latter." But before declaring the term "failure of issue," or "dying without issue," to mean an indefinite failure of issue, the whole will must be scanned, in order to discover the intention of the testator. The common law, however, required clear proof of a contrary intention to overcome the ordinary presumption of law in favor of its being an indefinite failure of issue. See cases cited *supra*. In *Chism v. Williams*, 29 Mo. 288, Judge Napton says: "The question is, conceding that the words 'dying without issue' mean an indefinite failure of issue, are there other words which, of themselves, and in despite of this general manifestation of intention to keep the property indefinitely in the descendants of the first taker, point, incontestably and unequivocally to the death of the first taker as a period contemplated by the testator when the limitation over should take effect."

³⁷ See *ante*, Sec. 393, and notes.

³⁸ See *post*, Sec. 399.

³⁹ Such is the statutory rule in Alabama, California, Georgia, Ken-

And it may be stated as a general proposition that in the other States the courts are receding from their former strict construction in favor of its being an indefinite failure of issue, so that, whenever it is possible to gather together sufficient circumstances to establish the intention to limit upon a definite, instead of an indefinite, failure of issue, the courts will readily do so, sometimes availing themselves of very slight circumstances in order to reach the conclusion which is most favorable to the validity of the devise. For example, in a devise to Thomas and his heirs, and if he die without issue, living William, then to William, the devise was held to refer to a failure of issue during the life of William.⁴⁰ So, also, where the contingency was that the person should die, leaving no issue *behind* him, or where the second limitation was only a life estate, it was held to mean a definite failure of issue.⁴¹

tucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Carolina, South Carolina, Tennessee and Virginia. 2 Jar. on Wills (5 Am. ed.) 340; Worrill v. Wright, 25 Ga. 659; Condict v. King, 13 N. J. 375; Fields v. Watson, 23 S. C. 42; Ford v. Cook, 73 Ga. 215; Black v. Williams, 51 Hun 380.

⁴⁰ Pells v. Brown, Cro. Jac. 590.

⁴¹ Porter v. Bradley, 3 T. R. 143; Trafford v. Boehm, 3 Atk. 440; Forth v. Chapman, 1 P. Wms. 663. Where the limitation over is to others, or to the surviving children or issue of the first taker, a *definite* failure of issue is generally presumed to be intended. Jackson v. Chew, 12 Wheat. 153; Brightman v. Brightman, 100 Mass. 238; Lion v. Burtiss, 20 Johns. 483; Cutter v. Doughty, 23 Wend. 513; Ingersoll's Appeal, 86 Pa. St. 240. The tendency is to construe "die *without leaving* issue," or "*leaving* no issue," as meaning a definite failure of issue. Maurice v. Maurice, 43 N. Y. 303; Hill v. Hill, 74 Pa. St. 173, 15 Am. Rep. 545; Edwards v. Bibb, 43 Ala. 666. *Contra*, Malcom v. Malcom, 3 Cush. 472; Haldeman v. Haldeman, 40 Pa. St. 29; Patterson v. Ellis, 11 Wend. 289; Tongue v. Nutwel, 13 Md. 415. So, also, was a definite failure of issue held to be intended by the clause dying "without lawful heirs," or "without lawful heirs of his body." Abbott v. Essex Co., 18 How. 202; Seibert v. Butz, 9 Watts 490; Berg v. Anderson, 72 Pa. St. 87; Simmonds v. Simmonds, 112 Mass. 157; Bullock v. Seymour, 33 Conn. 290. On the other hand, a devise to sons, but if they die without issue, then "to my surviving children," has been held to mean an indefinite failure of issue. See Lapsley v. Lapsley, 9 Pa. St. 130; Clark v. Baker, 3 Serg. & R. 470; Doyle v. Mullady, 33 Pa.

But the limitation over must be defined to take effect upon failure of issue, in order to cut down the preceding estate from an estate in fee simple. And if the limitation over is to vest upon failure of "heirs" of the first taker, the limitation would be invalid unless the word "heirs" could be construed to mean issue.⁴²

§ 398. Same — In deeds.— The rules of construction, as stated above, although in the main referable to springing and shifting uses created by deed, must in their application to these limitations receive the further restriction that there are sufficient technical words of limitation present to convert the prior limitation into a fee tail. If the first limitation is expressly an estate in fee simple, the second limitation over upon failure of issue of the first taker would not convert the former into an estate tail, although the same limitation in a will would have had that effect. Thus a conveyance to A. and his heirs, and if he should die without issue, then over, A. would take a fee upon condition, instead of an estate tail, as he would have done if the limitation had been by devise.⁴³ On St. 264; *Holcombe v. Lake*, 25 N. J. L. 605. So, also, to A. and B., their heirs and assigns, but if they die without issue, then over. *Lillibridge v. Adie*, 1 Mason 224. The truth is, the old rule, by which these questions were determined, was really arbitrary, and in most cases directly contrary to the real intention of the testator, although the courts professed to follow his intention as it appeared upon the will. For example, in the case, cited above, of a devise to two or more sons, and if they should die without issue, "then to my surviving children," an indefinite failure of issue was held to be intended; whereas the most natural and rational construction was, that the testator intended his surviving children to take, in the event of the death of one of them without issue. Those States which have by statute cut loose from these common-law rules have acted wisely. See *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. Rep. 643.

⁴² *Honiet v. Bacon*, 126 Pa. St. 176; *Cochran v. Cochran*, 127 Pa. St. 486; *Underwood v. Robbins*, 117 Ind. 308. See *Underwood v. Magruder* (Ky. 1905), 87 S. W. Rep. 1076.

⁴³ *Coltman v. Senhouse*, Pollexf. 536; *Davies v. Speed*, 2 Salk. 675; *Abraham v. Twigg*, Cro. Eliz. 478; *Hall v. Priest*, 6 Gray 18; 2 Washb. on Real Prop. 711, 712. It is apparent, from the small number of cases

the other hand, the question as to the definite or indefinite failure of issue is more liberally determined when it refers to shifting uses than in the case of executory devises, because of the common disinclination of the courts to construe the will so as to disinherit the heir at law.⁴⁴

§ 399. *Doctrine of perpetuity.*— We have seen that the common-law restrictions, as to the kinds and classes of estates which might be carved out of a fee, do not apply to executory devises or springing and shifting uses. As a consequence, if there was no restraint as to the time when an executory devise or future use should vest in possession, lands might be so conveyed to uses, or by way of executory devises, that the power of alienation might be indefinitely suspended, thereby preventing that change of ownership in lands, which has ever been considered so salutary to the welfare of the country. The courts, therefore, at a very early day, laid down the rule that executory interests, whether by way of use or devise, must, in order to be valid limitations, take effect in possession within a life or lives in being, and twenty-one years thereafter.⁴⁵ To this was added the nine months required by

cited, that this question very rarely arises in respect to springing and shifting uses.

⁴⁴ 2 Washburn on Real Prop. 711; *Forth v. Chapman*, 1 P. Wms. 663; *Hall v. Priest*, 6 Gray 18.

⁴⁵ 2 Washburn on Real Prop. 701, 702. This limit of the time within which an executory interest must take effect in possession to be valid was, no doubt, suggested by the fact that an estate tail, according to the English law, could not be made inalienable for any longer period. For example, A. would settle his lands to himself for life, remainder to his eldest son in tail male, remainder to his second son in tail male, remainder over. Since an estate tail could be barred by common recovery, A., in settling his estate in this manner, could only make the lands inalienable until the eldest son was born and became of age. It would, therefore, at the farthest, remain inalienable during his life and twenty-one years thereafter, viz., a life or lives in being and twenty-one years thereafter. This doctrine as to the probable origin of the doctrine of perpetuity is supported by Mr. Washburn (2 Washburn on Real Prop. 702); and it might be inferred from the discussion by Mr. Williams of

nature for the gestation of a child *en ventre sa mere*, when posthumous children were declared capable of taking future estates.⁴⁶ If the executory interest could, by any possibility, take effect beyond that period, it was void, even though it afterwards did, as a matter of fact, take effect within the period. It must be absolutely certain to vest within that period, if at all, in order to be valid.⁴⁷ If the future limitations be void for this reason, it leaves the prior limitation, if any, free from the condition, making what was a conditional estate an absolute one.⁴⁸ A limitation, void because it offends the doctrine of perpetuity, will be void altogether, and cannot be held, under the *cy pres* rule of construction, to be good as to that part which keeps within the period of perpetuity, and void only as to the excess.⁴⁹ And where the estates tail, marriage settlements, and the doctrine of perpetuity in the same connection (see Williams on Real Prop. 50, 51), that he also had in mind the idea of their common origin.

⁴⁶ 2 Washburn on Real Prop. 702, 703; Williams on Real Prop. 319.

⁴⁷ Purefoy v. Rogers, 2 Saund. 388; Nottingham v. Jennings, 1 Salk. 233; Duke of Norfolk's Case, 2 Chanc. Cas. 1; Wood v. Griffin, 46 N. H. 234; Andrews v. Jackson, 16 Johns. 399; Donahue v. McNichols, 61 Pa. St. 78; Mandlebaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61; Appleton's Appeal, 136 Pa. St. 354. See *contra*, Palms v. Palms (Mich.), 36 N. W. Rep. 419.

⁴⁸ Tud. Ld. Cas. 361; Nottingham v. Jennings, 1 Salk. 233; Beard v. Westcott, 5 B. & Ald. 801; Philadelphia v. Girard, 45 Pa. St. 27; Shephard v. Shephard, 2 Rich. Eq. 142; Coggin's Appeal, 124 Pa. St. 579; Hale v. Hale, 124 Ill. 399; Fowler v. Ingersoll, 50 Hun 60; Stout v. Stout 44 N. J. Eq. 479; Goldtree v. Thompson, 79 Cal. 613; Pennington v. Pennington, 70 Md. 418; Henderson v. Henderson, 46 Hun 509; Brown v. Brown (Tenn.), 6 S. W. Rep. 869; Fowler v. Ingersoll, 2 N. Y. S. 833; Davis v. Buford's Exrs. (Ky.), 3 S. W. Rep. 4.

⁴⁹ Leak v. Robinson, 2 Meriv. 362; Fox v. Porter, 6 Sim. 485; Evers v. Challis, 7 H. L. Cas. 555; Jackson v. Phillips, 14 Allen 572. Still there is a class of cases, in which parts of a testator's will will be carried into effect, while other parts which are void on account of remoteness, will be discarded. But this will be done, only when substantial justice will be done to all parties concerned, and when the paramount or general intention of the testator would then be carried into effect. See Arnold v. Congreve, 1 Russ. & Myl. 279; Carver v. Bowles, 2 Russ. & Myl. 306; Church v. Kemble, 5 Sim. 522.

devise is susceptible of two or more constructions, that construction will be adopted which will not offend the rule of perpetuity.⁵⁰ If the limitation is dependent in the alternative upon one of two events, one of which must happen within the period of perpetuity while the other is remote, it will be a good limitation, except that it will vest only upon the happening of the event which is not remote, while the other condition is void and has no effect upon the devise.⁵¹ The greatest difficulty is experienced in applying this rule against perpetuity to limitations, upon failure of issue. If the limitation cannot be construed as a reminder after an estate tail, or an executory devise to take effect upon a definite failure of issue, it would be void, since an executory devise, after an indefinite failure of issue, cannot always take effect within the period of perpetuity.⁵² Since estates tail cannot be created out of a term of years, the courts are inclined to construe a failure of issue in the devise of a term to mean a definite failure of issue, referable to the death of the ancestor, upon the failure of whose issue the future limitation is to vest. Otherwise such future limitation could never take effect, since it would always offend the rule against perpetuities.⁵³ It is

⁵⁰ *Roe v. Vingtut*, 117 N. Y. 204; *Sulany v. Middleton* (Md.), 19 Atl. Rep. 146. The rule, in construing a will, that the law favors the vesting of estates in the common-law sense and in the statutory sense, as regards the subject of perpetuities, is not for use except in solving uncertainties. *In re Moran's Will* (Wis. 1903), 96 N. W. Rep. 367.

⁵¹ *Fowler v. Depan*, 28 Barb. 224; *Schetter v. Smith*, 41 N. Y. 328; *Armstrong v. Armstrong*, 14 B. Mon. 333; *Burrill v. Boardman*, 43 N. Y. 254.

⁵² *Forth v. Chapman*, 1 P. Wms. 663; *Doe v. Ewart*, 7 A. & E. 636; *Terry v. Briggs*, 12 Metc. 22; *Hall v. Priest*, 6 Gray 18; *Anderson v. Jackson*, 16 Johns. 382; *Gray v. Bridgworth*, 33 Miss. 312; *Hackney v. Tracy*, 137 Pa. St. 53. As to when such a limitation would be a remainder after an estate tail, instead of an executory devise after a fee, see *ante*, Sec. 393. As to when a definite or indefinite failure of issue is intended, see *ante*, Secs. 397, 398.

⁵³ *Forth v. Chapman*, 1 P. Wms. 663; *Hall v. Priest*, 6 Gray 18; *Allen-der's Lessee v. Sussan*, 33 Md. 11, 3 Am. Rep. 171; *Morehouse v. Cotheal*, 22 N. J. L. 430; *Biscoe v. Biscoe*, 6 Gill & J. 232; *Brummet v. Bar-*

also difficult at times to determine whether in the case of an executory devise to a class, when some cannot take because too remote, the whole devise is void as against perpetuity, or only that part which offends. The determination of the question depends upon the ability to separate the good from the bad, and at the same time preserve the intention of the testator. If this can be done, and the parties who cannot take are not thereby prejudiced, then only that part of the devise will be void which is too remote, while the devise will be upheld and carried out in favor of those who can take. If the partial enforcement of the devise will work an injury to those who are excluded, or confer upon the fortunate ones benefits, not intended by the testator, the whole devise will then be void.⁵⁴ It must always be borne in mind that the rule of perpetuity only prohibits the *vesting* of future contingent estates beyond the permissible period. Hence, whenever the devise is *vested* the postponement of the time of enjoyment beyond the period of perpetuity does not affect the validity of the limitation.⁵⁵ In this country the common law rule of perpetuity, that future limitations must vest within a life or lives in being and twenty-one years thereafter, still generally prevails, although in some of the States the period has been shortened by statute. The most important change was made in New York and other States, where the period was limited to two lives in being.⁵⁶

ber, 2 Hill (S. C.), 543; Moore v. Howe, 4 B. Mon. 199. See Teit v. Richard (N. J. Ch. 1902), 53 Atl. Rep. 824; Stone v. Bradlee (Mass. 1903), 66 N. E. Rep. 324.

⁵⁴ James v. Wynford, 1 Smale & G. 40; Griffith v. Pownall, 13 Sim. 393; Catlin v. Brown, 11 Hall 372; Webster v. Boddington, 26 Beav. 128. See 2 Washb. Real Prop. 727-730; Stout v. Stout (N. J.), 15 Atl. Rep. 843; Andrews v. Rice, 53 Conn. 566.

⁵⁵ Hillyer v. Vandewater, 121 N. Y. 681.

⁵⁶ 1 Rev. Stat. N. Y. 723, Sec. 15; Greenland v. Waddell, 116 N. Y. 234; Henderson v. Henderson, 46 Hun 509; Wood's Estate, 55 Hun 204; Haynes v. Sherman, 117 N. Y. 433; Kennedy v. Hoy, 105 N. Y. 134; Ward v. Ward, 105 N. Y. 68; Ford v. Ford, 70 Wis. 19; Rice v. Barrett, 102 N. Y. 161; Farrand v. Petit, 84 Mich. 671; Cotting v. Schermeshorn, 58 Hun 610; Lee v. Tower, 124 N. Y. 370.

The same change in the rule has been made in other States. But this caution must be observed in determining which rule of perpetuity applies. While generally the limitation will be governed by the rule of perpetuity of the State in which the testator was domiciled, or his real estate was situated, if the limitation referred to real property at the time of his death,⁵⁷ yet it has been held that where the testator directs his executor to sell his lands in one State, and re-invest in lands in another State, subject to trusts and limitations, which offend the rule of perpetuity in the former State, but which is valid according to the rule in the latter State, the limitation will be valid.⁵⁸

§ 400. Rule against accumulation of profits.—It is very often desirable that testators should have the right to direct that the profits of their estates should be allowed to accumulate for a certain time before being distributed among the persons designated in the will. At common law there was no restriction as to the time within which the profits may be directed to accumulate, except the rule of perpetuity. As long as the accumulation was kept within the period of perpetuity it was a valid limitation. This is the general rule of law in this country at the present day,⁵⁹ but in England, and in some of the States, such accumulations are prohibited for a longer period than the life of the grantor and twenty-one years thereafter, or the minority of the person or persons who are to take.⁶⁰

⁵⁷ See *post*, Sec. 629.

⁵⁸ *Ford v. Ford* (Mich.), 44 N. W. Rep. 1057.

⁵⁹ 2 Washburn on Real Prop. 730; *Hale v. Hale* (Ill.), 17 N. E. Rep. 470. In New York and Pennsylvania statutes have been passed, similar in their provisions to the English statute mentioned in the text. 1 Rev. Stat. N. Y. 726, Sec. 37; *Manice v. Manice*, 43 N. Y. 305; *Pard. Dig.* (Pa. St. Laws) 853. See *Morrison v. Schoer* (Ill. 1902), 64 N. E. Rep. 545; *Tobin v. Graf*, 80 N. Y. S. 5.

⁶⁰ Statute 39, 40 Geo. III Ch. 98; 2 Washburn on Real Prop. 731; *Williams on Real Prop.* 320; *Goldtree v. Thompson*, 79 Cal. 613; *Roe v. Vingut*, 117 N. Y. 204; *Farmer's Estate*, 6 Dens. 433; *Schwartz's App.* 119 Pa. St. 337; *Brubaker's Appeal* (Pa.), 15 Atl. Rep. 708; *Scott v.*

§ 401. *Executory devises of chattel interests.*—At common law a remainder could not be limited in a chattel interest, after a prior limitation for life, or for any indefinite period which would be a freehold estate, if carved out of a fee. Such limitations would be void as common-law estates.⁶¹ Nor can an estate tail be created out of a term, the statute *de donis* referring only to tenements, estates of which tenure can be predicated. A devise of a chattel interest to one and the heirs of his body would be the devise of an absolute estate.⁶² But the rule in *Shelley's Case* has been held to apply to the limitations of leasehold estates, so that if a leasehold be devised to A., for life, with remainder to the heirs of the body or in general of A., A. will take an absolute estate in fee, instead of for life.⁶³ But future limitations were at an early day permitted to be created in chattel interests to take effect as executory devises,

West, 63 Wis. 529. This statute was passed in consequence of the foolish and vain ambitions of a man named Thelluson, to make the later generations of his family wealthy and powerful, by providing in his will for the accumulation of the profits during the lives of his then existing heirs. If it had been carried out, the estate would have amounted to £19,000,000, and it was then to be distributed among two or three persons. The will attracted widespread attention, and, it being thought dangerous to permit the accumulation of such vast wealth in the hands of private persons, as well as cruel and unjust to the immediate heirs, an attempt was made to break the will. See *Thelluson v. Woodford*, 1 B. & P. N. R. 396; *s. c.* 4 Ves. 227. But the court declared the limitation valid, since it did not break the rule against perpetuities. The will provided for the accumulation of the profits of the estate during the lives of all his children, grandchildren and great-grandchildren living at his death, and should, at the death of the last survivor, be divided up among certain descendants who would then be in being. It will be apparent that the testator kept within the rule against perpetuity.

⁶¹ 2 Washburn on Real Prop. 722; *Fearne Cont. Rem.* 401; *Tissen v. Tissen*, 1 P. Wms. 500; *Manning's Case*, 8 Rep. 95; *Smith v. Bell*, 6 Pet. 68; *Merrill v. Emery*, 10 Pick. 507; *Gillespie v. Miller*, 5 Johns. Ch. 21; *Cooper v. Cooper*, 1 Brev. 355.

⁶² 2 Washburn on Real Prop. 723; *Fearne Cont. Rem.* 401, 466; *Lovies' Case*, 10 Rep. 87; *Doe v. Lyde*, 1 T. R. 593; *Hughes v. Nicklas*, 70 Md. 484.

⁶³ *Hughes v. Nicklas*, 70 Md. 484; *Markley's Appeal*, 132 Pa. St. 352. See *Baldwin v. Tucker* (N. J. Ch. 1902), 55 Atl. Rep. 1132.

and it matters not whether there is or is not a preceding limitation, or whether the second limitation takes effect in derogation of the prior limitation. In each case the future limitation is construed as an executory devise; and the rules here laid down for the government of the other two classes of executory devises are in the main applicable to these.⁶⁴ The only restriction upon the power to create a future estate in a chattel lies in the nature of the chattel itself. If it is in its nature capable of sustaining a present and a future enjoyment, a future limitation will be good. But if the present enjoyment of the chattel involves a consumption of the thing itself, then of necessity any future limitation would be void.⁶⁵ If the remainder is limited in a chattel interest to the "heirs" of a certain person, the remainder-men will be ascertained by ascertaining who will inherit the real estate under the statute of descent.⁶⁶

⁶⁴ *Tissen v. Tissen*, 1 P. Wms. 500; *Merrill v. Emery*, 10 Pick. 507; *Gillespie v. Miller*, 5 Johns. Ch. 21; *Moffatt v. Strong*, 10 Johns. 12; *Keene's Appeal*, 64 Pa. St. 273; 2 Bla. Com. 174; 2 Washburn on Real Prop. 724; *Miller's Ex'x v. Simpson* (Ky.), 2 S. W. Rep. 171.

⁶⁵ *Atty.-Gen. v. Hall*, Fitzg. 314; *Bull v. Kingston*, 1 Meriv. 314; 2 Washburn on Real Prop. 724. But see *Upwell v. Halsey*, 1 P. Wms. 652; *Smith v. Bell*, 6 Pet. 68; *Rubey v. Barnett*, 12 Mo. 1; *Whittemore v. Russel*, 80 Me. 297; *Walker v. Pritchard*, 121 Ill. 221.

⁶⁶ *Lincoln v. Aldrich*, 149 Mass. 368; *Mason v. Bailey* (Del.), 14 Atl. Rep. 309; *Little's Appeal*, 117 Pa. St. 14; *Reed's Appeal*, 118 Pa. St. 215. But see *White v. Stanfield* (Mass.), 15 N. E. Rep. 919. See *Lacey v. Floyd* (Texas 1905), 87 S. W. Rep. 665; *Belcher's Est.* (Pa. 1905), 61 Atl. Rep. 252.

CHAPTER XVI.

POWERS.

- SECTION 402.** The nature of powers in general.
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420. Rights of donee's creditors in the power.
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§ 402. The nature of powers in general.— A power, in the most comprehensive sense in which the word can be used, is an authority conferred upon a person to do a thing. But in its present application it signifies an authority to dispose of property, which is vested either in the person exercising the power, or in some other person. Under this latter signification three distinct classes of powers will be recognized: *First*, statutory powers; *second*, powers of attorney; and *third*, what are generally called powers of appointment, or simply powers. A statutory power is one which is created and vested in a person by legislative enactment. It is an act of the government; it derives its authority from the Legislature, and is subject to

the same rules of interpretation and construction as statutes in general.¹ Powers of attorney are authorities conferred by a principal upon an agent to perform certain acts in the manner indicated in the instrument of authority. The exercise of this power is the act of the principal through, or by means of, the agent. It is exercised in the name of the principal, and requires as much formality in execution as if the principal were acting himself. This class of powers, so far as they pertain to the law of real property, will be more specifically explained in subsequent pages.² In both classes of powers just mentioned, statutory powers and powers of attorney, the legal title to the property thus disposed of is conveyed, not by the creation of the power, but by the deed of conveyance made in pursuance of the power. The title remains in the original owner, unaffected by the creation of the power, until its execution. It is divested only when the deed of conveyance is executed and delivered.³

§ 403. Powers of appointment.—The third class of powers, enumerated above, is what concerns us at present, viz.: powers of appointment. These powers, which are generally known simply as powers, are modes of disposition of property, which operate under the Statute of Uses or the Statute of Wills. The creation of the power invests in the person to whom it is granted, called the donee, a present indefeasible executory interest in the land. It is a right to convey the land, and cannot be revoked by the donor, nor is it revoked by his death.⁴ The

¹ *Baltimore v. Porter*, 18 Md. 284. See also, *Markham v. Porter*, 33 Ga. 508; *In the Matter of Bull*, 45 Barb. 334; *Leak v. Richmond Co.*, 64 N. C. 132.

² See *post*, Secs. 569, 570.

³ 2 Washburn on Real Prop. 610; 1 Sugden on Pow. (ed. 1856), 1, 171, 174; 3 Washburn on Real Prop. 277-279. "A power of sale may lawfully reside in one who has no legal or equitable interest in the property which is the subject of sale." *Coleman v. Cabaniss* (Ga. 1904), 48 S. E. Rep. 927.

⁴ *Roland v. Coleman*, 76 Ga. 652.

common law knows of no class of powers which will in themselves, by their very creation, convey an interest in real property, and thus incumber the title thereof.⁵ There are only two modes of creating such a power. One is by way of a use. The power in such a case is "a right to limit a use." (Kent.) In the exercise of the power a use is created, which is immediately executed into a legal estate by the Statute of Uses in the person to whom the use has been limited, and who is called the *appointee*. The estates created by means of these powers are either contingent, springing or shifting uses, according to their relation with the other limitations in the deed or will creating the power, and are governed by the same rules of construction.⁶ An ordinary contingent use vests upon the happening of an uncertain event. In the case of an estate created by means of a power of appointment, the uncertain event is the exercise of the power.⁷ The other mode of creating this kind of power is by will under the Statute of Wills. The estate so created is an executory devise, deriving its force and effect from the will itself. All powers in a will operate under the Statute of Wills, except where it takes the form of a power to limit a use, and there is a special seisin raised by the will to support the use thus limited. Then it operates under the Statute of Uses, as a contingent or future use.⁸ Whether the power be created by deed or by will, the appointee's estate will have the same characteristics as it would have had if, instead of the power, it had been limited in the instrument creating the power. And in order to determine the rights of the appointee, and the validity and character of the estate appointed to his use, it must be tested by the relation it would bear to the other limitations of the property, if it had occupied the

⁵ Sugden on Pow. (ed. 1856) 4; Co. Lit. 237 a. See *contra*, Chance on Pow. Secs. 5-12.

⁶ Co. Lit. 271 b, n. 231; Bac. Law Tr. 314; 1 Spence Eq. Jur. 455; 4 Kent's Com. 334; Williams on Real Prop. 394.

⁷ Co. Lit. 271 b, Butler's note, 231; Tud. Ld. Cas. 264; Sheph. Touch. 529; Williams on Real Prop. 294; Rodgers v. Wallace, 5 Jones L. 182.

⁸ Sugden on Pow. (ed. 1856) 240; Prest. Abst. 347.

place of the power in the original instrument. The appointor is merely an instrument employed to limit the estate; the appointee is in by the original instrument, which creates the power.⁹ The foregoing explanation of the doctrine of powers is true as to this country generally, with, perhaps, the only exception of New York and of those States in which the New York legislation has been copied. In those States all powers, heretofore known as operating under the Statute of Uses and the Statute of Wills, have been abolished, and only certain powers, enumerated in the statute, can now be created. But they have received at the hands of the courts practically the same constructions as powers in other States, so that what is subsequently said of powers of appointment is equally applicable to powers in New York, the only difference being that there they operate under the statute of New York, instead of the old English Statutes of Uses and Wills, and are confined to certain objects.¹⁰

§ 404. **Kinds of powers.**—Powers of appointment may be conferred upon persons having an interest or estate of some kind in the land, or they may be given to persons who are otherwise altogether strangers to the property. In the latter case they are called *collateral* or *naked* powers; the power is not attached to any present estate, and the donee possesses the mere right to exercise the power.¹¹ In the former case the power is either *appendant* or *in gross*, according to its relation

⁹ 1 Sugden on Pow. (ed. 1856) 171, 242; Co. Lit. 271 b, Butler's note, 231, Sec. 3, Pl. 4; Gilbert on Uses, 127 n; 4 Kent's Com. 337; 4 Cruise Dig. 220; 2 Washburn on Real Prop. 636, 637; Doolittle v. Lewis, 7 Johns. Ch. 45; Bradish v. Gibbs, 3 Johns. Ch. 550.

¹⁰ N. Y. Rev. Stat. Art. 3, Secs. 86-148; Hotchkiss v. Elting, 36 Barb. 38; Weinstein v. Weber, 178 N. Y. 94, 70 N. E. Rep. 115.

¹¹ Tud. Ld. Cas. 286; Williams on Real Prop. 294; 1 Sugden on Pow. 107; 2 Washburn on Real Prop. 639; Richardson v. Hunt, 59 Hun 627; Potter v. Couch, 141 U. S. 296, 1 Rev. St. N. Y. (Edm. ed.), Pt. 2, C. 1, Tit. 2, Secs. 55, 59; Robinson v. Adams, 80 Miss. 1098, 81 App. Div. 20, 71 N. E. Rep. 1139. See Coleman v. Cabaniss (Ga. 1904), 48 S. E. Rep. 927.

to the estate, to which it is attached. Any power whose execution creates an estate, which issues, partly or wholly, out of an estate vested in the donee, is a power *appendant*. Thus where a tenant for life has the right to make leases in possession, which are to continue until their natural termination, independent of the lessor's life estate, this is called a power *appendant*. The lease granted takes effect immediately in derogation of the tenant's life-estate, and binds the remainder-man, if it does not expire during the continuance of the life estate.¹² Powers *in gross* are those which do not conflict with the estate of the donee, and authorize the limitation of estates, which take effect out of the interest or estate of some one else. Such would be a power given to a life tenant to dispose of the remainder, to raise a jointure for his wife, to make leases commencing at his death. The exercise of these powers cannot by any possibility affect the estates to which they are attached.¹³ Powers are also divided into *general*, and *special* or *particular*. If the donee has the power to appoint to whom he pleases, it is a general power; and if he can appoint to only certain particular persons, it is a special or particular power.¹⁴ Then again a general power may be for the benefit of the donee, or one in trust for certain beneficiaries.¹⁵ If the power be to create a new estate, it is called a power of appointment.¹⁶ If it be

¹² Williams on Real Prop. 310; 2 Washburn on Real Prop. 639, 640; Maundrell v. Maundrell, 10 Ves. 246; Wilson v. Troup, 2 Cow. 236.

¹³ 1 Sugden on Pow. 114; 4 Cruise's Dig. 220; Gorin v. Gordon, 38 Miss. 214; Wilson v. Troup, 2 Cow. 236; Tud. Ld. Cas. 293.

¹⁴ 2 Washburn on Real Prop. 641; Co. Lit. 271 b, Butler's note, 231, Pl. 4, Sec. 3; Williams on Real Prop. 309; Wright v. Wright, 41 N. J. Eq. 382.

¹⁵ Tud. Ld. Cas. 294; Williams on Real Prop. 307, 308; Chance on Pow., Sec. 34; Howell v. Tyler, 91 N. C. 207.

¹⁶ "The power of appointment given by the will of B. devising property to J. for life, with authority to dispose of it by will, is properly exercised by J. devising the property to M. for life, with power to dispose of it by will; the power conferred on M. by J. not being a mere delegation of the power vested in J. by B.'s will." Mays v. Beech (Tenn. 1905), 86 S. W. Rep. 713.

simply to destroy an estate already vested, it is called a power of revocation. A power of appointment always implies a power of revocation, but as a rule an express power of revocation will not raise by implication a power of appointment. A power of appointment cannot be exercised without revoking a previous limitation; by the exercise of the power of revocation, where there is no express power of appointment, the land reverts to the grantor and his heirs.¹⁷

§ 405. **Suspension and destruction of powers.**—All general powers, given for the benefit of the donee, may be released by him to one holding the freehold, whether in possession, remainder, or reversion, and thus destroyed. And this too, whether the power be appendant, *in gross*, or collateral. For, it being given for the sole benefit of the donee, if he releases it, he will not be allowed thereafter to exercise it in derogation of his own release.¹⁸ But a special power, or a general power in trust for certain beneficiaries, cannot be extinguished or released by an act of the donee alone. The power in such cases is in the nature of a trust, and the beneficiaries have rights therein which are beyond the power of the donee to destroy.¹⁹ And where the exercise of the special power is mandatory, thereby imposing upon the donee a peremptory duty to exercise it; or where the discretion, if any is given the donee as to its exercise, is to be exerted and employed at some future time, the donee has no power to extinguish or release it, even though the persons interested in, and to be benefited by its ex-

¹⁷ 4 Cruise's Dig. 219, 220; Sandf. on Uses 154; Tud. Ld. Cas. 264; 4 Kent's Com. 415; Wright v. Tallmadge, 15 N. Y. 307; Ricketts v. Louisville, etc., R. R. Co. (Ky.), 15 S. W. Rep. 182.

¹⁸ Tud. Ld. Cas. 294; Edwards v. Slater, Hard. 416; Chance on Pow., Sec. 3115; 1 Sugden on Pow. 112; Williams on Real Prop. 310; West v. Berply, 1 Russ. & M. 431; Grosvenor v. Bowen, 15 R. I. 549; Spencer v. Kimball (Me. 1904), 98 Me. 499, 57 Atl. Rep. 793.

¹⁹ Co. Lit. 237 a, 265 b; 1 Sugden on Pow. 117; Doe v. Smyth, 6 B. & C. 172; s. c. 9 Dowl. & Ry. 136; Townson v. Tickell, 3 B. & A. 31; Chance on Pow., Sec. 3105; Graham v. Whitridge (Md. 1904), 57 Atl. Rep. 609.

ercise, consent to release, and join in the deed.²⁰ But if it is within the discretion of the donee when and whether, if at all, he should execute the power, a joint deed of release by himself and the beneficiaries will extinguish the power.²¹ Where the power is appendant, the conveyance of the entire estate to which the power is annexed will destroy the power. The power can only be exercised in derogation of the estate, and the donee will not be permitted to defeat his own grant by executing the power.²² But if he conveys only a part of his estate, leaving a reversion in him, the exercise of the power will only be suspended or postponed to the estate so granted, and the estate created by the power will vest upon the termination of the prior demise.²³ The power may be exercised at any time; only the enjoyment of the estate thus created is postponed.²⁴ But no conveyance of the estate of the donee, except by feoffment, will cause an extinguishment of the power *in gross*. As

²⁰ 2 Washburn on Real Prop. 643; Chance on Pow., Sec. 3121; Williams on Real Prop. See *Dave v. Johnson*, 141 Mass. 287.

²¹ *Brown & Sterritt's Appeal*, 27 Pa. St. 62; *Allison v. Wilson's Exrs.*, 13 Serg. & R. 330. See *Hare v. Cong. Soc.* (Vt. 1904), 57 Atl. Rep. 964.

²² *Goodright v. Cator*, Dougl. 460; *Wilson v. Troup*, 2 Cow. 195; 1 Sugden on Pow. 113-115; *Parker v. White*, 11 Ves. Jr. 209; *Walmesley v. Jowett*, 23 Eng. L. & E. 353; *Jones v. Windwood*, 4 Meas. & Wels. 653; Chance on Pow. Secs. 3155, 3159; Williams on Real Prop. 310; Tud. Ld. Cas. 260, 290; 4 Cruise's Dig. 157; *Bringloe v. Goodson*, 4 Bing. N. C. 726.

²³ *Ren v. Bulkeley*, Dougl. 292; *Tyrrell v. Marsh*, 3 Bing. 31; *Roper v. Halifax*, 8 Taunt. 845; *Doe v. Scarborough*, 3 Adolph. & Ell. 2; 4 Cruise's Dig. 221; *Goodright v. Cator*, Dougl. 477; Tud. Ld. Cas. 287. See *Graham v. Whitridge* (Md. 1904), 57 Atl. Rep. 609.

²⁴ 1 Sugden on Pow. 114, 115, citing *Bringloe v. Goodson*, 4 Bing. N. C. 726; Anon, Moore 612; *Bullock v. Thorne*, Moore 615; *Ren v. Bulkeley*, Dougl. 292; Tud. Ld. Cas. 546; Chance on Pow., Sec. 402. *Contra*, *Snape v. Turton*, Cro. Car. 472; *Mordaunt v. Peterborough*, 3 Keb. 305. But if the power appendant enables only the creation of estates in possession, as where it is a power to make leases in possession and not *in futuro*, the exercise of the power is altogether suspended. *Bringloe v. Goodson*, 4 Bing. N. C. 726; 1 Sugden on Pow. 116.

a rule a release is the only mode of extinguishing this kind of power.²⁵

§ 406. **How powers may be created.**— Powers may be created by deed or by will. They may be incorporated in the same instrument which conveys the property, or they may be indorsed thereon, or even granted by a separate instrument. If the instrument be a deed operating by transmutation of possession, the conveyance of the legal estate is necessary for the creation of the power. In the case of every instrument of conveyance, there can be a valid grant of power without a transfer of the legal estate.²⁶ No particular words or phrases are required. Any words which clearly indicate the intention of the donor to create a power, and which define its scope with a reasonable degree of certainty, will be sufficient. This rule governs all classes of powers, whether operating under the Statute of Uses or the Statute of Wills.²⁷ Where the deed which creates the power, operates by transmutation of possession, and a seisin is therefore raised by the deed to support the use, which is to be created under the power, the legal estate so conveyed must be as extensive as the use to

²⁵ Chance on Pow., Sec. 3172; *Edwards v. Slater*, Hard. 416; *Savile v. Blacket*, 1 P. Wms. 777; 2 Washburn on Real Prop. 643; 1 Sugden on Pow. 112. See *Weinstein v. Webber*, 178 N. Y. 94, 70 N. E. Rep. 115.

²⁶ *Outon v. Weeks*, 2 Keb. 809; *Fitz v. Smallbrook*, 1 Keb. 134; 1 Sugden on Pow. 217, 228-231; *Gilbert on Uses* 46; *Williams on Pers. Prop.* 246; Co. Lit. 271 b, III, Sec. 5, *Butler's note*; *Powell on Devises*; 1 Sandf. on Uses 195; *Andrews' Case*, Moore 107; *Fearne Cont. Rem.* 128; *Rash v. Lewis*, 21 Pa. St. 72; 3 Kent's Com. 319; *Maundrell v. Maundrell*, 10 Ves. 255; 6 Cruise's Dig. 490. "A naked power of disposition under a will may exist exclusive of any beneficial interest in the donee." *Rehearing* (1903), 69 N. E. Rep. 250, denied. *Hammond v. Croxton* (Ind. 1904), 70 N. E. Rep. 368.

²⁷ 2 Washburn on Real Prop. 650; 1 Sugden on Pow. 118; *McCord v. McCord*, 19 Ga. 602; *Chooftall v. Powell*, 1 Grant's Cas. 19; *Bradley v. Westcott*, 13 Ves. 445; *Smith v. Bell*, 6 Pet. 68; *Harris v. Knapp*, 21 Pick. 416; *Brant v. Va. Coal Iron Co.*, 93 U. S. 326; *Best v. Best* (Ky.), 11 S. W. Rep. 600; *Goudie v. Johnston*, 109 Ind. 427; *Logue v. Bateman*, 43 N. J. Eq. 434; *Fritsch v. Klausing* (Ky.), 13 S. W. Rep.

be thus created. The appointee under the power cannot take a larger estate than that granted to the feoffee to uses. This is only a special application of a general rule governing all classes of uses.²⁸

§ 407. Powers distinguished from estates.—As a consequence of this liberal rule concerning words necessary to create a power, it is very often difficult to determine whether the intention of a testator was to give an estate in the land, or only a naked power. Since technical words are used to create an estate by deed, it rarely happens that doubt will arise in the construction of a power by deed. The question, therefore, possesses importance only in relation to wills.²⁹ The intention of the testator will always govern whenever it can be clearly ascertained, even though the literal meaning of the words used would indicate a different conclusion.³⁰ The most numerous cases have arisen under devises, in which executors are directed to sell lands for the purpose of distribution. If the executors are intended to have possession, until sale under the power, then it is, of course, a power coupled with an interest, and the estate does not descend for the time being to the donor's heirs.³¹ Succinctly stated, if the devise be that "the

241; *Watson v. Sutro* (Cal.), 24 Pac. Rep. 172; *Woerz v. Rademacher*, 120 N. Y. 62; *In re Carr* (R. I.), 19 Atl. Rep. 145; *Brown v. Crittenden* (Ky.), 1 S. W. Rep. 421; *Cooghan v. Ockershausen*, 55 N. Y. Super. Ct. 286; *Ames v. Ames*, 15 R. I. 12; *Cherry v. Greene*, 115 Ill. 591; *Wright v. Wright*, 41 N. J. Eq. 382.

²⁸ Co. Lit. 271 b, Butler's note 231; *Cleveland v. Hallett*, 6 Cush. 403; 1 Sugden on Pow. 231.

²⁹ 4 Kent's Com. 319; *Sharpsteen v. Tillon*, 3 Cow. 651; *Peter v. Beverley*, 10 Pet. 532; *Jackson v. Jansen*, 6 Johns. 73; *Jackson v. Schaubert*, 7 Cow. 187; *Walker v. Quigg*, 6 Watts 87; *Ladd v. Ladd*, 8 How. 10; *Richardson v. Hunt*, 59 Hunt 627; *Potter v. Couch*, 141 U. S. 296; *Bean v. Com.* (Mass. 1904), 71 N. E. Rep. 784.

³⁰ *Bloome v. Waldron*, 3 Hill 361; see cases cited in preceding note; *Franklin v. Osgood*, 14 Johns. 527; *De Vaughn v. McLeroy*, 82 Ga. 687; *In re Rising*, 73 Law Ch. 455 (1904), 1 Ch. 533, 90 Law T. 504.

³¹ *Gray v. Lynch*, 8 Gill 403; *Hartley v. Minor's* App. 53 Pa. 212; *Clarey v. Frayer*, 8 Gill & J. 403; 4 Kent's Com. 320.

executor shall sell," or that "the land shall be sold," only a naked power is granted. But a devise to the executor to sell, or words of similar import, will vest the legal title in him; it will be a power coupled with an interest.³² All doubt is, of course, removed where the will makes some other disposition of the legal estate.³³ In New York, by statute, the executor in all such cases takes only a naked power, unless some duty is imposed upon him in regard to the management of the property, which would require its possession.³⁴

§ 408. Power enlarging the interest, with which it is coupled.— If the power is general and coupled with an interest, the duration of which is not clearly defined, as where there is a devise of lands generally, with full power to dispose of them by deed or by will, the devise will be construed to be that of an estate in fee, and not simply a life estate with a general power in gross attached thereto. But if the power is special, or a particular estate is expressly given with a general power of disposal, the power will not enlarge the estate, and the tes-

³² *Yates v. Crompton*, 3 P. Wms. 308; *Lancaster v. Thornton*, 2 Burr 1027; 1 *Williams on Ex.* 540; 4 *Kent's Com.* 326; 1 *Sugden on Pow.* 189-194; *Jackson v. Shauber*, 7 Cow. 18; Co. Lit. 113 a, *Hargrave's note* 2; *Greenough v. Wells*, 10 Cush. 571; *Gordon v. Overton*, 8 Yerg. 121; *Warfield v. English* (Ky.), 11 S. W. Rep. 662; *Herberts v. Herberts' Exrs.*, 85 Ky. 134; *Traphagen v. Levy*, 45 N. J. Eq. 448; *Perkins v. Presnell*, 100 N. C. 220; *Naar v. Naar*, 41 N. J. Eq. 88; *Spencer v. Kimball*, 98 Me. 499, 57 Atl. Rep. 793.

³³ *Den v. Aweling*, 1 Dutch. 449; *Hemingway v. Hemingway*, 22 Conn. 462; *Peter v. Beverley*, 10 Pet. 532; *Ladd v. Ladd*, 8 How. 10; *Inglis v. McCook* (N. J. Ch. 1904), 59 Atl. Rep. 630.

³⁴ N. Y. Rev. Stat., Art. 2, Sec. 68; *Aldrich v. Green*, 1 N. Y. S. 549. In Pennsylvania a statute provides that in all such cases, whatever may be the phraseology used, the executor takes the power coupled with the estate. *Shippen's Heirs v. Clapp*, 29 Pa. St. 265. "Where a will devised all testator's realty to his wife for life, with power to devise, sell, and mortgage the estate in fee, and convert the proceeds to her own use, etc., the power conferred on the wife was absolute, within Rev. St. 1898, Sec. 2112, defining an absolute power as one by means of which the grantee is able in his lifetime to dispose of the estate for his own benefit." *Auer v. Brown* (Wis. 1904), 98 N. W. Rep. 986.

tator's heirs will take as reversioners, if the power is not exercised.³⁵ But this is not an absolutely invariable rule. If, from the whole will it appears to have been the testator's intention to give a fee simple estate, the estate will be enlarged by

³⁵ 1 Sugden on Pow. 179, 180; *Flintham's App.*, 11 Serg. & R. 23, 24; *Jackson v. Robbins*, 16 Johns. 537; *Burleigh v. Clough*, 52 N. H. 272; *Herrick v. Babcock*, 12 Johns. 389; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 482; *Green v. Sutton*, 50 Mo. 190; *Urich's App.*, 86 Pa. St. 386, 27 Am. Rep. 707; *Page v. Roper*, 21 Eng. L. & E. 499; *Crozier v. Bray*, 120 N. Y. 366; *Glover v. Reid* (Mich.), 45 N. W. Rep. 91; *Jenkins v. Compton* (Ind.), 23 N. E. Rep. 1091; *Cashman's Estate*, 28 Ill. App. 346; *Kibler v. Huver*, 10 N. Y. S. Rep. 375; *Hood v. Haden*, 82 Va. 588; *Lininger's Appeal*, 110 Pa. St. 398; *Douglass v. Sharp*, 52 Ark. 113; *Rood v. Watson*, 54 Hun 85; *Lewis v. Pitman* (Mo.), 14 S. W. Rep. 52; *Sanborn v. Sanborn*, 62 N. H. 631; *Miller's Admr. v. Potterfield* (Va.), 11 S. E. Rep. 486; *Wittmore v. Russell*, 80 Me. 297; *Glover v. Stillson* (Conn.), 15 Atl. Rep. 752; *Gray v. Missionary Society*, 2 N. Y. Sup. Rep. 878; *Forsythe v. Forsythe*, 108 Pa. St. 129; *Cresap v. Cresap*, 34 W. Va. 310; *Dull's Estate*, 137 Pa. St. 112; *Holsen v. Kockhouse*, 83 Ky. 233; *Peckham v. Lego*, 57 Conn. 553; *Gaven v. Aller*, 100 Mo. 293; *Graves v. Trueblood*, 96 N. C. 495. See *Best v. Best* (Ky.), 11 S. W. Rep. 600; *In re Cager's Will*, 111 N. Y. 343; *Richardson v. Richardson*, 80 Me. 585; *McConnell v. Wilcox* (Ky.), 12 S. W. Rep. 469; *In re Foster's Will*, 76 Iowa 36. "Where a power to dispose of a life estate is given by the will creating it, such power is only coextensive with the interest of the donee, unless the contrary appears." *Dickinson v. Griggsville Nat. Bank*, 111 Ill. App. 183; *In re L. Hammeden*, 138 Fed. Rep. 606. That a life tenant, with an absolute power of disposition is held to have the life estate enlarged by the grant of a general power of disposal, so that the fee may be conveyed, is held in many cases and the reason for the recognition of such an enlargement of the estate is tersely stated by the North Carolina court, in a leading case, as follows: "This is a power appurtenant to her life estate; and the estate which may be created by its exercise will take effect out of the life estate given to her, as well as out of the remainder. A power of this description is construed more favorably than a naked power given to a stranger, or a power appendant, because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously." *Troy v. Troy*, 60 N. C. 623. See also, *Underwood v. Cave* (Mo.), 75 S. W. Rep. 455; *Wright v. Westbrook*, 121 N. C. 156, 28 S. E. Rep. 299; *White v. White*, 21 Vt. 250; *Chew v. Keller*, 100 Mo. 362, 13 S. W. Rep. 395; *Burford v. Aldridge*, 165 Mo. 419, 63 S. W. Rep. 109; *Cummings v. Shaw*. 108

the power, notwithstanding the devisee's estate has been expressly limited for life.³⁶ And where the power annexed enlarges the estate into a fee, it will, if not expressly qualified, render any subsequent limitation void.³⁷ In every case the limitation of the power of disposal must be clear, especially in a will. For where the limitation of the estate is expressly for life, the power of disposal may be limited in its operation to the life estate.³⁸

§ 409. Who can be donees.—Any one, who is capable of holding and disposing of his own property, can be the donee of the power. It seems also that a purely collateral power

Mass. 159; *Parks v. Robinson* (N. C.), 50 S. E. Rep. 649; *Clifford v. Choate*, 100 Mass. 340. This rule, however, is not followed by the Federal Supreme Court, which consistently adheres to the doctrine that a general power of disposal, by a life tenant, does not enlarge the estate into a fee, or authorize the conveyance of the fee, as such a power would be inconsistent with the grant of an estate for life. *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Brant v. Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745.

³⁶ *Goodtitle v. Otway*, 2 Wils. 6; *Bradford v. Street*, 11 Ves. 135; *Doe v. Lewis*, 3 Adol. & Ell. 123; *Wilson v. Gaines*, 9 Rich. Eq. 420; *Andrew v. Brumfield*, 32 Miss. 107; *Denson v. Mitchell*, 26 Ala. 360; *Burke v. Stiles* (N. H.), 18 Atl. Rep. 657; *Walker v. Pritchard*, 121 Ill. 221; *Lienan v. Summerfield*, 41 N. J. Eq. 381; *Russell v. Eubanks*, 84 Mo. 82; *Morford v. Dieffenbacker*, 54 Mich. 593; *Bowen's Admr. v. Bowen's Admr.* (Va.), 12 S. E. Rep. 885. "A power of sale given to the devisee of a life estate becomes inoperative as a power from the testatrix, where he is also the devisee of the remainder, and a mortgage given by him in his individual right is valid." *Spencer v. Kimball* (Me. 1904), 57 Atl. Rep. 793, 98 Me. 499.

³⁷ *Jones v. Bacon*, 68 Me. 34; *s. c.* 28 Am. Rep. 1; *McKenzie's App.*, 41 Conn. 607, 19 Am. Rep. 525; *Rona v. Meier*, 47 Iowa 607, 29 Am. Rep. 403. See *ante*, Sec. 298. Under Wis. Rev. St. (1898), Sec. 2108, an absolute power of disposition, not accompanied with a trust, changes the estate of the donee into a fee, as to creditors and purchasers, subject to future estates limited thereon. *Auer v. Brown* (Wis. 1904), 98 N. W. Rep. 966.

³⁸ *Patty v. Goolsby*, 51 Ark. 61; *Douglass v. Sharp* (Ark.), 12 S. W. Rep. 202; *Cox v. Sims*, 125 Pa. St. 522; *Fernbacher v. Fernbacher*, 4 Dem. 227; *s. c.* 17 Abb. N. C. 330; *Dickinson v. Bank*, 111 Ill. App. 183,

may be exercised by an infant; but this is doubtful, and it is to be supposed that, where the power is to be executed by means of an instrument which an infant is not capable of making, he will not be able to execute the power until he becomes of age.³⁹ But a married woman can exercise a power as freely as if she were a *feme sole*. This is a common mode of enabling a married woman to dispose of the property secured to her by marriage settlement.⁴⁰

§ 410. By whom the power may be executed.—As a general proposition, only those who are named as the donees in the instrument creating the power can execute the power. In testamentary powers, the executor will be impliedly vested with the power, if no donee is specially named or described.⁴¹ The donee cannot assign it unless he is expressly authorized, nor can his personal representatives execute it unless expressly named.⁴² This, however, is not true of powers in trust, or powers coupled with an interest, the execution of which does not require the exercise of a special discretion reposed in the particular donee. In the case of a power in trust, the court will not allow any accident to or neglect of the trustee—not even his death—to defeat the trust power. It will either compel the trustee to execute it or appoint a new trustee in his stead, who will have the same powers.⁴³ But the trustee cannot delegate his power without authority.⁴⁴ It would, how-

³⁹ 4 Kent's Com. 324, 325; 1 Sugden on Pow. 181-211; 2 Washburn on Real Prop. 652.

⁴⁰ 1 Sugden on Pow. 182; 4 Kent's Com. 325; Doe v. Eyre, 3 C. B. 578; s. c. 5 C. B. 741; Ladd v. Ladd, 8 How. 27; Rush v. Lewis, 21 Pa. St. 72; Doe v. Vincent, 1 Houst. 416-427. See *ante*, Sec. 348, note.

⁴¹ Officer v. Board of Home Missions, 47 Hun 372.

⁴² 1 Sugden on Pow. 214, 215; 4 Cruise's Dig. 211; Cole v. Wade, 16 Ves. 27; *Re Bierbaum*, 40 Hun 504; Reeves v. Tappan, 21 S. C. 1.

⁴³ 2 Sugden on Pow. 158; Greenough v. Wells; Hunt v. Rousmanier, 8 Wheat. 207; Leeds v. Wakefield, 10 Gray 517; Doe v. Ladd, 77 Ala. 223.

⁴⁴ Story's Eq. Jur. 1062; Franklin v. Osgood, 14 Johns. 562, 563; Peter v. Beverley, 10 Pet. 565; Cole v. Wade, 16 Ves. 28 n; 1 Sugden on Pow. 214-216; Lewin on Tr. 228. "Where a power is given in a will

ever, not be a delegation of power for the donee to direct his agents to do the subordinate ministerial acts.⁴⁵ A power coupled with an interest will ordinarily, not only survive the donee, but can be exercised by him, to whom the interest has been assigned, provided always the power is not expressly personal to the donee.⁴⁶ Where the power is limited to several as a class, such as executors, trustees, or sons, although all must join in the execution, if alive, the power will survive the death of one or more; but there must be at least two surviving, in order to comply with the plural description of the donees.⁴⁷ In the case of executors, the rule is so far relaxed that a single survivor may execute the power; and where the power is coupled with an interest, the power may be exercised by those who qualify as executors; it is not necessary for the others to join in the execution of the power.⁴⁸ Its exercise does not, however, depend upon their qualification as executors; they may insist upon their right to join in the execution, even though they or any of them have failed to qualify or have resigned or died by words that clearly indicate that the donor placed special confidence in the donee, so that the element of personal choice is found, such power must be exercised by the person or persons thus selected, and ordinarily is not transmissible." *Sells v. Delgado* (Mass. 1904), 70 N. E. Rep. 1036.

⁴⁵ *Toder v. Herring* (Miss.), 6 So. Rep. 840.

⁴⁶ *Hunt v. Rousmanier*, 8 Wheat. 203; *Wilson v. Troup*, 2 Cow. 236; *Bergen v. Bennett*, 1 Caines' Cas. 15; *Hartley's v. Minor's App.*, 53 Pa. St. 212; *Jencks v. Alexander*, 11 Paige Ch. 619; *Doolittle v. Lewis*, 7 Johns. Ch. 45. "A testamentary appointment in discharge of a moral or legal obligation does not lapse merely by reason of the appointee predeceasing the testator, but extends to the legal personal representative of the appointee." *Stevens v. King*, 73 Law J. Ch. 535 (1904), 2 Ch. 30, 90 Law T. 665, 52 Wkly Rep. 443.

⁴⁷ 1 Sugden on Pow. 144, 146; Story's Eq. Jur., Secs. 1061, 1062, n; 4 Greenl. Cruise Dig. 211 n; Co. Lit. 113, Hargrave's note 146; *Franklin v. Osgood*, 14 Johns. 553; *Peter v. Beverley*, 10 Pet. 564; *Montefiore v. Browne*, 7 H. L. Cas. 261.

⁴⁸ 4 Kent's Com. 220; *Bergen v. Bennett*, 1 Caines' Cas. 16; 1 Sugden on Pow. 144, 146; *Peter v. Beverley*, 10 Pet. 564; *Tainter v. Clark*, 13 Metc. 220; *Naunborf v. Schunlann*, 41 N. J. Eq. 14; *Vernor v. Coville*, 44 Mich. 281; *In re Bailey*, 15 R. I. 60.

their executorships.⁴⁹ So, also, may the power be exercised by the executors, after they have been discharged from the administration of the estate.⁵⁰ But this is the case only when the power is given to the executors *nominatim*. If the power is given *virtute officii* then the power can only be exercised by the acting executors.⁵¹ And although by the law the executor, appointed by will in one State, may not be able to exercise the ordinary powers of an executor over lands situated in another State, yet he may execute a testamentary power of sale when directed so to do.⁵² Where the power is given to several donees *nominatim*, it indicates the repose of a personal discretion in each, and the power will not survive the death of one of them.⁵³ So, also, if a power is given one or more executors by name, it cannot be exercised by an administrator with the will annexed.⁵⁴ But it is otherwise, if the power is given to the executor as such.⁵⁵

§ 411. **Mode of execution.**—In the execution of the power the donee must observe strictly all the conditions and restrictions imposed by the donor, both as to the manner and the time of execution. The donor has the right to impose whatever conditions he pleases, and however unessential they may appear to be, a neglect of them would make the execution defective. They must be strictly complied with.⁵⁶ Thus a power

⁴⁹ *Tainter v. Clarke*, 13 Metc. 220; *Clark v. Tainter*, 7 Cush. 567; *Treadwell v. Cordis*, 5 Gray 341; *Dunning v. Ocean Nat. Bank*, 6 Lans. (N. Y.) 296. See cases cited in note 47 *supra*.

⁵⁰ *Scholl v. Olmstead*, 84 Ga. 603, 11 S. E. Rep. 541.

⁵¹ *Yates v. Compton*, 2 P. Wms. 309; *Ross v. Barclay*; *Water v. Margerson*, 10 P. F. S. (Pa.) 39; *Evans v. Chew*, 21 P. F. S. 47.

⁵² *Doolittle v. Lewis*, 7 Johns. Ch. 45-48. But see *Hutchins v. State Bank*, 12 Metc. 425.

⁵³ Co. Lit. 113, Hargrave's note 146; 4 Greenl. Cruise Dig. 211 n; Story's Eq. Jur., Secs. 1061, 1062; 1 Sugden on Pow. 144-146; *Peter v. Beverley*, 10 Pet. 563; *Franklin v. Osgood*, 14 Johns. 553; *Tainter v. Clarke*, 13 Metc. 220; *Cole v. Wade*, 16 Ves. 27.

⁵⁴ *Re Bierbaum*, 40 Hun 500; *Compton v. McMahan*, 19 Mo. App. 490.

⁵⁵ *Griggs v. Voghte* (N. J.), 19 Atl. Rep. 867.

⁵⁶ *Sugden on Pow.* 221, 250, 278; *Langford v. Eyre*, 1 P. Wms. 740;

to appoint by deed cannot be exercised by will; but if there is no restriction as to the kind of instrument, it may be either by deed or by will.⁵⁷ So must all other special directions be observed, and conditions performed.⁵⁸ If the power be to sell, the property can be sold only in the manner prescribed by the donor, and a power of sale will not ordinarily imply a power to mortgage.⁵⁹ And a power to rent or lease does not include the power to sell absolutely.⁶⁰ It is customary for the donee's instrument of conveyance to contain a recital of the power under which he acts, but this recital is not competent evidence of the existence of the power, and if it is questioned it must be established by other testimony.⁶¹

§ 412. Who may be appointees.— If it be a general power, any one whom the donee selects may take under the power. A wife may appoint the estate to her husband, and so may the husband to his wife.⁶² Likewise the donee may appoint

Habergham v. Vincent, 2 Ves. 231; *Wright v. Wakeford*, 17 Ves. 454; *Wright v. Barlow*, 3 Maule & S. 512; *Ives v. Davenport*, 3 Hill 373; *Williams on Real Prop.* 295. "An execution of a power under a will, which is contrary to the limitation contained therein, is void." *Ketchin v. Rion* (S. C. 1904), 47 S. E. Rep. 376.

⁵⁷ *Todd v. Sawyer* (Mass.), 17 N. E. Rep. 527. "A devise of testator's property to his wife, to will to his children 'as she thinks proper,' vests in the wife a discretion in the exercise of the power conferred, which includes the right of unequal distribution." *Allder v. Jones* (Md. 1903), 56 Atl. Rep. 487.

⁵⁸ *Ladd v. Ladd*, 8 How. 30-40; *Austin v. Oakes*, 117 N. Y. 577; *Rose v. Hatch*, 55 Hun 457; *Jennert v. Houser*, 4 Ohio C. C. 353; *Valentine v. Wyson* (Ind.), 23 N. E. Rep. 1076.

⁵⁹ 1 *Sugden on Pow.* 513; 4 *Kent's Com.* 331; *Bloomer v. Waldron*, 3 Hill 361; *Leavitt v. Pell*, 25 N. Y. 474; *Ives v. Davenport*, 3 Hill 373; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453.

⁶⁰ *Roe v. Vingut*, 117 N. Y. 204.

⁶¹ *Hershy v. Berman*, 45 Ark. 309. "If a deed can have no efficacy except by reference to a power, and the deed has been executed substantially as provided in the instrument creating the power, the estate will pass, although the power is not referred to in the deed." *Kirkman v. Wadsworth* (N. C. 1905), 49 S. E. Rep. 962.

⁶² *Sugden on Pow.* 182; 4 *Kent's Com.* 325; *Doe v. Eyre*, 3 C. B. 578;

himself.⁶³ And if the donee appoints to A. to the use of B. the Statute of Uses will execute the use in A., leaving the use in B. unexecuted, it being a use upon a use.⁶⁴ But this rule would not apply to powers which operated under the Statute of Wills. If it be a special power, it can be exercised only in favor of the special objects named. Thus a power of appointment to children will not support an appointment to grandchildren, unless in some unusual cases, strongly impregnated with circumstances, such as the non-existence of children at the time when the power was created, and the impossibility of other children being subsequently born, which clearly show an intention to refer to grandchildren under the name of children.⁶⁵ But the term *issue* is generally capable of embracing all descendants of every generation.⁶⁶

§ 413. **Execution by implication.**—In order to insure a valid execution, the power should be expressly referred to in the instrument of execution; but this is not necessary if it appears in any way, upon the face of the instrument, or from the facts of the case, to have been the intention of the donee to exercise the power.⁶⁷ And the courts have of late years so far relaxed the rule as to construe the instrument to be, by necessary intendment, a good execution of the power, if it cannot operate in any other way, notwithstanding the deed or will purports to dispose only of the individual property of the

s. c. 5 C. B. 741; *Ladd v. Ladd*, 8 How. 27; *Bradish v. Gibbs*, 3 Johns. Ch. 523; 2 Sugden on Pow. 24.

⁶³ 2 Washburn on Real Prop. 660; Williams on Real Prop. 295, n. 1.

⁶⁴ 1 Sugden on Pow. 229; 2 Prest. Abst. 248; 2 Washburn on Real Prop. 613.

⁶⁵ 2 Sugden on Pow. 253; 4 Kent's Com. 345; Tud. Ld. Cas. 306; *Wythe v. Thurlston*, Ambl. 555; *Horwitz v. Norris*, 49 Pa. St. 211. See *Allder v. Jones* (Md. 1903), 56 Atl. Rep. 487; *Biggins v. Lambert*, 203 Ill. 625, 73 N. E. Rep. 371.

⁶⁶ *Wythe v. Thurlston*, Ambl. 555; *Freeman v. Parsley*, 3 Ves. 421; *Drake v. Drake*, 56 Hun 390.

⁶⁷ 1 Sugden on Pow. 232; 4 Kent's Com. 334; Story's Eq. Jur., Sec. 1062 a.

donee.⁶⁸ A specific reference to the property subject to the power will be sufficient in the case of a collateral or naked power; but where the power is appendant or *in gross*, if there be no express reference to the power, only the legal estate, to which it is attached, will pass. The capacity of the instrument to operate upon the estate of the donee negatives any implied or presumed intention to exercise the power. And where the power is not coupled with an interest, if the donee has no property which he could dispose of by means of the instrument executed, it will be a good execution of the power, though neither the power nor the property was referred to.⁶⁹

§ 414. **Excessive execution.**—To what extent an excessive execution will affect the validity of the appointment depends upon the ability to separate the good part from the bad part. If the excess can be separated and clearly distinguished from what would have been a valid execution, the latter will be sustained, and only the excess declared void. But if such a separation cannot be made without destroying the evidence of the donee's intention to exercise the power in the manner in which he could, the whole will be avoided, and a failure of execution will be decreed.⁷⁰ Thus, if the appointment be made to a number of persons, some of whom can take and others cannot, it will be good as to the former, at least, in the case of a general power. If the power be special, it would be good as to those who can take, provided the partial execution of the

⁶⁸ Doe v. Vincent, 1 Houst. 416, 427; Taylor v. Eastman, 92 N. C. 601. See Kirkman v. Wadsworth (N. C. 1905), 49 S. E. Rep. 962.

⁶⁹ 4 Kent's Com. 335; Amory v. Meredith, 7 Allen 397; Blagge v. Miles, 1 Story 426; 1 Sugden on Pow. 432; 4 Cruise Dig. 212; Co. Lit. 271 b, Butler's note 231; 2 Washburn on Real Prop. 612; Doe v. Rooke, 6 B. & C. 720; Bepper's Will, 1 Pars. Eq. Cas. 440; Patterson v. Wilson, 64 Md. 193; Mut. Life Ins. Co. v. Shipman, 119 N. Y. 324; Hood v. Haden, 82 Va. 588; Lee v. Simpson, 134 U. S. 572; Kirkman v. Wadsworth (N. C. 1905), 49 S. E. Rep. 962.

⁷⁰ Tud. Ld. Cas. 306; 2 Sugd. Pow. 55, 62, 75; 4 Cruise Dig. 205; Crompe v. Barrow, 4 Ves. 681; Funk v. Eggleston, 92 Ill. 515, 34 Am. Rep. 136; Graham v. Whitridge (Md. 1904), 57 Atl. Rep. 609.

power in this manner does not affect the lawful rights of the others.⁷¹ So also if the donee appoints a larger sum or a larger estate than the power authorizes, the execution will be good within the limits of the power; or if he annexes to the appointment conditions which are prohibited or not authorized by the terms of the power, the illegal conditions will be void, and the appointee will take an absolute estate.⁷² In this connection it may be stated that the *cy pres* doctrine of construction applies to powers executed by will, as it does to all testamentary dispositions. If an appointment by will be void in part when literally construed, and there appears on the face of the will a general intent, which would be a good execution of the power were it not for the special intent manifested by the manner in which he executes it, the general intent will prevail, and the appointment will be held to be good. Thus, if the appointment be to an unborn son for life, with remainder to his (the son's) unborn sons in tail, since the latter limitation is void as against the rule of perpetuity, the court would construe the appointment an estate tail in the first taker, instead of a life estate, there appearing to have been a general intent to that effect.⁷³

§ 415. Successive execution.—The appointment of a less estate than what may be created under the power will be good, unless there is an express restriction against a partial execution.⁷⁴ And as long as the power is not exhausted it may be exercised successively, at different times over different parts

⁷¹ *Sadler v. Pratt*, 5 Sim. 632. See cases cited in note 58.

⁷² *Parker v. Parker*, Gibb. Eq. 168; 2 Sugd. Pow. 85; Tud. Ld. Cas. 317-319; *Alexander v. Alexander*, 2 Ves. Sr. 640; 4 Cruise Dig. 202; *Campbell v. Leach*, Ambl. 740.

⁷³ 2 Sugden on Pow. 60, 61; 2 Washburn on Real Prop. 666; *Robinson v. Hardcastle*, 2 T. R. 241; *Leeds v. Wakefield*, 10 Gray, 514, 519. See, *In re Risnig* (Eng. 1904), 73 Law. J. Ch. 455, 1 Ch. 533, 90 Law. T. 504; *Risnig v. Risnig*, *idem*.

⁷⁴ 4 Cruise Dig. 205; 2 Washburn on Real Prop. 621-688; *Butler v. Heustis*, 68 Ill. 594, 18 Am. Rep. 589.

of the property, or over different estates in the same tract of land, whether the power is one of appointment or of revocation. And where it is intended that the power shall not be subsequently exercised, it is the custom to release it, where that is possible.⁷⁵

§ 416. **Revocation of appointment.**—The donee cannot revoke his appointment, unless he expressly reserves the power of revocation in the instrument of appointment, or it is granted to him in the instrument of creation. And if the power may be exercised by deed or by will, the revocation of an appointment by deed will revive the power to appoint by will.⁷⁶

§ 417. **Defective execution — How and when cured.**—The general rule is that an execution, defective because of a failure to conform to the directions of the donor, will be nugatory, and the appointment absolutely void. And if the appointment is a mere gift to the appointee, and the power is general and free from the character of a trust, the slightest defect will invalidate the execution.⁷⁷ But if the power is special, or the execution is a trust and a peremptory duty upon the donee, or if the donee has received a valuable consideration for the appointment, equity will correct or make good the defective execution by ordering a re-execution,⁷⁸ provided there has been a sub-

⁷⁵ 1 Sugden on Pow. 342; 2 *Id.* 43-45; 4 Cruise Dig. 200, 201; Digges's Case, 1 Rep. 174; Co. Lit. 271 b, Butler's note 231; Woolston v. Woolston, 1 W. Bl. 281.

⁷⁶ 2 Sugden on Pow. 243; Co. Lit. 271 b, Butler's note 231; Saunders v. Evans, 8 H. L. Cas. 721.

⁷⁷ 2 Sugden on Pow. 98; Tud. Ld. Cas. 317; Inglis v. McCook (N. J. Ch. 1904), 59 Atl. Rep. 630.

⁷⁸ Hughes v. Wells, 9 Hare 749; Shannon v. Bradstreet, 1 Sch. & Lef. 52; Reid v. Shergold, 10 Ves. 370; Pollard v. Greenvil, 1 Chan. Cas. 10; Wilkes v. Holmes, 9 Mod. 485; Thorp v. McCullum, 1 Gilman 614; Hout v. Hout, 20 Ohio St. 119; Schenck v. Ellingwood, 3 Edw. Ch. 175; Bruce v. Bruce, L. R. 11 Eq. 371; Pepper's Will, 1 Pars. Eq. 436, 446; Huss v. Morris, 63 Pa. St. 367; Hervey v. Hervey, 1 Atk. 561; *In re Dyke's Estate*, L. R. 7 Eq. 337; Dowell v. Dew, 2 Y. & C. 345; Ellison

stantial compliance with the condition of execution, and the defect relates to the formalities of execution, such as the number of attesting witnesses, the technical words of limitations, conveyance, etc.⁷⁹ But there is no relief against the defective execution of a statutory power. The remedy for relief is confined to powers created by act of the owner of the property.⁸⁰

§ 418. *Non-execution.*—But if the donee has failed altogether to execute the power, or disregarded the material conditions imposed by the donor upon his execution, equity will not interfere to compel an execution,⁸¹ unless the power be a trust, the execution of which is mandatory. In such a case equity will not permit any accident or neglect of the donee to defeat the trust, and thus deprive the beneficiaries of their rights under the power. All mandatory powers, whether general or special, are trusts, and courts of equity will execute such powers, even if the donee has failed to exercise the power, and died. But there can never be any interference by the courts with discretionary powers, if the donees have refused to exercise them.⁸²

v. Ellison, 6 Ves. 656; *Watt v. Watt*, 3 Ves. 244; *Tudor v. Anson*, 2 Ves. Sen. 582.

⁷⁹ Story Eq. Jur., Secs. 169–175; 2 Sugden on Pow. 88, *et seq.*; 4 Cruise Dig. 222, *et seq.*; *Cotter v. Laver*, 2 P. Wms. 622; *Tollet v. Tollet*, 2 P. Wms. 489; *Schenck v. Ellenwood*, 3 Edw. Ch. 175; *Long v. Hewitt*, 44 Iowa 363; *Bradish v. Gibbs*, 3 Johns. Ch. 523, 550; *Barr v. Hatch*, 3 Ohio 527.

⁸⁰ *Gridley's Heirs v. Phillips*, 5 Kan. 349; *Kearney v. Vaughn*, 50 Mo. 284; *Smith v. Bowes*, 38 Md. 463; *Earl of Darlington v. Pulteney*, Cowp. 260; and see *Stewart v. Stokes*, 33 Ala. 494.

⁸¹ *Howard v. Carpenter*, 11 Md. 259; *Mitchell v. Denson*, 29 Ala. 327; *Bull v. Vardy*, 1 Ves. 270; *Tollet v. Tollet*, 2 P. Wms. 489; 1 Eq. Lead. Cas. 365, and notes (4 Am. ed.); *Arundell v. Phillpot*, 2 Vern. 69.

⁸² Story Eq. Jur., Secs. 169–175, 1062; 2 Sugden on Pow. 88, *et seq.*; 4 Cruise Dig. 222, *et seq.*; *Gorin v. Gordon*, 38 Miss. 214; *Neves v. Scott*, 9 How. 196–213; *Sedgwick v. Laffin*, 10 Allen 432; 1 Sugden on Pow. 158; *Withers v. Yeadon*, 1 Rich. Eq. 324, 329; *Brown v. Higgs*, 8 Ves.

§ 419. **Rules of perpetuity applied to powers.**—The rule against perpetuity finds application both to the limitations of the power and to the estates created under the power. If the power can be exercised at a time beyond that within which all limitations must take effect in possession, viz.: a life or lives in being and twenty-one years thereafter, the power is void. It is, therefore, generally necessary to place a limitation upon the time within which the power may be exercised. A power to one and his heirs, without express or implied limitation, would be void, at least so far as the heirs are concerned.⁸³ The greatest difficulty has been experienced in applying the rule against perpetuity to the estates appointed under the power. If the power is special, and the appointment is limited to a person or persons, none of whom can take, from being too remote under the rule, the power is absolutely void. But if the power permits an appointment among a class, some of whom can take, and a discretion is left in the donee as to which individuals of the class shall be appointed, the power will be void as to those who cannot take. The possibility of an illegal appointment will not invalidate the power, if it is in the end properly exercised by an appointment to lawful persons.⁸⁴ In determining the validity of an appointment under a special power in respect to perpetuity, the appointment must be viewed in its relation to, and as a part of, the original instrument creating the power, and must be considered in the light of the circumstances surrounding the estate and the parties thereto, when the original instrument was executed, if the power be created by deed, and at the death of the testator, if by will. Thus a power to appoint among grandchildren cannot be exercised in favor of such grandchildren, whose parents

561, 574. See, *Biggins v. Lambert*, 115 Ill. App. 576, 213 Ill. 625, 73 N. E. Rep. 371; *Allder v. Jones* (Md. 1903), 56 Atl. Rep. 487.

⁸³ *Bristow v. Warde*, 2 Ves. 350; *Ware v. Polhill*, 11 Ves. 283.

⁸⁴ 1 Sugden on Pow. 471-475; 2 Washburn on Real Prop. 672-675; Co. Lit. 271 b, Butler's note 231; Gilbert's Uses, 160 n; *Graham v. Whitridge* (Md. 1904), 57 Atl. Rep. 609.

were not in being at the time that the power was created.⁸⁵ But if it be a general power, it is so much like an estate in fee, in respect to the restriction against alienation, that an appointment will be good, if at the time when the power was exercised it did not offend the doctrine of perpetuity. The validity of an appointment under a general power is determined by its condition when made, and not considered as a part of the instrument in which the power was created. An appointment under such a power to unborn children of parents who are *in esse* at the time of the execution, but unborn at the time of creation of the power, would be good. The restriction upon alienation only began when the appointment was made.⁸⁶

§ 420. **Rights of donee's creditors in the power.**—The power not being an estate in the land, if the donee's creditors have any interest in the same or in the estate created under the power, it can only be an equitable claim. The donee's creditors have no legal rights in the power.⁸⁷ Where the power is general and coupled with an interest, a sale of the interest will prevent the subsequent exercise of the power.⁸⁸ In no case can the donee's creditors acquire an interest in, or prevent the execution of a special power. It is also definitely settled that where the donee has not exercised his general power, there is no interest in the donee to which the rights of creditors may at-

⁸⁵ 2 Washburn on Real Prop. 671; Co. Lit. 271 b, Butler's note 231; 1 Sugden on Pow. 471-475; 2 Prest. Abst. 165, 166; *Dana v. Murray*, 122 N. Y. 604; *In re Christie*, 59 Hun 153.

⁸⁶ 2 Washburn on Real Prop. 671; Fearne's Exec. Dev. 5, Powell's note; 1 Sugden on Pow. 516; Mifflin's Appeal, 121 Pa. St. 205; Appleton's Appeal, 136 Pa. St. 354. See, *In re Rising*, 73 Law. J. Ch. 455, 1 Ch. 533, 90 Law. T. 504.

⁸⁷ *Blake v. Irwin*, 3 Kelly 345; *Johnson v. Cushing*, 15 N. H. 298; *Townsend v. Windham*, 2 Ves. Jr. 3; *Covendale v. Aldrich*, 19 Pick. 391.

⁸⁸ *Hobbs v. Hobbs*, 15 Ohio St. 419. See *ante*, Sec. 405. See *Linn v. Downing*, 216 Ill. 64, 74 N. E. Rep. 729. But see, for power coupled with an interest, under Ky. St. (1903), Sec. 1681, as to creditors' rights, *Johnson's Trustee v. Johnson*, 79 S. W. Rep. 293.

tach.⁸⁰ Nor can the creditors, through their assignee in bankruptcy, under the bankrupt law, execute the power for their benefit.⁸⁰ But it has been held that where the appointment is made under the power to a voluntary appointee, the creditors may levy upon the estate in the appointee's hands; and that the appointee always takes the estate subject to the payment of the donee's debts, if the donee might have exercised the power in favor of his creditors.⁸¹ Since the creditors have no interest in the power itself, and cannot execute it, or compel its execution in their favor; and since the donee never had any other interest in the property except the power, and the estate of the appointee passed to him directly from the donor, it is difficult to understand by what course of reasoning the position of these two courts can be sustained.

§ 421. The rights of creditors of the beneficiaries.—As a matter of course, if a special power of trust is exercised, the judgment-creditors may levy upon the beneficiary's share in the proceeds of sale. But they cannot compel the donee to execute the power.⁸² And if the legal title descended to the beneficiary, subject to a power of sale, whatever interest the beneficiary's creditors and grantees acquire in the estate will be defeated by the subsequent exercise of the power, but they will in equity attach at once to the beneficiary's share in the proceeds of sale.⁸³

⁸⁰ Tallmadge v. Sill, 21 Barb. 34; Strong v. Gregory, 19 Ala. 146. See Thorpe v. Goodall, 17 Ves. Jr. 338, 460; Holmes v. Coghill, 12 Ves. 206; Jenny v. Andrews, 6 Madd. 264.

⁸⁰ Jones' Assignee v. Clifton, U. S. Cir. Ct. Dist. of Kentucky (1878), 7 Cent. L. J. 89.

⁸¹ Johnson v. Cushing, 15 N. H. 298; Tallmadge v. Sill, 21 Barb. 34.

⁸² Chew's Exrs. v. Chew, 28 Pa. St. 17. See Johnson's Trustee v. Johnson (Ky. 1904), 79 S. W. Rep. 293.

⁸³ Allison v. Wilson v. Wilson's Exrs., 13 Serg. & R. 330; Reed v. Underhill, 12 Barb. 113. See, for rights of beneficiary's creditors, under the Wisconsin statute (R. S. 1898, Sec. 2108), Auer v. Brown, 98 N. W. Rep. 966. And see, for power granted, subject to testator's debts, Ashman v. Harriman (N. H. 1904), 58 Atl. Rep. 501.

CHAPTER XVII.

INCORPOREAL HEREDITAMENTS.

- SECTION I. *Rights of Common.*
II. *Easements.*
III. *Franchises.*
IV. *Rents.*

- SECTION 422. Incorporeal hereditaments defined.
423. Kinds of incorporeal hereditaments.

§ 422. **Incorporeal hereditaments defined.**— An incorporeal hereditament is a right of an intangible nature which descends to the heir like corporeal hereditaments. It is rather a right in, or issuing out of, a corporeal hereditament than a right to or of such kind of property. The enjoyment and exercise of the right produces substantial results, but the results are to be distinguished from the right, and do not constitute the incorporeal hereditament. The Roman *jura in re aliena* comprised a very large class of those rights, which are in our law comprehended under the term *incorporeal hereditaments*.

§ 423. **Kinds of incorporeal hereditaments.**— Blackstone mentions nine principal classes of incorporeal hereditaments, viz.: (1) Commons; (2) Easements; (3) Rents; (4) Advowsons; (5) Corodies; (6) Annuities; (7) Franchises; (8) Offices; (9) Dignities. Of these, Commons, Easements, Rents and Franchises pertain to this country. The others do not now, if they ever did, exist here, and can very well be omitted. In presenting this subject the discussion will be confined to I. Rights of Commons; II. Easements, III. Franchises; and IV. Rents.

SECTION I.

RIGHTS OF COMMON.

SECTION 424. Definition.

425. Kinds of rights of common.

426. Commons appendant and appurtenant.

§ 424. Definition.— A right of common is a right which one may have in another's land, to take from it certain substantial products, which constitute a part of the realty because of their connection therewith. An easement is also a right in, or issuing out of, another's land, and constitutes a burden upon it, as will be seen in the next section; but it only relates to such modes of enjoyment which may be had without drawing from it anything which, in contemplation of law, is a part of the land. A right of common is known also by the Norman French term *profit a prendre*, a right to take something from the land. As will be seen, the term *right of common* has lost its significance in this country. An easement may prevent the owner of adjacent land from building so near the boundary as to exclude the light and air from one's residence, or it may consist in the right to keep a stream free from obstruction while flowing through the adjoining land above; but light, air and water are not a part of the realty, and, therefore, one cannot have a right of common in them. Another distinction is that a right of common does not impose any obligation upon the owner of the land to maintain a supply of the thing taken, while an easement may contain such an obligation. Such an obligation may be the very essence of the easement.¹

¹ 2 Bla. Com. 32; *Huntington v. Asher*, 96 N. Y. 604. See also *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Hill v. Lord*, 48 Me. 83; *Huff v. McCauley*, 53 Pa. St. 206.

§ 425. **Kinds of rights of common.**— There are four important kinds of common, viz.: Common of pasture, piscary, turbary and estovers. Common of pasture is a right of pasturing cattle upon the land of another. Common of piscary is the right to fish in the streams which pass through another's land. Common of turbary consisted in the right to dig turf or peat for use as fuel. Of the same character would be the right to dig coal for the same purpose. Common of estovers was a right of the same nature, being a right to take whatever wood is necessary for use on the farm, for the purpose of fuel, repairing the ploughs and other agricultural implements, or the hedges and fences. According to the use to which the wood was put, they were respectively called house-bote, plough-bote and cart-bote, and hay-bote or hedge-bote. The enjoyment of these rights of estovers was limited to a reasonable degree, and the wood could be used only as far as it was necessary for the purposes of the farm.²

§ 426. **Commons appendant and appurtenant.**— At common law rights of common were divided into two classes, common appendant, and common appurtenant. Common appendant was the more usual kind. It arose out of the peculiar condition of the English tenantry, and more especially out of the manor system of holding lands. When the lord of the manor rented his arable land to his tenant, he gave with this land these rights of common, so that the tenant would be able to obtain everything necessary for the successful conduct of the farm. Thus the tenant had a right to pasture his cattle upon the waste land of his lord, to take the necessary wood from the forests, etc.³ Common appendant does not now exist in this country. Whatever commons are created here are of the class known at common law as common appurtenant, or *in gross*. They rest upon grant, express or implied. When implied, the right is acquired by prescription, or under the Stat-

² 2 Bla. Com. 32-35.

³ 2 Bla. Com. 33.

ute of Limitations. Common appurtenant and common appendant were annexed to some land held by the person enjoying the right, while common *in gross* was to a man and his heirs, independent of any land he may hold.⁴ Inasmuch as commons are now created in the same manner as easements, they receive almost the same construction. The subject, therefore, needs no special treatment beyond what has been already stated. The principal American cases are cited below.⁵

⁴ 2 Bla. Com. 33, 34.

⁵ Knowles v. Nicholls, 2 Curt. 571; Donnell v. Clark, 19 Me. 174; Thomas v. Mansfield, 13 Pick. 240; Perkins v. Perkins, 44 Barb. 134; Van Rensselaer v. Radcliffe, 10 Wend. 639; Livingstone v. Ten Broeck, 16 Johns. 14; Funkhouser v. Langkopf, 26 Mo. 45; Edwards v. McClung, 39 Ohio St. 41.

SECTION II.

EASEMENTS.

SECTION 427. What are easements.

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- 430. Easements by express grant.
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- 450. Party walls.
- 451. Double ownership in buildings — Subjacent support.
- 452. Legalized nuisances.

§ 427. What are easements.— As has been explained in distinguishing between commons and easements, the latter are rights of enjoyment in, or issuing out of, another's land, which restrict or limit the owner's right of enjoyment either affirmatively, by giving another person a right to use the land for certain purposes, as, for example, a right of passing over the land, or negatively, by restraining the owner from using it in

a particular manner, such as the erection of buildings so near to the boundary line as to exclude the light and air from the residence of an adjoining proprietor.⁶ A technical easement can only exist as appurtenant to an estate in lands, although there may be an incorporeal hereditament in the nature of an easement, which exists and is owned independently of any estate in the land.⁷ Two estates are thereby brought into relation with each other, and the existence of both is necessary to the maintenance of an easement. They are called the *dominant* and *servient* estates. The *dominant* estate is the one enjoying the easement, and to which it is attached; the *servient* estate is the one upon which the easement is imposed. As appurtenant to the dominant estate, the easement passes with it into whosoever hands the land may come. The easement cannot be severed from it.⁸

§ 428. **When merger takes effect.**—When the dominant estate falls into the possession of the owner of the servient estate, the easement is extinguished, if the two estates are co-equal and co-extensive, since no man can have an easement in his own land.⁹ If the title to either of the estates proves defective, the easement is only suspended while the two estates

⁶ *Ritger v. Parker*, 8 Cush. (Mass.) 145; *Gale on Easements*, p. 5; *Oliver v. Hook*, 47 Md. 301; *Scriver v. Smith*, 100 N. Y. 471; *Big Mt. Imp'v't. Co.'s App.*, 54 Pa. St. 361; *Goddard on Eas.* 70, 71, 72, 84; *Barlow v. Rhodes*, 1 O. & M. 448; *Thomson v. Waterlow*, L. R. 6 Eq. Cas. 36; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Washburn on Eas.* 39; *Worthington v. Grimson*, 105 E. C. L. 616; *Pearson v. Johnson*, 68 N. Y. 62; s. c. 23 Am. Rep. 149.

⁷ *Knecken v. Voltz*, 110 Ill. 264; *Manderbach v. Bethany Orphans' Home*, 1 Cent. Rep. (Pa.) 402; *Hills v. Miller*, 3 Paige (N. Y.) 254.

⁸ *Hills v. Miller*, 3 Paige (N. Y.) 254; *Oliver v. Hook*, 47 Md. 301; *Meek v. Breckenridge*, 29 Ohio St. 642; *Murphy v. Welch*, 128 Mass. 489; *Dark v. Johnston*, 55 Pa. St. 361; *Parsons v. Johnson*, 68 N. Y. 62; *Stuyvesant v. Woodruff*, 1 Zab. (N. J.) 133.

⁹ *Atwater v. Bodfish*, 11 Gray 150; *McAllister v. Devane*, 76 N. Car. 57; *Miller v. Lapham*, 44 Vt. 416; *Denton v. Leddell*, 23 N. J. Eq. 64; *McTavish v. Carroll*, 7 Md. 352.

are in the possession of the one owner.¹⁰ So if the dominant estate which is transferred to the owner of the servient estate, is less in point of duration than the servient, the easement will only be suspended during the union of the two estates and will revive upon their separation.¹¹ And it may be stated generally that, wherever the extinguishment of an easement will operate as an injury to some one having rights in the same, equity will limit the effect of the union of the estates to suspension during such union, and the easement will revive, in favor of the parties having rights in it, at the termination of the union. But if the two estates are of the same quality and duration, when they come into the possession of the same owner, the easement is completely extinguished, and is not revived by a subsequent conveyance of the dominant estate, except by express agreement.¹²

§ 429. *How acquired.*—Easements are acquired by grant, express or implied, or by prescription, which pre-supposes a grant. The doctrine of prescription as known at the common law is no longer in practical operation.¹³ It has been superseded by Statutes of Limitation, which fix a time in which a right may be acquired by adverse possession or enjoyment. The subject of title by prescription or limitation will be treated more fully in subsequent pages. These Statutes of Limitations do not in express terms refer to easements, but courts have generally applied to easements their provisions concerning rights in real property. It is, therefore, a general rule that a right of easement is acquired by prescription

¹⁰ *Tyler v. Hammond*, 11 Pick. 193.

¹¹ *Grant v. Chase*, 17 Mass. 443; *Pearce v. McClenaghan*, 5 Rich. 178.

¹² *Thomson v. Waterlow*, L. R. 6 Eq. Cas. 36; *Barlow v. Rhodes*, 1 C. & M. 448; *Longendyke v. Anderson*, 101 N. Y. 625; *Parsons v. Johnson*, 68 N. Y. 62. But see, *Bullock v. Phelps* (R. I. 1905), 27 R. I. 164, 61 Atl. Rep. 589.

¹³ "To acquire an easement in the land of another under the common law, the use must have been continued from a time when the memory of man ran not to the contrary." *Wasmund v. Harm* (Wash. 1904), 78 Pac. Rep. 777.

within the time prescribed by the Statute of Limitation for the recovery of lands.¹⁴ But since the application of the statute to the case of easements rests upon analogy, the statutory period has been held to raise only a legal *presumption* that a grant has been made, and does not operate as a *legal bar*. The presumption can be rebutted by evidence, showing that there had been no grant.¹⁵ But the rule is not *uniform*, there being *eases* which hold that it is a conclusive presumption.¹⁶ It is probable that this may now be considered as the generally prevailing law.¹⁷ But no prescriptive right can be claimed where the long use was had under a license from the owner of the land,¹⁸ or where the use was constantly interrupted.¹⁹ Nor can there be any easement by prescription in favor of the public.²⁰ The public may, however, ac-

¹⁴ *Campbell v. Wilson*, 3 East 294; *Richard v. Williams*, 7 Wheat. 59; *Stearns v. Jones*, 12 Allen 582; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Nichols v. Wentworth*, 100 N. Y. 455; *Wallace v. United Presb. Church*, 111 Pa. St. 164; *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 632; *Smith v. Putnam*, 62 N. H. 369; *McKinzie v. Elliott* (Ill.), 24 N. E. Rep. 965.

¹⁵ *Tinkham v. Arnold*, 3 Me. 120; *Parker v. Foote*, 19 Wend. 309; *Sherwood v. Burr*, 4 Day 244. See *Tredwell v. Inalee*, 120 N. Y. 458. 24 N. E. Rep. 651.

¹⁶ *Beasley v. Shaw*, 6 East 208; *Wright v. Howard*, 1 Sim. & S. 190; *Cornett v. Phudy*, 80 Va. 710.

¹⁷ *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Polson v. Ingram*, 22 S. Car. 541; *Benlow v. Robbins*, 71 N. C. 338; *Nicholls v. Wentworth*, 100 N. Y. 455; *Gordon v. Taunton*, 126 Mass. 349; *Com. v. Low*, 3 Pick. (Mass.) 408; *Sargent v. Ballard*, 9 Pick. (Mass.) 251. See *Hay v. Callman* (N. Y. 1905), 73 N. E. Rep. 1125.

¹⁸ *Eckerson v. Crippen*, 38 Hun 419. "Where the owner of a saloon adjoining a hotel had a permissive license to use the rotunda as a passageway to the saloon, such license could not ripen into an easement." *Belser v. Moore* (Ark. 1904), 84 S. W. Rep. 219.

¹⁹ *Kirschner v. The W. & A. R. Co.*, 67 Ga. 760; *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180; *Eckerson v. Crippen*, 39 Hun (N. Y.) 419.

²⁰ *Curtis v. Keesler*, 14 Barb. (N. Y.) 511; *Pearsall v. Post*, 20 Wend. (N. Y.) 121; *s. c.* 22 Wend. (N. Y.) 440. Compare *Gordon v. Taunton*, 126 Mass. 349.

quire such a right by dedication, and without formal conveyance.²¹

§ 430. **An easement by express grant.**—Is created by deed, containing an express reservation of the right. It cannot be created by parol.²² It need not be reserved in the same deed which creates or conveys the dominant estate; it may be granted in a separate deed.²³ It may, also, be created in a deed conveying the servient estate by reservation to the grantor.²⁴ For the creation of an easement by express grant upon one estate in favor of another, there need not be any prior unity of title or estate in the two parcels of land. There need not be any previous connection whatever between the two estates or their owners.²⁵

§ 431. **Implied grants.**—An easement is created by implied grant where the easement is so essential to the enjoyment of the estate granted, that it is necessary to be implied to prevent the conveyance from operating as an injury to the grantee. Thus, if a man conveys a parcel of land, surrounded on all sides by his own land, so that the grantee cannot get to the land conveyed, except by passing over the other lands of the grantor, the law implies that a right

²¹ *Trustees of Watertown v. Cowen*, 4 Paige (N. Y.) 510; see also *Scott v. Cheatham*, 12 Heisk. (Tenn.) 713; *Stevenson v. Chattanooga*, 20 Fed. Rep. 586.

²² *Brown on Statute of Frauds*, Sec. 232; *Bryan v. Whistler*, 8 B. & C. 288; *Knight v. Dyer*, 57 Me. 174; *Taylor v. Millard*, 118 N. Y. 244, 23 N. E. Rep. 376; *Robinson v. Thrailkill*, 110 Ind. 117; see also *Fuhr v. Dean*, 26 Mo. 116; *Brooks v. Curtis*, 4 Lans. (N. Y.) 283; *Miller v. A. & S. R. Co.*, 6 Hill (N. Y.) 61.

²³ *Gerrard v. Cook*, 2 Bos. & P. N. R. 109; *Ashcroft v. E. R. Co.*, 126 Mass. 196; *Hankey v. Clark*, 110 Mass. 262; *Corbin v. Dale*, 57 Mo. 297; *Richardson v. Clements*, 89 Pa. St. 503.

²⁴ *Pettee v. Hawkes*, 13 Pick. 323.

²⁵ *Gibert v. Peteler*, 39 N. Y. 165. See *Bernos v. Coulpa* (La. 1905), 38 So. Rep. 438; *Bole v. Todd* (Ga. 1905), 50 S. E. Rep. 990; *Anthony v. Kennard Bldg. Co.* (Mo. 1905), 87 S. W. Rep. 921.

of way over such lands was granted in the deed.²⁶ What shall be considered such a necessity as will raise an easement by implication depends upon the facts of each particular case. It is a well established rule that the necessity need not be absolute. If the enjoyment of the estate granted cannot be complete without the easement, except at an unusual expense, or inconvenience, the easement will be implied.²⁷ The enjoyment of the land without the easement need not be absolutely impossible. Thus, in the case of a right of way, it is not necessary that the land should be entirely surrounded, in order to create by implication an easement of way over the grantor's lands; it will be sufficient if the land granted is to such an extent surrounded, that the grantee can get to it only with great difficulty and inconvenience.

§ 432. *Equitable easements.*—Corresponding to, and forming a part of, the subject of implied easements, is the doctrine of equitable easements. At law it is impossible for an easement to exist between two estates owned by the same person. If the two parcels had had separate owners, upon the union of them in the one owner, as we have seen, the easement would at least be suspended during the continuance of such union and revive upon their separation. The ease-

²⁶ *Pomfret v. Ricord*, 1 Saund. 322; *Proctor v. Hodgson*, 10 Exch. 624. See *post*, Sec. 439.

²⁷ *O'Rorke v. Smith*, 11 R. I. 259; *s. c.* 23 Am. Rep. 440; *Francies's Appeal*, 96 Pa. St. 200; *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Barnes v. Lloyd*, 112 Mass. 224; *Hollenbeck v. McDonald*, 112 Mass. 247; *Buss v. Dyer*, 125 Mass. 287; *Wentworth v. Philpot*, 60 N. H. 193; *Burns v. Gallagher*, 62 Md. 462; see also, *Mitchell v. Seipel*, 53 Md. 251; *Randall v. McLaughlin*, 10 Allen (Mass.) 366. "Where land sold out of a tract is surrounded on three sides by land of private individuals, the sale carries with it, by presumption of law, a right of way over the remaining land of the grantor to a public highway." *Brown v. Kemp* (Ore. 1905), 81 Pac. Rep. 236. "An execution sale of part of a tract of land without an exit carries with it a right of way of necessity over the remainder." *Damron v. Damron* (Ky. 1905), 84 S. W. Rep. 747.

ment would revive only when the dominant and servient estates were of unequal value in the matter of duration.²⁸ But notwithstanding the fact that at law there can be no easement in favor of one parcel imposed upon another, both being held by the same owner, yet in equity such a relation may exist. If the owner of two parcels so uses them as to make one servient to the other, as, for example, in the construction of a drain carrying waste water from one estate over the other, in equity an easement will be imposed upon one lot in favor of the other, which, upon the severance of ownership by alienation, assumes the character of a legal easement,²⁹ if its continuance is essential to the enjoyment of the estate which is sold.³⁰ It seems also that the servitude will be an open and notorious incumbrance, particularly where the servient estate is conveyed away.³¹ The same principle has been applied to a case where the owner of two lots conveys them to different grantees, and so divides them that the wall of the house conveyed to one of them falls within the boundary line of the other, held to create an equitable easement in favor of the owner of the house.³² Especially does an easement arise when the *quasi* dominant estate is granted to another. If the *quasi* servient estate has been conveyed, it is a question of some doubt whether there is reserved to the grantor by implication an easement

²⁸ See *ante*, Sec. 428.

²⁹ *Pyer v. Carter*, 40 Eng. L. & Eq. 410; *Guy v. Brown*, 5 Moore 644; *Johnson v. Jordan*, 2 Metc. 234; *Smith v. Blanpied*, 62 N. H. 652; *Smith v. Smith*, 62 N. H. 429; *Crosland v. Rogers* (S. C.), 10 S. E. Rep. 874; *Lampman v. Milks*, 21 N. Y. 505; *Huttemeier v. Albro*, 18 N. Y. 48; *Lansing v. Wiswall*, 5 Denio (N. Y.) 213.

³⁰ *Smith v. Blanpied*, 62 N. H. 652; *Smith v. Smith*, 62 N. H. 429; *Crosland v. Rogers* (S. C.), 10 S. E. Rep. 874. See *Jackson v. Eli* (D. C. 1904), 23 App. D. C. 122; *Hess v. Kennedy* (N. J. Ch. 1904), 61 Atl. Rep. 464.

³¹ *Tredwell v. Insley*, 120 N. Y. 458, 24 N. E. Rep. 651; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Grant v. Chase*, 17 Mass. 443.

³² *Reiners v. Young*, 38 Hun 335; *John Hancock, etc., v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550.

to maintain the drain or other burden upon the granted estate. The authorities, English and American, are at variance on this question. In this country the better opinion is that the rule would be the same as in the case of the conveyance of the *quasi* dominant estate,³³ especially if it was strictly necessary to the enjoyment of the dominant estate, and the existence of the easement is apparent or known to the grantee.³⁴

§ 433. Easement implied from covenant.—Somewhat similar are the cases where, in the conveyance of several parcels of land to different grantees, the grantor imposes a restriction upon the use and mode of enjoyment of the land so granted, which creates a mutual benefit to the owners of the several parcels. Even though the restriction be in the form of a covenant, equity will construe it to have the binding force of an easement, and will sustain an action for its enforcement in favor of any one of the owners. They are covenants running with the land, and can be enforced by any one in whose possession any one of the parcels should fall.³⁵ Such would be the case where, in granting several

³³ *Warren v. Blake*, 54 Me. 289; *Johnson v. Jordan*, 2 Mete. 234; *Treadwell v. Inslee*, 120 N. Y. 458.

³⁴ *Scott v. Bentel*, 23 Gratt. (Va.) 1; *Hardy v. McCullough*, 23 Gratt. (Va.) 251; *Griffiths v. Morrison*, 106 N. Y. 165; *Outerbridge v. Phelps*, 13 Abb. N. C. (N. Y.) 117; *Morrison v. King*, 62 Ill. 30; *Life Ins. Co. v. Patterson*, 103 Ind. 582; *s. c.* 53 Am. Rep. 550; *Robinson v. Thrailkill*, 110 Ind. 117; *Cave v. Crafts*, 53 Cal. 135; *Sanderlin v. Baxter*, 76 Va. 299; *s. c.* 44 Am. Rep. 165; *Galloway v. Bonesteel*, 65 Wis. 79; *Petland v. Keep*, 41 Wis. 490; *Turner v. Thompson*, 58 Ga. 268; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492; *Hazard v. Robinson*, 3 Mason (U. S.) 272; *Alexander v. Tolleston Club*, 110 Ill. 65; *Cihak v. Klekr*, 117 Ill. 643. See *Keith v. Twen. Cent. Club*, 73 Law. J. Ch. 545, 90 Law. T. 775 (Eng. 1904).

³⁵ *Martin v. Martin* (Kan.), 25 Pac. Rep. 418; *Clement v. Burtis* (N. Y.), 24 N. E. Rep. 1013; *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. Rep. 1; *Graves v. Deterling*, 120 N. Y. 447; *Pittsburg, etc., R. R. Co., v. Reno*, 22 Ill. App. 470; *s. c.* 123 Ill. 273, 14 N. E. Rep. 195; *Midland Ry. Co. v. Fisher* (Ind.), 24 N. E. Rep. 756, 758. See *Hess v. Kennedy* (N. J. Ch. 1905), 61 Atl. Rep. 464.

parcels of land, the conveyances contain covenants that any buildings thereafter erected upon any one of them shall be set back from the street a certain distance. An injunction would be granted at the suit of either of the owners of the several pieces of property restraining another from violating the covenant.³⁶ But if the covenant as to the use of the land is imposed upon only one of the lots, and omitted in the conveyance of the others, the covenant is held to be thereby abandoned even as to the grantee in whose deed the covenant was inserted.³⁷

§ 434. Rights of action in defense of easements.—The actions are of two kinds, (1) by injunction ³⁸ restraining some

³⁶ *Whatman v. Gibson*, 9 Sim. 196; *Harrison v. Good*, L. R. 11 Eq. 338; *Brewer v. Marshall*, 19 N. J. Eq. 543; *Winfield v. Henning*, 21 N. J. Eq. 188; *St. Andrews Church Appeal*, 67 Pa. St. 518; *Pingree v. McDuffie*, 56 N. H. 306; *Burns v. Gallagher*, 62 Md. 462; *Viall v. Carpenter*, 14 Gray (Mass.) 126; *Day v. Walden*, 46 Mich. 575; *Brown v. Burkenmeyer*, 9 Dana (Ky.) 159; *Lennig v. Ocean City Assn.*, 41 N. J. Eq. 606; *s. c.* 56 Am. Rep. See also, *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65; *Foster v. City of Buffalo*, 64 How. Pr. (N. Y.) 127; in the *Matter of Opening Eleventh Ave.*, 81 N. Y. 436; *Baxter v. Arnold*, 114 Mass. 577; *s. c.* 11 Am. Rep. 335; *Bagnall v. Davies*, 140 Mass. 76; *Atty.-Gen. v. Williams*, 140 Mass. 329, 54 Am. Rep. 468; *Payson v. Burnham*, 141 Mass. 547; *Hamlin v. Werner*, 144 Mass. 396; *Winnepeaukee, etc., Assn. v. Gordon*, 63 N. H. 505; *Webb v. Robbins*, 77 Ala. 176; *Hull v. C. B. & Q. R. R. Co.*, 65 Iowa 713; *Coudert v. Sayre* (N. J.), 19 Atl. Rep. 190; *Graves v. Detenling*, 120 N. Y. 447, 24 N. E. Rep. 655; *Page v. Murray* (N. J.), 19 Atl. Rep. 11; *Mackenzie v. Childers*, 43 Ch. Div. 265; *Foster v. Foster*, 62 N. H. 46; *Avery v. N. Y. Cent. & C. R. R. Co.* (N. Y.), 24 N. E. Rep. 20, 24; *Smith v. Bradley* (Mass.), 28 N. E. Rep. 14. In the same manner a covenant to build and maintain a party wall, if the wall has been constructed, will operate as an easement. *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283. But an *executory* agreement or covenant to build a party wall cannot operate as an easement, since such a covenant does not run with the land, and is binding only upon the covenantor. *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611.

³⁷ *Duncan v. Central Pas. R. R. Co.* (Ky.), 4 S. W. Rep. 228; *Stuart v. Diplock*, 23 Ch. Div. 343.

³⁸ *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 632; *Herman v.*

future injury or impairment of the easement, or enforcing the performance of the conditions of such easement, and (2) an action for damages for the objection to, or interference with, the easement which has already happened.³⁹ And in order to sustain the action for damages, no actual damage need be proven. It would be an *injuria sine damno*, or wrong without damage, which is always actionable. But the owner of the servient estate may make any use of it, which does not materially interfere with the exercise of the easement.⁴⁰

§ 435. How easements may be lost or extinguished.—This may occur (1) by acts of the owner of the dominant estates, or (2) by acts of the owner of the servient estate. An easement may be released by deed of the owner of the dominant estate, or it may be lost by abandonment. It cannot be released by parol agreement, unless the agreement is carried into execution by some affirmative act, as the creation of a new easement in the place of the old one, so

Roberts, 119 N. Y. 37, 23 N. E. Rep. 442; *Swift v. Coker*, 83 Ga. 789, 10 S. E. Rep. 442; *Frey v. Lowden*, 70 Cal. 550, 11 Pac. Rep. 838. See *Wasmund v. Harm* (Wash. 1904), 78 Pac. Rep. 777.

³⁹ 2 Washburn on Real Prop. 339; Tud. Ld. Cas. 129; *Bane v. Bean*, 63 Mich. 652, 30 N. W. Rep. 373; *Autenreith v. St. Louis, etc.*, R. R. Co., 36 Mo. App. 254; *Ladd v. City of Boston* (Mass.), 24 N. E. Rep. 858. "A mandatory injunction for the removal of a building obstructing ancient lights should not be granted in an ordinary case where damages would be an adequate remedy." *Colls v. Home & Colonial Stores* (Eng. 1904), 73 Law J. Ch. 484 (1904), App. Cas. 179, 90 Law. T. 687, 53 Wkly. Rep. 30, 20 Times Law R. 475.

⁴⁰ *Patterson v. Phila., etc.*, R. R. Co., 8 Pa. Co. Ct. 186; *Phillips v. Dressler*, 122 Ind. 414, 24 N. E. Rep. 226; *Ames v. Shaw*, 19 Atl. Rep. 831, 82 Me. 379; *Joslin v. Sones* (Iowa), 45 N. W. Rep. 917; *Grafton v. Moir*, 9 N. Y. S. 3; *Spalding v. Bemiss* (Ky.), 1 S. W. Rep. 468; *McKenzie v. Elliott* (Ill.), 24 N. E. Rep. 965; *Tyler v. Cooper*, 47 Hun 94; *Smith v. Holloway* (Ind.), 24 N. E. Rep. 886; *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. Rep. 704. See *Hay v. Coleman* (N. Y. 1905), 73 N. E. Rep. 1125, on measure of damages.

that by non-user the first has been lost.⁴¹ Mere non-user, even though for twenty years, will not of itself extinguish the easement unless there has been adverse possession.⁴² It must be accompanied with the express or implied intention of abandonment, and the owner of the servient estate, acting upon the intention of abandonment and the actual non-user, must have incurred expenses upon his own estate.⁴³ The three elements, non-user, intention to abandon and damage to the owner of the servient estate, must concur in order to extinguish the easement. In cases of easements created by prescription the last element is not considered essential.⁴⁴ The easement may also be destroyed when the owner of the dominant estate gives a license to the owner of the servient estate to perform or do certain acts upon the servient estate, the performance of which will effectually prevent the enjoyment of the easement. The execution of the license will destroy or extinguish the easement, since

⁴¹ *Liggins v. Inge*, 7 Bing. 682; *Ward v. Ward*, 7 Exch. 838; *Shaffer v. State Bank*, 37 La. Ann. 242; *Snell v. Leavitt*, 39 Hun 227.

⁴² *Veghte v. R. W. P. Co.*, 4 C. E. Green (N. J.) 142; see also *Horner v. Stillwell*, 35 N. J. L. 307; *Pratt v. Sweetser*, 68 Me. 344; *Eddy v. Chace*, 140 Mass. 471.

⁴³ *Eddy v. Chace*, 140 Mass. 471; *Polson v. Ingram*, 22 S. C. 541; *Tyler v. Cooper*, 47 Hun 94; *Whitney v. Wheeler Cotton Mills (Mass.)*, 24 N. E. Rep. 774; *Vogler v. Geiss*, 51 Md. 407. See also *Pope v. O'Hara*, 48 N. Y. 446; *Polson v. Ingram*, 22 s. c. 541; *Hamilton v. Farrar*, 128 Mass. 492; *King v. Murphy*, 140 Mass. 254; *Central Wharf, etc., Crop. v. Proprietors of India Wharf*, 123 Mass. 567; *Johnston v. Hyde*, 32 N. J. 446; see also *Hulme v. Shreve*, 3 Green's Ch. (N. J.) 116; *Merritt v. Parker, Cox* (N. J.) 460; *Jewett v. Whitney*, 43 Me. 242. "Abandonment is a matter of intention, and consists in the giving up of a thing absolutely without reference to any particular person or purpose. There can be no abandonment to a definite person." *Norman v. Corbley* (Mont. 1905), 79 Pac. Rep. 1059.

⁴⁴ *Jewett v. Jewett*, 16 Barb. (N. Y.) 150; see also *Pope v. O'Hara*, 48 N. Y. 446; *Eddy v. Chace*, 140 Mass. 471; *Bronson v. Coffin*, 108 Mass. 175; *Knecken v. Voltz*, 110 Ill. 264; *Day v. Walden*, 46 Mich. 575; *Steere v. Tiffany*, 13 R. I. 568; *Louisville, etc., R. Co. v. Covington*, 2 Bush (Ky.) 526; *Wilder v. St. Paul*, 12 Minn. 192.

the license is irrevocable after execution.⁴⁵ Finally, any actions on the part of the owner of the dominant estate, which increase the burden upon the servient estate and which so materially change the easement, as that it cannot be restored to its original condition, will operate in a discharge of the servient estate from the burden of the easement. But if the increase in the burden can be separated from the original easement, the latter will still remain.⁴⁶ In the same way as easements may be acquired by prescription, so may they also be lost or extinguished.⁴⁷ This subject is similar in its character, and is allied to the subject of loss by abandonment.

§ 436. **Kinds of easements.**—The easements most commonly known are *right of way, light and air, water, support, and party walls*. Many other servitudes may be imposed upon the land, but a discussion of the classes just mentioned will be sufficient to illustrate the general principles.

⁴⁵ *Winter v. Brockwell*, 8 East 308; *Liggins v. Inge*, 7 Bing. 682; *McConnell v. Am. Bronze, etc., Co.*, 41 N. J. Eq. 447; *Morse v. Copeland*, 2 Gray (Mass.) 302. Compare *Dyer v. Sandford*, 9 Metc. (Mass.) 395.

⁴⁶ *Luttrell's Case*, 4 Rep. 87; *Saunders v. Newman*, 1 B. & Ald. 258; *Garrett v. Sharp*, 3 A. & E. 325; *Blanchard v. Bridges*, 4 A. & E. 176; *Carpenter v. Graber*, 66 Tex. 465; 1 S. W. Rep. 178; *Hicox v. Chicago, etc., R. R. Co.* (Mich.), 44 N. W. Rep. 143; *Prescott v. White*, 21 Pick. (Mass.) 341; *Cary v. Daniels*, 9 Metc. (Mass.) 466; *Thompson v. Uglow*, 4 Ore. 360; *Blaisdell v. Stephens*, 14 Nev. 17; *Hall v. McCaughey*, 51 Pa. St. 43; *Kaler v. Beaman*, 49 Me. 207; *Schaffer v. State Bank*, 37 La. Ann. 242; *Jaqui v. Johnson*, 27 N. J. Eq. 552; *Darlington v. Painter*, 7 Barr (Pa.) 473; *Stevenson v. Stewart*, 7 Phila. 293; *Evangelical, etc., Home v. Buffalo Hydraulic Assn.*, 64 N. Y. 563; *Roberts v. Roberts*, 55 N. Y. 275; *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Huson v. Young*, 4 Lans. (N. Y.) 63.

⁴⁷ *Clarke v. Gaffeney*, 116 Ill. 362; *Veghte v. R. W. P. Co.*, 4 C. E. Green (N. J.) 142; see also *Horner v. Stillwell*, 35 N. J. L. 307; *Pratt v. Sweetser*, 68 Me. 344; *Eddy v. Chance*, 140 Mass. 471. "An agreement surrendering a right of way by necessity is an instrument required to be recorded, under the statute providing for the record of every conveyance of lands, tenements, or hereditaments." *Dahlberg v. Haerberle* (N. J. Sup. 1904), 59 Atl. Rep. 92.

§ 437. **Right of way.**—Rights of this character are divided into *private*, where the right is in favor of one or more private individuals, and is appurtenant to an estate owned by them, and *public*, where it is enjoyed by the public generally. They are easements imposed upon another's land, authorizing certain persons or the public, as the case may be, to pass over it, in pursuit of specific or general objects.

§ 438. **A private way.**—May be created by express grant, or it may be implied from the circumstances surrounding the estate granted (these are called ways of necessity), or it may further be acquired by prescription. A way acquired for a particular mode of use will not be extended so as to include the right to use it in some other manner. Thus, if the right be limited to a foot-path, it cannot be used as a carriage-way or horse-way. Such an extension of the right would be an act of trespass, and render the owner of the dominant estate liable for damages to the owner of the servient estate. This would be the case, even though the burden upon the servient estate has not been materially increased.⁴⁸ Neither can the way be used for the benefit of any other estate but the one to which the easement is appurtenant.⁴⁹ A right of way may be granted subject to a condition and limitation, and the right in such

⁴⁸ *Brunton v. Hall*, 1 Gale & D. 207; *Cowling v. Higginson*, 4 Mees. & W. 245; *Ballard v. Tyson*, 1 Taunt. 279; *Allan v. Gourme*, 11 A. & E. 759; *French v. Marstin*, 24 N. H. 440, 32 N. H. 316; *Kirkham v. Sharp*, 1 Wharf. 323. But a general right of way will be inferred from evidence that the way has been used in every manner necessary for the full enjoyment of the dominant estate. *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519. For cases on the implied right of way on surface, as incident to right to mine, see *White, Mines & Min. Rem.*, Sec. 219, p. 293, and cases cited; *Chartiers Coal Co. v. Mellors*, 152 Pa. St. 286.

⁴⁹ *Colchester v. Roberts*, 4 Mees. & W. 769; *Williams v. James*, L. R. 2 C. B. 580; *Davenport v. Lamson*, 21 Pick. 72; *French v. Marstin*, 24 N. H. 440, 32 N. H. 316; *Hayes v. De Vity*, 141 Mass. 233; *Brightman v. Chaping*, 1 Atl. Rep. 412, 15 R. I. 166; *Reise v. Enos* (Wis.), 45 N. W. Rep. 414.

cases cannot be claimed after the breach of the condition or happening of the limitation.⁵⁰ Where the way is acquired by express or implied grant, the owner of the servient estate has the right to lay out the way in whatever manner will be most convenient to him, and will at the same time secure to the owner of the dominant estate the full enjoyment of the easement. But if the owner of the servient estate refuses to do this, the owner of the dominant estate may exercise the power. Once the way has been laid out, it cannot be changed by either party without the consent of the other.⁵¹ Private ways may be acquired also by prescription.⁵²

§ 439. *Ways of necessity.*—A way of necessity exists where the land granted is completely environed by land of the grantor, or partially by his land, and the land of strangers. The law implies from these facts that a right of way over the grantor's land was granted to the grantee, as appurtenant to the estate.⁵³ Inasmuch as the implication is raised from the existence of a necessity, the easement expires with the cessation of the necessity, as, for example, when a new way is acquired.⁵⁴ When such a necessity exists as will create by implication a right of way, is a question of fact, determined by the circumstances of each particular case. Mere inconvenience will not constitute such necessity. It must be a strict necessity; but excessive expense in procuring another way would make it a case of strict necessity.⁵⁵ *Rear*

⁵⁰ *Hall v. Armstrong*, 53 Conn. 554.

⁵¹ *Henning v. Burnett*, 8 Exch. 187; *Northam v. Hurley*, 1 E. & B. 665; *Holmes v. Seeley*, 19 Wend. 507; *French v. Williams*, 82 Va. 462.

⁵² *Gay v. Boston & Albany R. R. Co.*, 141 Mass. 407.

⁵³ *Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. Rep. 632; *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. Rep. 879. But see, as to necessity that land sold should be surrounded by grantor's land. *Wills v. Reid* (Miss. 1905), 38 So. Rep. 793.

⁵⁴ *Pettingill v. Porter*, 8 Allen 9; *Baker v. Crosby*, 9 Gray 421; *Vlial v. Carpenter*, 14 Gray 126; *Thomas v. Bertram*, 4 Bush 317; *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

⁵⁵ *Pettingill v. Porter*, 8 Allen 1; *O'Rorke v. Smith*, 11 R. I. 259, 23

entrances to city lots cannot be claimed as ways of necessity.⁵⁶ If a way of necessity is implied for any purpose, it may be used for any and all purposes for which private ways are generally adapted.⁵⁷

§ 440. **Who must repair the way.**—In the absence of an express agreement, the grantee of the right of way must keep the way in repair; and if he fails to do so, he has no right to use other adjacent land of the servient estate because the way has become impassable. But the obligation to repair may by covenant be imposed upon the owner of the servient estate. In such a case, if the latter violates the agreement, the grantee of the way may, if it is necessary, pass over the adjoining land of the servient estate.⁵⁸

§ 441. **Public or highways.**—Here no reference is made to such highways where the fee simple title to the land is in the State or municipal corporation. In such cases there can be no question in respect to easements. This section relates to such cases where the land, over which the highway extends, belongs to the owners of the contiguous land, and a right of way over it is enjoyed by the public.⁵⁹ Where it is

Am. Rep. 440; *Bartlett v. Prescott*, 41 N. H. 493; *Barr v. Flynn*, 70 Mo. 383; *Fischer v. Laack* (Wis.), 45 N. W. Rep. 104; *Morse v. Benson* (Mass.), 24 N. E. Rep. 675; *Pearson v. Allen* (Mass.), 23 N. E. Rep. 731; Nat. Exch. Bank *v. Cunningham*, 46 Ohio St. 575, 22 N. E. Rep. 924; *Murphy v. Lee*, 144 Mass. 371; *Bell v. Todd*, 51 Mich. 21; *Smyles v. Hastings*, 22 N. Y. 217; approving 24 Barb. (N. Y.) 44; *Pratt v. B. C. R. Co.*, 19 Hun (N. Y.) 30; *Foster v. Buffalo*, 64 How. Pr. (N. Y.) 127; *Wills v. Reid* (Miss. 1905), 38 So. Rep. 793.

⁵⁶ *Fischer v. Laack* (Wis.), 45 N. W. Rep. 104; *Smith v. Griffin* (Colo.), 23 Pac. Rep. 905.

⁵⁷ *Whittier v. Winkley*, 62 N. H. 338.

⁵⁸ *Pomfret v. Ricord*, 1 Saund. 323; *Bullard v. Harrison*, 4 M. & S. 387; *Jones v. Percival*, 5 Pick. 485; *Hamilton v. White*, 5 N. Y. 9.

⁵⁹ The right of the public to the use of a highway, where the soil or bed belongs to the adjoining owners, is not strictly an easement; it is an incorporeal hereditament in the nature of an easement. Since the subject of highways is not to be treated at any length, it is discussed in

doubtful whether the grantor intended to convey an easement or a fee simple title to the land, the presumption is held to be in favor of the grant of an easement.⁶⁰ Such highways are established either by dedication by the owners of the land, or by appropriation by the State, under the right of *eminent domain*. In the case of dedication no formal acts are necessary to the creation of the way. Any act or acts such as conveyances of lots bounding on such streets, platting and recording a map, in which the streets are laid out, and the like, which show a clear intention to dedicate the land to the public use will be sufficient.⁶¹ The conveyance of lands for the purpose of a highway may always be subjected to conditions, restrictions and limitations as to use, which can only be removed by the exercise of the right of eminent domain.⁶² A highway may also be created by custom, as from long use by the public, although there had been no dedication by the owner.⁶³ To make the dedication complete

this connection to avoid the necessity of a separate subdivision of this chapter.

⁶⁰ *N. Y. & N. E. R. R. Co. v. City of Providence* (R. I.), 19 Atl. Rep. 759.

⁶¹ *Pope v. Town of Union*, 18 N. J. Eq. 282; *Hawley v. City of Baltimore*, 33 M. D. 270; *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Point Pleasant Land Co. v. Cranmer*, 40 N. J. Eq. 81; *Re Pearl St.*, 111 Pa. St. 565; *Harrison v. Augusta Factory*, 73 Ga. 447; *Brooks v. Topeka*, 34 Kan. 277; *Shea v. Ottumwa*, 66 Iowa 39; *State v. Schwin*, 65 Wis. 207; *Dorman v. Bates Mfg. Co.*, 82 Me. 438; *Johnson v. Shelter Island Grove, etc., Co.*, 47 Hun 374; *In re Ladue*, 118 N. Y. 213, 23 N. E. Rep. 465. The evidence of an intention to dedicate the land, must be clear and manifest. *Manchester v. Hoag*, 66 Iowa 649; *Robinson v. Coffin*, 2 Wash. 251. See *Mott v. Ens* (N. Y. 1904), 90 N. Y. S. 608, 97 App. Div. 586; *Providence Steamboat Co. v. Fall River* (Mass. 1904), 72 N. E. Rep. 338.

⁶² *Odneal v. City of Sherman*, 77 Texas 182.

⁶³ *Holt v. Sargent*, 15 Gray 97; *Compton's Petition*, 41 N. H. 197; *State v. Van Derveer*, 57 N. J. L. 259; *South Branch R. R. Co. v. Parker*, 41 N. J. Eq. 489; *Strong v. Makeever*, 102 Ind. 578; *Toof v. Decatur*, 19 Ill. App. 204; *Hart v. Red Cedar*, 63 Wis. 634; *Fritsche v. Fritsche* (Wis.), 45 N. W. Rep. 1088. But see *Forres v. Falgoust*, 37 La. An. 497; *Tucker v. Conrad*, 103 Ind. 349, where it is held that mere

and binding upon the public, there must be an acceptance of the same. But continued use of the land in conformity with the dedication will be sufficient evidence of acceptance. A *formal* acceptance is not necessary.⁶⁴ A dedication to public use as a highway or other thoroughfare is not affected by an attempted appropriation of the land to other public uses in the exercise of the right of eminent domain. The defective condemnation may be set aside, but the dedication as a highway survives, and the original owner cannot maintain ejectment for the land.⁶⁵

§ 442. *Light and air.*— There may, like a right of way, be an easement in the light and air coming from over the land of an adjacent owner, which would prevent its obstruction by any erections upon the adjoining land near the boundary line. Thus, the owner of a house may acquire an easement in the adjoining land, to permit the free passage of light and air through his windows. This easement, in its more important features, resembles the right of way, which has been already discussed. It will not, therefore, be necessary to present in detail the law upon the subject. Like the right of way, the owner of the dominant estate cannot do anything which will increase the burden upon the servient estate. Any act, such as closing windows and opening new ones, increasing the size of the windows, or removing the house, which operates in changing or increasing the burden upon the servient estate, will destroy the easement.⁶⁶

user of the land as a highway, without some evidence of an adverse claim, will not give the public any vested rights in the land. *Stuart v. Frink*, 94 N. C. 487, 55 Am. Rep. 618; *State v. Horn*, 35 Kan. 717.

⁶⁴ *Muzzey v. Davis*, 54 Me. 361; *Cole v. Sprowle*, 35 Me. 161; *Pope v. Town of Union*, 18 N. J. Eq. 282; *Manderschid v. Dubuque*, 29 Iowa 73; *Barteau v. West*, 23 Wis. 416; *Buchanan v. Curtis*, 25 Wis. 99, 3 Am. Rep. 23; *Brown v. Kansas City, etc., R. R. Co.*, 20 Mo. App. 427.

⁶⁵ *Moses v. St. Louis Sectional Dock Co.*, 84 Mo. 242.

⁶⁶ *Luttrell's Case*, 4 Rep. 87; *Tud. Ld. Cas.* 132, 133; *Cherrington v. Abney Mill*, 2 Vern. 646; *Moore v. Rawson*, 3 B. & C. 332; *Blanchard v. Bridges*, 4 A. & E. 176.

§ 443. *How acquired.*—In England an easement of light and air may be, and is generally, acquired by prescription or long user. An uninterrupted enjoyment of twenty years will be sufficient to create the easement. It is necessary, however, that there should be a building, for the benefit of which the easement is acquired.⁶⁷ There can be no such easement in favor of an open lot. The extent of the easement, therefore, depends upon the amount of enjoyment derived from it during the period of prescription.⁶⁸ During the period of prescription the right is *inchoate*, and may be defeated by the erection on the adjacent land of any structure which will exclude the light and air, and interrupt the adverse enjoyment. The owner of the adjoining land cannot be prevented from imposing such barriers to the acquisition of the easement.⁶⁹ In this country the right to acquire the easement by prescription has not met with general recognition. On the contrary, the tendency is to deny the right altogether. At the present day the courts of New Jersey, Illinois, and Louisiana are the only ones which still uphold this doctrine,⁷⁰ while it is repudiated by the other courts.⁷¹ In some of the States it is held that, where one person owns two contiguous lots, and sells one of them, which has a build-

⁶⁷ *Calls v. Home & Col. Stores* (Eng. 1904), 73 Law J. Ch. 484, 90 Law T. 687, 53 Wkly. Rep. 30, 20 Times L. Rep. 475.

⁶⁸ *Martin v. Goble*, 1 Comp. 322; *Moore v. Rawson*, 3 B. & C. 332; *Clark v. Clark*, L. R. 1 Ch. 16; *Roberts v. McCord*, 1 Mo. & Rob. 230.

⁶⁹ *Smith v. Kendrick*, 7 C. B. 515, 565; *Moore v. Rawson*, 3 B. & C. 332; *Corcoran v. Nailor*, 6 Mackey 580.

⁷⁰ *Ropeson v. Pittinger*, 2 N. J. Eq. 57; *Durel v. Boisblanc*, 1 La. An. 407; *Gerber v. Grubell*, 16 Ill. 217.

⁷¹ *Collier v. Pierce*, 6 Gray 18; *Rogers v. Sawin*, 19 Gray 376; *Carrig v. Dee*, 14 Gray 583; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Randall v. Sanderson*, 111 Mass. 114; *Carring v. Dee*, 14 Gray (Mass.) 583; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Mullen v. Stricker*, 19 Ohio St. 135; *Haverstick v. Sipe*, 33 Pa. St. 368; *Stein v. Hauck*, 56 Ind. 65; *Turner v. Thompson*, 58 Ga. 268; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Morrison v. Marquardt*, 24 Iowa 35; *Pierre v. Fernald*, 28 Me. 436; *Cherry v. Stein*, 11 Md. 1. But see, *Anthony v. Kennard Bldg. Co.* (Mo. 1905), 87 S. W. Rep. 921.

ing on it with windows opening on the remaining lot, an easement passes to the grantee to have free passage of light and air over the adjoining lot.⁷² But this rule is repudiated by some of the other courts,⁷³ and perhaps the better rule is, that such an easement will be implied from the existence of windows overlooking the other lot of the grantor, only when it is really necessary to the enjoyment of the estate granted.⁷⁴ It is possible, however, although very unusual, to acquire a right to the easement of light and air by express grant in any State, and the same rules of construction are applied to them which govern in cases of such prescriptive rights under the English law.⁷⁵

§ 444. Right of water.—Where a stream of water passes over the land of two or more adjacent owners, it has been established, upon the doctrine of law that there can be no right of property in water except as to its use, that the adjacent owners have mutual easements upon the soil of each other for the free and unrestricted flow of water. This rule, however, applies in its full force only to the natural streams. The riparian owners have the right to use the water to a reasonable extent, but cannot so use it as to diminish the flow, corrupt the water,⁷⁶ or to dam it up, and cause an over-

⁷² *Jones v. Jenkins*, 34 Md. 1, 6 Am. Rep. 1; *Hubbard v. Town*, 33 Vt. 295.

⁷³ *Keats v. Hugo*, 115 Miss. 204, 15 Am. Rep. 80; *Haverstick v. Sipe*, 33 Pa. St. 368; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Morrison v. Marquardt*, 24 Iowa 35.

⁷⁴ *Powell v. Simmes*, 5 W. Va. 1, 13 Am. Rep. 629; *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497.

⁷⁵ *Mahan v. Brown*, 13 Wend. 263; *McCready v. Thompson*, Dudley (S. C.) 113; *Grimley v. Davidson* (Ill.), 24 N. E. Rep. 439. See also cases cited in preceding note.

⁷⁶ *Wash. v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Richmond Manuf. Co. v. Atlantic DeLaine Co.*, 10 R. I. 106, 14 Am. Rep. 658; *Jacobs v. Allard*, 42 Vt. 303, 1 Am. Rep. 331. But pollution of the water of a stream by sewage is not actionable against the city, unless the pollution results from a negligent construction or use of the sewers. The city is not responsible in damages, if it is the result of a defective plan of

flow of the land above or diminish the volume of the stream below.⁷⁷ But if the stream is prevented from inundating lowlands in time of freshets there is no liability for so doing although the volume of the stream may be thereby increased to the greater damage of the banks below.⁷⁸ The stream cannot be diverted from its regular course, if by so doing injury results to the owners above or below.⁷⁹ To what extent the water may be used by a riparian owner depends upon the circumstances of each case. And the only general rule which can be stated is, that it must not be so used as to produce a perceptible damage to the other proprietors.⁸⁰ The detention of water, if it is for a reasonable use, will

sewerage. *Merrifield v. City of Worcester*, 110 Mass. 211, 14 Am. Rep. 592. For presentation of the "American common law," relating to easements in water courses, as pertaining to mining on the public domain, see *White, Mines & Min. Rem.*, Secs. 209, 210 *et sub*.

⁷⁷ *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Colburn v. Richards*, 13 Mass. 420; *Anthony v. Lapham*, 5 Pick. 175; *Kankakee, etc., R. R. Co. v. Horan*, 30 Ill. App. 553; affirming 23 N. E. 621; *Miss., etc., R. R. Co. v. Archibald (Miss.)*, 7 So. Rep. 212. And where the erection of a dam is authorized by legislative enactment, the owner of the dam must make compensation to all riparian proprietors, who have been injured thereby. *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 59; *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Kankakee, etc., R. R. Co. v. Horan*, 30 Ill. App. 553; affirming 23 N. E. Rep. 621.

⁷⁸ *St. Louis, etc., R. R. Co. v. Schneider*, 30 Mo. App. 620.

⁷⁹ *Elliott v. Fitchburg R. R. Co.*, 10 Cush. 191; *Macomber v. Godfrey*, 108 Mass. 219, 11 Am. Rep. 349; *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301. Water may be diverted from the channel for any reasonable use, but it can only be detained as long as it is necessary and reasonable, and it must be returned to the channel, before it passes to the land of the riparian proprietor below. *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Arnold v. Foot*, 12 Wend. 330; *Miller v. Miller*, 9 Pa. St. 74; *Pool v. Lewis*, 46 Ga. 162, 5 Am. Rep. 526.

⁸⁰ *Mason v. Hill*, 5 B. & Ald. 1; *Embrey v. Owen*, 6 Exch. 353; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Pollitt v. Long*, 58 Barb. 20; *Arnold v. Foote*, 12 Wend. 339; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Holeman v. Boiling Spring Co.*, 14 N. J. Eq. 335; *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102; *Samuels v. Armstrong (N. Y. 1905)*, 93 N. Y. S. 24; *Clark v. Allman (Kan. 1905)*, 80 Pac. Rep. 571.

not be actionable, even though it may cause injury to the proprietors below. But if the use be an unusual one, then it is not likely that the rule would apply.⁸¹ This rule is well established in favor of mill owners, the working of whose mills by the water prevents its use for a similar purpose by a riparian proprietor below. The right to run a mill in such cases, and to dam up the water for that purpose, depends upon the priority of establishment. He who first creates a mill upon the banks of the stream obtains a prior right to the use of the stream for that purpose, and if the quantity of water is not sufficiently large to permit the running of more than one mill, no other mill can be erected. If a second mill is erected by a proprietor above, and the diversion and detention of water for the purpose of the mill are so great as to diminish materially the supply of water to the first mill, the owner of the latter can enjoin such detention or diversion of the water.⁸² The mill owner cannot, under any circumstances, so dam up the water as to cause it to overflow the land above, or to divert it from the proprietor below, although in some States by statute mill owners are permitted to inflict such injury upon the adjoining proprietors by the payment in compensation in the way of damages, the assessment, and recovery of which are regulated by the statutes.⁸³

§ 445. Percolations and swamps — Surface drainage.—The above statements are only applicable to what are known in

⁸¹ *Springfield v. Harris*, 4 Allen 494; *Gould v. Boston Duck Co.*, 13 Gray 443; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Pool v. Lewis*, 41 Ga. 162, 5 Am. Rep. 526; *Whitney v. Wheeler Cotton Mills (Mass.)*, 24 N. E. Rep. 774.

⁸² *Liggins v. Inge*, 7 Bing. 682; *Mason v. Hill*, 5 B. & Ad. 1; *Williams v. Moreland*, 2 B. & C. 910; *Bealey v. Shaw*, 6 East 209; *Ang. on Wat. Cour.*, Secs. 130, 135; *Carey v. Daniels*, 8 Metc. 466; *Calmount v. Whitaker*, 3 Rawle 84.

⁸³ *Washburn on Ease.*, Ch. 3, Sec. 5, Pl. 35-46; *Ang. Wat. Cour.*, Sec. 482. See, for right to divert water for irrigation purposes, *Hage v. Eaton* (U. S. C. C. Colo. 1905), 135 Fed. Rep. 411.

the law as natural water courses. There must be a regular stream flowing in a regular channel, whether on the surface or under ground, in order that such rights may be claimed in it. If the water constituted a swamp upon the adjacent land, which flowed in no fixed channel, or if it percolated through the soil from one tract of land to another, the rules enunciated in the preceding paragraph do not apply. The owner of the land may draw off the water from the swamp, or divert the percolation, so as to collect the water in a well upon his own land, notwithstanding it results in serious detriment to the adjacent proprietor.⁸⁴ But if the owner of the land is actuated by malice, as where he pollutes the water, or cuts off the underground current, simply for the purpose of rendering his neighbor's well useless, an action would lie for the damage thus inflicted.⁸⁵ If the pipes and other conduits can be so arranged that one well need not interfere with the other, as in the case of the artesian wells, the parties will be required to observe this caution.⁸⁶

In draining one's land of surface water, no action will lie if it be allowed to flow over the adjoining land through natural channels.⁸⁷ It is sometimes held that the owner of the adjoining land may prevent such overflow of his land by the erection of barriers, or by the use of any other suitable

⁸⁴ *Ocean Grove, etc., Assn., v. Asbury Park, Com. n.*, 40 N. J. Eq. 447.

⁸⁵ *Rawstron v. Taylor*, 11 Exch. 369; *Greenleaf v. Francis*, 18 Pick. 117; *Luther v. Winnisimett Co.*, 9 Cush. 171; *Wilson v. City of Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Brown v. Illina*, 25 Conn. 583; *Village of Delphi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Hougan v. Milwaukee, etc., R. R.* 35 Iowa 558, 14 Am. Rep. 502; *Burroughs v. Saterlee*, 67 Iowa 396, 56 Am. Rep. 350.

⁸⁶ *Burroughs v. Saterlee*, 67 Iowa 366, 56 Am. Rep. 350; *Collins v. Chartiers Val. Gas Co.*, 131 Pa. St. 143, 18 Atl. Rep. 1012. See also, *Brown v. Armstrong* (Iowa 1905), 102 N. W. Rep. 1047; *Bryant v. Merritt* (Kan. 1905), 80 Pac. Rep. 600; *Tyrus v. R. R.* (Tenn. 1905), 86 S. W. Rep. 1074.

⁸⁷ *Sentner v. Tees*, 132 Pa. St. 216, 18 Atl. Rep. 1104; *Boynton v. Londay*, 19 Nev. 69, 6 Pac. Rep. 43.

means.⁸⁸ And while this is without doubt a sound rule in the case of urban servitudes, the better opinion is, at least in respect to drainage on farms and woodlands, that the upper land has a natural right to natural drainage over the land.⁸⁹ But in the drainage of one's land it is not permissible to direct the flow of the water upon the adjoining land or to increase the volume of the flow by the construction of a drain or ditch.⁹⁰ Still, it is permissible by the use of such means to empty the water into a natural stream, and if the volume of the stream is thereby increased to such an extent as to cause damage to the riparian owners below, they are without remedy.⁹¹ The same rule applies to the drainage of one's land into the highway.⁹²

§ 446. **Artificial water courses.**—The rule is also different where the water course is artificial. No one has the right to establish an artificial water course upon the land of another; but if the latter permits its construction he acquires no easement in the water, and cannot compel its perpetual maintenance, whatever injury he might suffer from its discontinuance. An uninterrupted enjoyment of the artificial water course for twenty years will not give him such a right. The construction of the water course being only for certain purposes, the adjoining owner could not by mere enjoyment

⁸⁸ *Greeley v. Maine Cent. R. R.*, 53 Me. 200. *Contra*, if it does injury, *Gerrish v. Clough*, 48 N. H. 9, 2 Am. Rep. 165; *Ogburn v. Connor*, 46 Cal. 346, 13 Am. Rep. 213.

⁸⁹ *Farris v. Dudley*, 78 Ala. 124, 56 Am. Rep. 24; *Boyd v. Conklin*, 54 Mich. 583, 52 Am. Rep. 831; *Abbott v. K. C., etc., R. R. Co.*, 83 Mo. 271, 53 Am. Rep. 581; *Schneider v. Mo. Pac. R. R. Co.*, 29 Mo. App. 681.

⁹⁰ *Weidekin v. Snelson*, 17 Ill. App. 461; *Beach v. Gaylord*, 43 Minn. 476, 45 N. W. Rep. 1095; *Chapel v. Smith (Mich.)*, 45 N. W. Rep. 69; *Weddell v. Hapner (Ind.)*, 24 N. E. Rep. 368; *David Heiser v. Rhodes (Pa.)*, 19 Atl. Rep. 400.

⁹¹ *Dickinson v. Worcester*, 7 Allen 19; *Smith v. Kendrick*, 7 C. B. 515; *Hoester v. Hemsath*, 16 Mo. App. 485; *Wagner v. Chaney*, 19 Ill. App. 546; *Bryant v. Merritt (Kan. 1905)*, 80 Pac. Rep. 600.

⁹² *Huddleston v. West Bellevue*, 111 Pa. St. 110.

acquire a prescriptive right to its continuance. He who creates the artificial stream may stop or divert it when he pleases, but at the same time he cannot maliciously foul the water to the detriment of the riparian owners below.⁹³

§ 447. *Easements in water courses and surface drainage.*—The various rights so far mentioned are natural rights incident to riparian ownership, implied or established by law. These rights are enjoyed independent of any contract or grant. But it is manifest that an express grant may operate in enlarging, diminishing or altogether extinguishing, the natural rights. They may be varied, and new rights may be acquired by prescription⁹⁴ or grant. An express grant or prescription will alter the natural or common law rights of the riparian owners⁹⁵ in the same manner as the creation of express and special easements affects the rights of property in other cases.⁹⁶ The same rule applies to the right of surface drainage and the maintenance of water pipes across another's lands.⁹⁷ But in order that such a right may be claimed by prescription, the right must have been exercised during the statutory period of limitation in defiance of or

⁹³ *Arkwright v. Gell*, 5 Mees. & W. 203; *Mayor v. Chadwick*, 11 A. & E. 571; *Saunders v. Newman*, 1 B. & Ald. 258; *Napier v. Bulwinkle*, 5 Rich. 317.

⁹⁴ *Whitney v. Wheeler Cotton Mills (Mass.)*, 24 N. E. Rep. 774; *Cox v. Clough*, 70 Cal. 345; *Terry v. Smith*, 47 Hun 333; *Keyser v. Covell*, 62 N. H. 283; *Johnson v. Boorman*, 63 Wis. 268; *McGeorge v. Hoffman (Pa.)*, 19 Atl. Rep. 413.

⁹⁵ See *Roe v. Redner (N. Y. 1904)*, 93 N. Y. S. 258.

⁹⁶ *Manning v. Wasdale*, 5 A. & E. 758; *Stockport Waterworks v. Potter*, 3 H. & C. 300; *s. c.* 31 L. J. Exch. 9; *McDaniel v. Cummings*, 83 Cal. 515, 22 Pac. Rep. 216; *Peaslee v. Tower*, 62 N. H. 434; *Carleton Mills Co. v. Silver*, 82 Me. 215, 19 Atl. Rep. 154; *Warner v. Cushman*, 82 Me. 164, 19 Atl. Rep. 159; *Curtis v. La Grande Water Co. (Ore.)*, 23 Pac. Rep. 808; *Terry v. Smith*, 47 Hun 333; *Whitney v. Wheeler Cotton Mills Co. (Mass.)*, 24 N. E. Rep. 774.

⁹⁷ *Johnson v. Knapp*, 150 Mass. 267, 23 N. E. Rep. 40; *White v. Sheldon*, 8 N. Y. S. 212; *Ribordy v. Pellachoud*, 28 Ill. App. 303.

adverse to the claims of the owner of the servient estate.⁹⁸

Where special rights are acquired in a stream of water by grant, the owner of the dominant estate or grantee has no right to make such use of the water as will inflict greater injury upon the other riparian owners than is expressly permitted by the terms of the grant. And the right acquired by prescription cannot in the same way be enlarged or extended.⁹⁹ Where one has the right of a water course over another's land, he is obliged to keep it in repair, in the absence of covenants imposing that obligation upon the owner of the land, and for that purpose he has the right to enter upon the land to make the repairs, taking care that no unnecessary damage be done to the servient estate.¹

§ 448. **Right of lateral and subjacent support.**—As an incident to the right of property in lands, the proprietor cannot make excavations upon his land, which will deprive the adjoining land of that lateral support which is necessary to keep it from falling in.² In the same manner, where there is a separate ownership in the surface, and the mines beneath, the owner of the mines cannot, by working them, so weaken the subjacent support to the surface as to cause it to cave in.³ The cases are numerous in which the right to lateral and subjacent support is claimed and conceded, and

⁹⁸ *White v. Sheldon*, 8 N. Y. S. 212; *Boynton v. Longley*, 19 Nev. 69, 6 Pac. Rep. 437.

⁹⁹ *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Bickett v. Morris*, L. R. 1 H. L. Cas. 47; *Smith v. Langewald*, 140 Mass. 205; *Mack v. Bensley*, 63 Wis. 80.

¹ *Peter v. Daniel*, C. B. 568; *Prescott v. White*, 21 Pick. 341. "Where an owner of land granted a right to the owner of a dam to keep, maintain, rebuild, and repair the same, the grantee of the owner takes subject to the grant." *Roe v. Redner* (N. Y. Sup. 1904), 93 N. Y. S. 258.

² *Partridge v. Scott*, 3 Mees. & W. 220; *Humphries v. Brogden*, 12 Q. B. 743; *Beard v. Murphy*, 37 Vt. 101; *McGuire v. Grant*, 25 N. J. L. 356; *Charless v. Rankin*, 22 Mo. 566.

³ *Humphries v. Brogden*, 12 Q. B. 739; *Smart v. Morton*, 5 E. & B. 30; *Rowbotham v. Wilson*, 8 E. & B. 123; *Jones v. Wagner*, 66 Pa. St. 429, 5 Am. Rep. 385.

the same general principles determine the character and limitations of both kinds of support.⁴ These are natural rights of easements, which are independent of any covenant or grant. They extend, however, only to the support of the adjoining land or surface in its natural condition. If the burden of support is increased by the erection of buildings upon the land, and because of such increase the excavation has caused the injury to the adjacent owner, he is without remedy. He had no natural easement upon the land of his neighbor for the support of his buildings. Such is also the rule where in the case of mines, the erection of the buildings causes the surface to give way.⁵ But if the excavation is made in a negligent or unskillful manner, and the damage results from negligence or unskillfulness, and not from the increase of the burden by the erection of the house, an action will lie for the injury thus sustained.⁶ And it is generally

⁴ *Homer v. Watson*, 79 Pa. St. 242; *s. c.* 21 Am. Rep. 55; *Richardson v. Vt. Cent. R. Co.*, 25 Vt. 465; *Yandes v. Wright*, 66 Ind. 319; *Jones v. Wagner*, 66 Pa. St. 429; *Scranton v. Phillips*, 94 Pa. St. 15; *Carlin v. Chappell*, 101 Pa. St. 348; *Buskirk v. Stickland*, 47 Mich. 389; *Shafer v. Wilson*, 44 Md. 268; *Dyer v. City of St. Paul*, 27 Minn. 457; *Marvin v. The Brewster Iron Mfg. Co.*, 55 N. Y. 538; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *s. c.* 14 Am. Rep. 322; *White v. Dresser*, 135 Mass. 150; *Coleman, et al., v. Chadwick*, 80 Pa. St. 81. See also, *Myer v. Hobbs*, 57 Ala. 175; *Gilmore v. Driscoll*, 123 Mass. 199; *Mamer v. Lussem*, 65 Ill. 484; *Wilms v. Jess*, 94 Ill. 464; *s. c.* 34 Am. Rep. 242; *Tunstall v. Christian*, 80 Va. 1; *s. c.* 56 Am. Rep. 581; *Northern Trans. Co. of Ohio v. Chicago*, 99 U. S. (9 Otto) 635. For discussion of relative rights of surface and mine owner and collation of authorities on injuries to surface owner, from removal of subjacent strata, by mine owner, both as regards the land in its natural state and with additional weight of buildings, see, *White, Mines & Min. Rem.*, Secs. 212, 216.

⁵ *Rogers v. Taylor*, 2 H. & N. 828; *Palmer v. Fleshees*, 1 Sid. 167; *McGuire v. Grant*, 25 N. J. L. 356; *Napier v. Bulwinkle*, 5 Rich. 311; *Charless v. Rankin*, 22 Mo. 566.

⁶ *Foley v. Wyeth*, 2 Allen 131; *Richardson v. Vermont Cent. R. R.*, 25 Vt. 465; *Panton v. Holland*, 17 Johns. 92; *McGuire v. Grant*, 25 N. J. L. 356; *Wilms v. Jess*, 94 Ill. 464; *Coleman v. Chadwick*, 80 Pa. St. 81; *Horner v. Watson*, 79 Pa. St. 242; *Scranton v. Phillips*, 94 Pa. St. 15; *Carlin v. Chappell*, 101 Pa. St. 348; *Livingston v. Moingona Coal Co.*, 49 Iowa 369.

held that the party intending to make an excavation on his own land must notify the adjoining proprietor if the excavation is likely to endanger the foundation of his building.⁷ The English courts, however, deny the right to an action in such a case, if injury would not have resulted from the negligence, had there been no building or other superstructure upon the land.⁸ A common case for the application of the right to lateral and subjacent support, is that of cutting down the grade of streets to such an extent as to cause a caving in of adjoining land.⁹ But these natural rights may be enlarged or diminished by express grant, or entirely new rights may be acquired by prescription. Thus a house may have annexed to it by grant or prescription an easement for lateral or subjacent support on the adjacent or underlying property of another, which cannot be claimed as a natural incident of the right of property. On the other hand, the right to such a support may be surrendered altogether.¹⁰ Where the natural easement is thus extended to include the support of buildings then all excavations must be so con-

⁷ See *Payton v. Mayor of London*, 9 Barn. & Cress. 725; 4 Man. & Ky. 625; *Walters v. Pfeil*, 1 Moody & Malk. 362; *Massey v. Goyder*, 4 Car. & Payne 161; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169. As a general rule, the easement of support on the part of the surface owner is held, by implication, to extend to his buildings, so as to protect him from excavations or underground drifts. *White, Mines & Min. Rem.*, Secs. 212-216, and cases cited.

⁸ *Smith v. Thackerah*, L. R. 1 C. B. 564; *Brown v. Robins*, 4 H. & N. 186; *Strogan v. Knowles*, 6 H. & N. 454; *Backhouse v. Bonomi*, 9 H. L. Cas. 503.

⁹ *Humphries v. Brogden*, 12 Q. B. D. 743; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *s. c.* 23 Eng. Com. L. 380; *Hendricks v. Spring Valley Mining and Irrigation Co.*, 58 Cal. 190.

¹⁰ *Rogers v. Taylor*, 2 H. & M. 828; *Wyatt v. Harrison*, 3 B. & Ad. 817; *Cox v. Matthews*, 1 Vent. 237; *Brown v. Windsor*, 1 Compt. & J. 20. It has been held in Georgia and elsewhere that the right to lateral support for a building cannot be acquired by prescription. *Mitchell v. Mayor*, 49 Ga. 19, 15 Am. Rep. 469; *Gilmore v. Driacoll*, 122 Mass. 199; *Tunstall v. Christian*, 80 Va. 1; *s. c.* 56 Am. Rep. 591; *Napier v. Bulwinkle*, 5 Rich. (S. Car.) 311.

ducted that no damage be done to the buildings or other structures.¹¹

§ 449. **Implied grant of lateral support.**—Another exception to the general rule arises where the owner of two adjoining lots conveys one with a building thereon; he cannot by excavations on the other lot deprive the building of the requisite support. The grant of an easement for lateral support is implied from his conveyance of the lot and building. He will not be permitted to do anything upon the remaining lot which will detract from its full enjoyment.¹² The same rule applies when adjacent houses rely for lateral support upon the walls of each other, as where houses are built in a block, and the walls between them mutually support each other. If one man erects the block, and afterwards sells one or more of the houses, an easement for support arises in favor of the owners of the several houses.¹³ This easement may also be acquired by express grant in all cases where it will not be implied.¹⁴

§ 450. **Party walls.**—Rights similar to lateral support are acquired by the erection of the so-called party walls. A party wall is one which is erected between two lots for the common benefit of the owners thereof in supporting the beams of their adjoining buildings. They are not tenants in common of the entire wall. Each has the title in severalty

¹¹ *Partridge v. Scott*, 3 Mee. & W. 220; *Brown v. Windsor*, 1 Compt. & J. 20; *Hide v. Thornborough*, 2 Car. & Kir. 250; *McMillen v. Watt*, 27 Ohio 306; see also *City of Quincy v. Jones*, 76 Ill. 231; *s. c.* 20 Am. Rep. 243; *Tunstall v. Christian*, 80 Va. 1; *s. c.* 56 Am. Rep. 581; *O'Connor v. Pittsburg*, 18 Pa. St. 187.

¹² *Brown v. Windsor*, 1 C. & J. 20; *Richards v. Rose*, Ex. Ch. 218; *Humphries v. Brogden*, 12 Q. B. 743; *Eno v. Del Vecchio*, 4 Duer 53; *McGuire v. Grant*, 25 N. J. L. 356.

¹³ See *Dee v. King* (Vt. 1905), 59 Atl. Rep. 839.

¹⁴ *Solomon v. Vintner's Co.*, 4 H. & N. 598; *Walters v. Pfeil*, Mood. & M. 362; *Peyton v. Mayo of London*, 9 B. & C. 725; *Kieffer v. Imhof*, 26 Pa. St. 438; *City of Quincy v. Jones*, 76 Ill. 231; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492.

to one-half, with an easement for support in the other half. Each of the owners can do whatever he pleases with his own half, provided he does not weaken the support of the other half. And if he tears down his half he does it at the risk of rendering himself liable for any injuries sustained by the remaining portion of the wall.¹⁵ But it is not every wall which is common between two houses that has the characteristics of a party wall.¹⁶ But every such wall by constant use as a common wall for twenty years will become a party wall by prescription.¹⁷ Party walls are generally erected by express agreement between the parties, each paying his share of the expenses.¹⁸ The mere erection by one of a common wall between them will not subject the other to liability for one-half the expenses of erection, even though he derives as much benefit therefrom as the one who caused its erection.¹⁹ Party walls are generally, though not necessarily, erected one-half on each of the contiguous estates.²⁰ The easements of the adjoining owners in each other's half of the party-wall are lost whenever the party-wall is pulled down or otherwise destroyed.²¹

¹⁵ *Matts v. Hawkins*, 5 Taunt. 20; *Sherred v. Cisco*, 4 Sandf. 480; *Orman v. Day*, 5 Fla. 385; *Berry v. Todd*, 14 Daly 450.

¹⁶ *Traute v. White* (N. J.), 19 Atl. Rep. 196.

¹⁷ *Eno v. Del Vecchio*, 4 Duer 53; *Dowling v. Hennings*, 20 Md. 179. But see *Mitchell v. Mayor*, 49 Ga. 19, 15 Am. Rep. 669; *Napier v. Bulwinkle*, 5 Rich. 311.

¹⁸ *Evans v. Howell* (Ill. 1903), 111 Ill. App. 167; *Hutchins v. Mum* (D. C. 1903), 22 App. D. C. 88.

¹⁹ *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283; *Sherred v. Cisco*, 4 Sandf. 480; *Dole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611. And one part owner of a party wall may be sued on his contract or covenant for his share of the expenses. *Day v. Caton*, 115 Mass. 513, 20 Am. Rep. 347; *Rindge v. Baker*, 57 N. Y. 207, 15 Am. Rep. 475. But a covenant to build a party wall is executory and personal in its nature, and does not run with the land so as to bind the assigns of the covenantor. *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611.

²⁰ See *Cubitt v. Porter*, 8 B. & C. 257; *Wiltshire v. Sidford*, 8 B. & C. 259; *Dowling v. Hennings*, 20 Md. 179; *Hammann v. Jordan*, 9 N. Y. S. 423.

²¹ *Heartt v. Kruger* (N. Y.), 24 N. E. Rep. 841, 5 N. Y. S. 841.

§ 451. Double ownership in buildings — Subjacent support.

— Where there is a separate ownership in the upper or lower half of a house, similar easements of support are enjoyed by the respective owners. The owner of the upper half is entitled to the subjacent support from the lower half, and the owner of the lower half has an easement in the upper half, the roof, etc., for protection from rain and other elements. The owner of the upper story would also have as a way of necessity, if not by express grant, a right to use the hall and stairs in getting to and out of the upper story.²² The law is not very clear as to the obligations of the owners to each other. Without doubt one cannot do any affirmative act to his half which will result in damage to the other. But whether he is under a legal obligation to keep his half in repair for the benefit of the other is not well settled,²³ although that would seem to be a just and equitable doctrine. If there is no such obligation to repair, the owner of the other half has the right to enter and make the repairs himself. There seems also to be a tendency to adopt the French rule, making all expenses for repair a common charge upon all the owners.²⁴ But it will require further adjudication in order to settle the rights and obligations of these parties.

If there is no provision for rebuilding, the title of the purchaser of an upper story or single room of a building is completely extinguished by the destruction of the building.²⁵

²² *Mayo v. Newhoff* (N. J.), 19 Atl. Rep. 837.

²³ The authorities generally deny the right of action. *Calvert v. Aldrich*, 99 Mass. 74; *Pierce v. Dyer*, 109 Mass. 374, 12 Am. Rep. 716. But if the owner of the upper half repairs the roof, he bears the whole expenses, and cannot compel the owner of the other half to pay any proportion of it. *Ottumwa Lodge v. Lewis*, 34 Iowa 67, 11 Am. Rep. 135. See also *Graves v. Berdan*, 26 N. Y. 501; *McCormick v. Bishop*, 28 Iowa 239.

²⁴ *Campbell v. Mesier*, 4 Johns. Ch. 334. *Contra*, *Ottumwa Lodge v. Lewis*, 34 Iowa 67, 11 Am. Rep. 135. And see *Graves v. Berdan*, 26 N. Y. 501; *McCormick v. Bishop*, 28 Iowa 239.

²⁵ *Hahn v. Baker Lodge* (Oreg.), 27 Pac. Rep. 166. For authorities on the easement of the owner of buildings and other structures, of

§ 452. **Legalized nuisances.**— Where one acquires from the owners of the land in the neighborhood, by grant or prescription, the right to do things which, without such license, would be a nuisance, and for which an action would lie, he is said to have acquired an easement in the lands to commit the nuisance, free from liability for the consequences. Such is very often the case with noisome or offensive trades. The trade must, however, be lawful, and likely to be productive of benefit to the public, in order that the easement may bind the owners of the neighboring land. And a nuisance, legalized in this manner, must be kept strictly within the conditions upon which the right was acquired. The licensee will not be permitted to increase the nuisance, or to establish a new one in its place, and the right must be exercised with the least possible discomfort or annoyance to the owners of the adjoining lands.²⁶

support from the subjacent strata of the soil, on which such erections are placed, see *White, Mines and Min. Rem.*, Sec. 216.

²⁶ *Aldred's Case*, 9 Rep. 59 a; *Cole v. Barlow*, 4 C. & B. (N. S.) 434; *Dana v. Valentine*, 5 Metc. 8; *Atwater v. Bodfish*, 11 Gray 152; *Holeman v. Boiling Spring Co.*, 14 N. J. Eq. 346. See, for allowance of damages, for flagrant violation of land owner's rights, *Bernos v. Canepa* (La. 1905), 38 So. Rep. 438.

SECTION III.

FRANCHISES.

SECTION 453. Definition.

454. Kinds of franchises.

455. Mutual obligations.

456. Conflicting franchises — Constitutional prohibition.

§ 453. Definition.— A franchise is a privilege granted by the government to individuals which is not enjoyed by, and do not belong in common to, the people of a country. In England it is conferred by letters patent from the crown, and in this country by grants from the legislative department of the government. It is a privilege which is granted because it is calculated to promote the public benefit, while at the same time it affords a source of revenue to those who engage in its exercise.²⁷ A franchise is generally, but not necessarily, granted to a corporation. Individuals may possess it, but it is usually of such a nature that it is easier and more convenient for corporations to exercise it. It is an estate of inheritance, unless its enjoyment is limited to a specific period, and is inheritable.²⁸ It can be aliened, and may be sold to satisfy the debts of the corporation or the individuals who own it.²⁹ The franchise is to be distinguished from the char-

²⁷ Bk. of Augusta v. Earle, 13 Pet. 519; 2 Bla. Com. 37; People v. Utica Ins. Co. 15 Johns. 358. In England franchises are now granted by the Legislature, instead of by the crown as formerly. 1 Cool. Bla. Com. 274, n.

²⁸ 3 Kent's Com. 459; 2 Washburn on Real Prop. 291; Chadwick v. Haverhill Bridge, 2 Dane Abr. 686; Stark v. McGowen, 1 Nott. & M. 393; Clark v. White, 5 Bush 353.

²⁹ 2 Washburn on Real Prop. 297. For compliance with franchise, after sale by the corporation to which same was granted, see Grosse P. L. v. Detroit & L. Ry. Co. (Mich. 1902), 90 N. W. Rep. 42. For

ter of the corporation which owns it, although the franchise is often granted in the same act which contains the charter. Thus, in the case of a railroad company, the franchise of the road may be sold to satisfy debts, but the charter does not pass with it.

§ 454. **Kinds of franchises.**—There are as many kinds of franchises as there may be privileges granted by the government. The most common are ferries, bridges, turnpike roads, and railroads. A ferry is the right to conduct passengers and freight by boat across a navigable stream between two points on the opposite banks. The right to a ferry does not depend upon the proprietorship of the water, or of the banks. Neither gives the right to set up a ferry, nor does the grant of a ferry interfere with the general navigation of the stream.³⁰ In the same manner is the right to construct a bridge across a stream, or to build a railroad or turnpike, a privilege, and not a common right which may be enjoyed by any one.³¹

§ 455. **Mutual obligations.**—In the grant of a franchise, mutual obligations are assumed by the government and the individuals or corporations who receive it. The government confers upon the latter the right to exercise the right of *eminent domain* over private property, so far as it is necessary for the enjoyment of the franchise, and the further right to

custom of letting franchise to highest bidder, see *California v. Tel. Co.* (Mo. 1905), 87 S. W. Rep. 604.

³⁰ *Peter v. Kendall*, 6 B. & C. 703; *Fay, Petitioner*, 15 Pick. 243; *Fall v. County Sutter*, 21 Cal. 252; *Inh. Peru v. Barrett* (Me. 1905), 60 Atl. Rep. 968.

³¹ *Beckman v. Saratoga, etc., R. R.*, 3 Paige Ch. 45; *Bloodgood v. Mohawk Railroad*, 18 Wend. 9; *Milhan v. Sharp*, 27 N. Y. 619; *McRoberts v. Washburn*, 10 Minn. 27. "The fact that the corporation's right in the State authorizes a contract—a lease—cannot alter its status, as a contract made under a franchise cannot reach beyond the rights acquired by the franchise itself, and afford immunity from public duties." *Louisiana & Northwest R. Co. v. State* (Ark. 1905), 88 S. W. Rep. 559.

provide for its own compensation, by charging a toll to all persons who make use of the benefits thus provided. On the other hand, the corporation undertakes to provide for the public safety and convenient accommodations, and for any failure to carry out its part of the contract it is liable to any person who may be injured thereby, and it may lose its franchise by forfeiture to the State. The franchise is forfeited only at the suit of the government, by a judgment in a proceeding of *scire facias* or *quo warranto*.³²

§ 456. Conflicting franchises — Constitutional prohibition.— If the government, in granting a franchise, obligates itself not to grant a similar franchise to be exercised in the same neighborhood, or between the same points, any subsequent franchise would be void, under the provision of the United States Constitution, which prohibits a State from passing any law impairing the obligation of a contract.³³ But if there is no express restriction of that kind, none will be implied. And the grant of a second franchise would be good, even though its exercise would render the first altogether valueless.³⁴ A franchise is not necessarily a monopoly. And even when there is such a restriction, the State is not prohibited from destroying the first franchise by the grant of a second, under the doctrine of *eminent domain*, whenever the public wants require such a forfeiture.³⁵ In such a case, however, the owners of the first

³² *Peter v. Kendall*, 6 B. & C. 703; *Willoughby v. Horridge*, 12 C. B. 742; 3 Kent's Com. 458; 2 Washburn on Real Prop. 293; *Louisiana & N. W. Co. v. State* (Ark. 1905), 88 S. W. Rep. 559.

³³ *Dartmouth College v. Woodward*, 4 Wheat. 518; *Boston & Lowell R. R. v. Salem & L. R. R.*, 2 Gray 1; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *McRoberts v. Washburn*, 10 Minn. 29.

³⁴ *Charles River Bridge Co. v. Warren River Bridge Co.*, 7 Pick. 344; *s. c.*, 11 Pet. 429; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 61; *Fall v. County Sutter*, 21 Cal. 252.

³⁵ For constitutionality of laws impairing the validity of franchises, see *C. B. & I. R. Co. v. Abbott* (Ill. 1905), 215 Ill. 416, 74 N. E. Rep. 412; *People v. Bd. Tax Comr.*, 199 U. S. 53, 49 L. Ed. 30; *Detroit, etc., R. Co. v. Powers*, 138 Fed. Rep. 264.

franchise would be entitled to, and would receive, a proper compensation for such loss. A franchise is just as much subject to the exercise of eminent domain, under similar restrictions as to compensation, as any other kind of private property.³⁶ If, however, private persons attempt, without a franchise, to exercise the same rights as are granted by the franchise, to the prejudice of the owners of the franchise, such an interference would be considered a nuisance, which will be abated and damages awarded upon proper application to the courts.³⁷

³⁶ *West River Bridge Co. v. Dix*, 6 How. 507; *Richmond R. R. Co. v. Louisa R. R. Co.*, 13 How. 71; *Boston Water Power Co. v. Boston & W. R. R. Co.*, 23 Pick. 360; *McRoberts v. Washburn*, 10 Minn. 27; *Rochester v. Rochester* (N. Y. 1905), 74 N. E. Rep. 963.

³⁷ 2 Bla. Com. 219; 2 Washburn on Real Prop. 294; *Ogden v. Gibbons*, 4 Johns. Ch. 150; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; *Fall v. County Sutter*, 21 Cal. 252. But see, as to the power of the legislature to alter or change the charter power of a corporation, within the power reserved by the grant, *McKee v. Chautauqua Assembly*, 130 Fed. Rep. 536.

SECTION IV.

RENTS.

SECTION 457. Rents defined.

458. Rent-service.

459. Rent-charge and rent-seck — Fee farm rents.

460. How created.

461. How extinguished or apportioned.

462. Remedies for the recovery of the rent.

463. Liens arising from charges by will or by deed.

464. Liens by express charges.

§ 457. Rents defined.— A rent, according to Mr. Washburn, “is a right to the periodical receipt of money or money’s worth in respect of lands, which are held in possession, reversion or remainder, by him from whom the payment is due.”²² It is, in other words, a right to the payment of something out of the profits of lands, to be rendered by the owner thereof and his privies. At common law there were three kinds of rents, viz.: *Rent service*, *rent seck* and *rent charge*.

§ 458. Rent service.— A *rent service* is that which the owner of a feud reserves to himself in conveying a part or the whole of his estate therein, to be paid by the grantee. In every such conveyance there was a tenure existing between grantor and grantee even of the fee, and out of this tenure, and as an incident thereof, whenever there was a rent reserved the owner of the rent had the right to go upon the land and *distrain* the grantee’s goods and chattels, and satisfy himself for the accrued and unpaid rent by a sale thereof. This right of *distress* was enjoyed by the holder of a rent service, without its being expressly reserved.²³ The Statute *Quia Emptores*

²² 2 Washburn on Real Prop. 272; Co. Lit. 142 a.

²³ In some States the right of *distress* for rent still exists, in a modi-

abolished all tenure between grantors and grantees of the fee, so that at present a rent service cannot be reserved out of a fee.⁴⁰ But this tenure does exist between reversioner or remainder-man, and the tenant of a term of years, and therefore a rent service may be reserved in a lease.⁴¹

§ 459. *Rent charge and rent seck — Fee farm rents.*— Rent charge is that, the payment of which is made a charge upon the land, but to which no right of distress was attached, unless expressly granted or reserved. If the owner of the rent was given this right, it was called a rent charge; if he did not possess it, the rent was a mere dry rent, or rent seck, the payment of which cannot be enforced by any seizure of the property out of which it was to issue.⁴² The characteristics of these two kinds of rents, at present, present no dissimilarity except in the matter of remedies for their enforcement, and are generally known under the common name of *fee-farm rents*, and are thus distinguished from *rents service*.⁴³ They will, therefore, be treated together under that common appellation.

§ 460. *How created.*— *Fee-farm* rents are created by any form of conveyance which constitutes a valid transfer of other incorporeal hereditaments. And they may be either reserved by the owner of the land in the deed conveying the land, or granted by him to a stranger, while he retains the land,⁴⁴ or

fied form. *Stephens v. Hooks* (Ga. 1905), 50 S. E. Rep. 119; *Cummings v. Smith*, 114 Ill. App. 35. But see, *Groesbeck v. Milling Co.* (Tex. 1905), 86 S. W. Rep. 346.

⁴⁰ 2 Washburn on Real Prop. 273; 3 Prest. Abst. 54; *Van Rensselaer v. Read*, 26 N. Y. 563; *Wallace v. Harmstad*, 44 Pa. St. 495.

⁴¹ 2 Washburn on Real Prop. 273; *Williams on Real Prop.* 247.

⁴² 3 Prest. Abst. 55; 2 Bla. Com. 42; *Williams on Real Prop.* 329, 330; 2 Washburn on Real Prop. 273, 274; *Cornell v. Lamb*, 2 Cow. 652; *Wallace v. Harmstad*, 44 Pa. St. 495.

⁴³ 3 Prest. Abst. 54; 2 Washburn on Real Prop. 273; *Langford v. Selmes*, 3 Kay & J. 229; *Williams on Real Prop.* 333.

⁴⁴ 3 Prest. Abst. 53; 3 Cruise Dig. 273; *Williams on Real Prop.* 334;

they may be acquired by prescription.⁴⁵ It may be granted in fee, in tail, for life or for years, and there may be a grant of the rent to one for a particular estate, with a remainder to another.⁴⁶ But the rent will be only good so far as the estate of the grantor extends. A tenant for life cannot grant a rent for a longer period than his own life.⁴⁷ Once the rent is created it is itself the subject of a grant or devise, and may be carved up into any number of estates, as long as the fee is not parted with. It descends to the heirs, and is capable of being conveyed to uses and in trust.⁴⁸ The wife also may have her dower or the husband his curtesy out of a rent held in fee or in tail.⁴⁹ *Fee-farm* rents are not very common in this country. Indeed they are rarely met with in practice. But they are valid limitations, and will receive the same recognition in this country as is accorded to them in England. Whenever used, they are resorted to for the purpose of securing to certain heirs their share in the inheritance without partitioning the land, or for raising jointures for married women.⁵⁰

§ 461. *How extinguished or apportioned.*—If one having a rent-charge acquires by purchase a part of the premises, out of which the rent issues, the rent is wholly extinguished, since

Van Rensselaer v. Hays, 19 N. Y. 68; *Ingersoll v. Sergeant*, 1 Whart. 337.

⁴⁵ *Wallace v. United Presb. Church*, 111 Pa. St. 164.

⁴⁶ 2 Washbur on Real Prop. 275; *Williams on Real Prop.* 334; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Read*, 26 N. Y. 564.

⁴⁷ *Williams on Real Prop.* 329; 2 Washburn on Real Prop. 277; 2 Dane's Abr. 452.

⁴⁸ 3 Prest. Abst. 53; 2 Washb. on Real Prop. 276; 3 Cruise Dig. 285, 292; *Toan v. Pline*, 60 Mich. 385; *Trulock v. Donahue*, 76 Iowa 758. "Rents accruing before the death of the landlord do not inure to the benefit of the heirs by descent." *Coberly v. Coberly* (Mo. 1905), 87 S. W. Rep. 957.

⁴⁹ 2 Washburn on Real Prop. 276; 3 Cruise Dig. 291.

⁵⁰ *Scott v. Lunt*, 7 Pet. 596; *Adams v. Bucklin*, 7 Pick. 121; *Van Rensselaer v. Platner*, 2 Johns. Cas. 17; *Williams Appeal*, 47 Pa. St. 290; *Farley v. Craig*, 11 N. J. L. 262; 2 Washburn on Real Prop. 277, 278; *Atkinson v. Orr* (Ga.), 9 S. E. Rep. 787.

a rent-charge is not capable of apportionment. This rule is the result of the repugnance entertained at common law to this kind of rent. The rule is the same if he releases any portion of the land from the charge.⁵¹ But the rule is confined to cases of acquisition by purchase. If a portion of the land is acquired by descent, the rent will be apportioned.⁵² The owner of the rent may avoid the operation of this rule by entering into a new agreement with the owner of the land. Thus if the land is held by tenants in common, in case of partition between them, the owner of the rent may by agreement apportion the rent between them, or he may release a portion of the land with the consent of the other land-owners.⁵³ These agreements, however, would virtually be new grants of rent, and cannot technically be said to secure an apportionment of the old rent. Although there can be no apportionment of rent in case of a release, or transfer to the grantee, of a part of the land charged with the rent, it can be divided up indefinitely by the owner of the rent, and it can be apportioned among the heirs of the grantee at his death, or a part may be severed by levy of execution to satisfy the debts of the grantee.⁵⁴

§ 462. Remedies for the recovery of the rent.—The ordinary common-law remedy was that of *distress*. Upon failure to pay the rent, the person entitled to payment could distrain the tenant's personal property found upon the land, out of which the rent issues. This right of distress was invariably an incident to a rent service, but had to be expressly reserved

⁵¹ 2 Washburn on Real Prop. 288; Co. Lit. 148; Williams on Real Prop. 337; Dennett v. Pass, 1 Bing. (N. C.) 388; Parley v. Craig, 11 N. J. L. 262.

⁵² 2 Washburn on Real Prop. 288; Williams on Real Prop. 337; Cruger v. McLaury, 41 N. Y. 223.

⁵³ Van Rensselaer v. Chadwick, 22 N. Y. 33; 2 Washb. on Real Prop. 289.

⁵⁴ Rivin v. Watson, 5 Mees. & W. 255; Farley v. Craig, 111 N. J. L. 262; Reyerson v. Quackenbush, 26 N. J. L. 236; Cook v. Brightly, 46 Pa. St. 440. See Williams v. Williams Co. (Ga. 1905), 50 S. E. Rep. 52.

in the case of a rent charge.⁵⁵ In most of the States in this country the right of distress has at some time been adopted and enforced, as modified by Stat. 4, Geo. II, ch. 28, which extended it to rents seck and rents charge, thereby abolishing all distinction between them.⁵⁶ But it has never existed in New England, and has now been abolished in New York and several of the other States, while perhaps, everywhere the remedy has been subjected to statutory changes and restrictions.⁵⁷ In addition to the right of distress, there is the ordinary personal action against the tenant and his assigns for the recovery of rent as it falls due. This remedy always exists together with, or in the absence of, the right of distress.⁵⁸ In the common-law pleading, the form of action varies with the form of the deed, in which the rent is reserved or granted. If the deed is an indenture, covenant will lie, if a deed poll, *assumpsit* is the proper form of action, while the action of *debt* will lie in most cases, whether the instrument be an indenture or a deed-poll.⁵⁹ Sometimes, in the creation of a fee-farm rent, a right of entry and forfeiture is granted, which turns the estate into one upon condition. Or the right of entry is only granted for the purpose of giving the possession of the premises to the grantee of the rent, to re-imburse himself for the accrued rent out of the profits of the land.

⁵⁵ 2 Washburn on Real Prop. 278; 2 Shars. Bla. Com. 43 n.

⁵⁶ 2 Washburn on Real Prop. 278, 293; 3 Kent's Com. 472; Grant v. Whitwell, 9 Iowa 154.

⁵⁷ 2 Washburn on Real Prop. 278, 279; Guild v. Rogers, 8 Barb. 502; 3 Kent's Com. 473 n; 2 Dane's Abr. 451.

⁵⁸ 2 Washburn on Real Prop. 479; Swasey v. Little, 7 Pick. 296; Van Rensselaer v. Read, 26 N. Y. 564; Van Rensselaer v. Dennison, 35 N. Y. 400.

⁵⁹ 2 Washburn on Real Prop. 281; Parker v. Webb, 3 Salk. 5; Hinsdale v. Humphrey, 15 Conn. 433; Gale v. Nixon, 6 Cow. 445. See Smith v. Borden (N. Y. 1904), 89 N. Y. S. 317, 96 App. Div. 236. "A notice by a landlord to his tenant, under Rev. St. 1887, Secs. 5093, 5094, requiring him to pay rent or surrender possession, describing the premises and naming the amount due, is sufficient to sustain an action in unlawful detainer." Hunter v. Porter (Idaho 1904), 77 Pac. Rep. 434.

Whether the entry results in a total or only a partial forfeiture of the estate, the grantee can enforce his right to the possession by the ordinary common-law action, by *writ of assize* or by *ejectment*.⁶⁰ The remedies vary greatly, according to the terms of each grant, and the local statute law of each State. For a more detailed statement of the appropriate remedies, the reader is referred to these statutes.

§ 463. Liens arising from charges by will or by deed.—Charges upon land, similar in their effect as an incumbrance upon lands to rent are held by equity to exist when specific property, or property in general, included in a residuary devise is conveyed or disposed of by will subject to or charged with, the payment of debts, legacies, or annuities in favor of some third party. The legal title to the property was conveyed or devised to the grantee or devisee subject to a lien or incorporeal right in favor of the person to whom the legacy, debt, or annuity is to be paid. This lien can be enforced against the property subject to it in favor of the intended beneficiary. These equitable liens may appear in deeds, as in the case of marriage settlements and the like, but it is more common,—and in this country it is rarely otherwise,—to be found in wills.⁶¹ This lien may be enforced not only against the dev-

⁶⁰ 2 Washburn on Real Prop. 279, 280; Co. Lit. 201, note 85, 202; Farley v. Craig, 11 N. J. L. 262. See Stephenson v. Haines, 16 Ohio St. 478; Marshall v. Conrad, 5 Call. 364. "Where a tenant is in possession, equity has no jurisdiction to enforce a forfeiture of a lease, the lessor having an adequate remedy by ejectment." Johnson v. Lehigh Valley Traction Co. (U. S. C. C., Pa. 1904), 130 Fed. Rep. 932. "Where a lessor reserves in the lease an option to terminate the lease on service of a 30-day notice on breach of covenant, he is not thereby precluded from pursuing his remedy of forcible detainer, if a tenant fails to pay rent when due." Hunter v. Porter (Idaho 1904) 77 Pac. Rep. 434.

⁶¹ Hill v. Bk. of London, 1 Atk. 618, 620; Bright v. Larcher, 4 De G. & J. 608; Markings v. Markings, 1 De G. F. & J. 355; Pearson v. Helliwell, L. R. 18 Eq. 411; Hoyt v. Hoyt, 85 N. Y. 142; Horning v. Wiederspallen, 28 N. J. Eq. 387; Gardenville, etc., Assn. v. Walker, 52 Me. 452;

isee, but also against the grantee, mortgagee and other subsequent purchasers who take it with notice.⁶² And the record and probate of the will in which the charge is made is notice to a subsequent purchaser of the equitable lien arising therefrom.⁶³

At one time this was the only way in which land could be subjected to liability for the debts of the decedent owner, and therefore the charge of the land by the will with the payment of the debts was a provision of the greatest importance to creditors. But now all lands, as well as personal property, are made generally liable for the satisfaction of the debts, and the testamentary charge is only valuable to creditors so far as such charge of the specific property with the payment of specific debts gives to the particular creditors a special exclusive lien for the satisfaction of their claims. Commonly, and in order that any property may be subject to an equitable lien in favor of the payment of debts or legacies, the intention of the testator to so charge the property must either be expressly stated in the will so as to create an express charge upon the property, or the charge upon the property must be implied from the provisions of the will, or from the circumstances surrounding the parties and the disposition of the property by will; so that the lien may arise from express and implied charges whenever the intention of the testator to so charge the property can be clearly deduced from all the circumstances of the case.⁶⁴

§ 464. Liens by express charges.—The testator may of course by express terms charge the payment of his debts or

Siron v. Ruleman's Exr., 32 Gratt. 215; *Burch v. Burch*, 52 Ind. 136; *Rhoades v. Rhoades*, 88 Ill. 139.

⁶² *Perkins v. Emory*, 55 Md. 27; *Donnelly v. Edenlen*, 40 *Id.* 117; *Blauvelt v. Van Winkle*, 29 N. J. Eq. 111.

⁶³ *Wilson v. Piper*, 77 Ind. 437.

⁶⁴ *Hoyt v. Hoyt*, 85 N. Y. 142; *Owens v. Clayton*, 56 Md. 129; *Steene v. Steele's Admr.*, 64 Ala. 438; *Taylor v. Harwell*, 65 *Id.* 1; *Heslop v. Gatton*, 71 Ill. 528; *Kirkpatrick v. Chestnut*, 5 S. C. 216.

liens or of any one of them either upon the particular piece of land, or upon the land in general disposed of in the residuary devise. Whenever such intention is made plain by the language of the will, these charges could be made upon both real and personal property as well as upon the residue of personal property which is given to the residuary legatee. No particular language is required to be used in creating the express charge, provided the intention to so charge the property with the payment of the legacy or debts is manifest in the will. The express charges of property with the payment of the debts and legacies may be divided into two classes. In the first class will be found all those cases where the testator devises the land or funds expressly for the payment of debts and legacies. In such a case the property devised, or funds bequeathed, will be expressly charged with the payment of the specified debts or legacies, but the devisee or legatee will not be personally liable for the payment of such debts or legacies. The only remedy in such a case for the beneficiaries of the charge will be against the property which has been charged with the payment of debts and legacies. On the other hand, the second class cases will include all those where the language employed charges the devisee or legatee with the payment of a debt or legacy in consideration of a devise or bequest to him. In such a case the charge created not only a lien upon the property devised or bequeathed, but likewise imposed a personal liability upon the devisee or legatee, and the beneficiary of the charge can proceed against the devisee personally as well as against the subject-matter of the devise.⁶⁵

⁶⁵ *Gardenville, etc., Assn. v. Walker*, 52 Md. 452; *Frampton v. Blume*, 129 Mass. 152; *Birch v. Sherratt*, L. R. 2 Ch. 644; *Brook v. Beadley*, L. R. 4 Eq. 106, 3 Ch. 672. For liens for rent, under statute, the provisions of the various State laws should be consulted. See, for example, *Staber v. Collins* (Iowa 1904), 100 N. W. Rep. 527.

CHAPTER XVIII.

LICENSES.

SECTION 465. What is a license?

466. Revocation of the license.

467. Revocation of license — Continued.

468. How licenses are created.

§ 465. What is a license? — A license is an authority or power to make use of land in some specific way, or to do certain acts or a series of acts upon the land of another. It differs from an easement in that it is not created by deed or by prescription, and hence it is not a right or interest issuing out of land, no *jus in re*; simply a naked authority.¹ A license is a personal interest or right, which is terminated either by the death of the licensor or licensee, or by the sale and transfer of the land without notice of the license, and which cannot be assigned without the consent of the licensor.² The licensee must exercise his authority in a reasonably prudent manner,

¹ "A license is a personal privilege to do certain acts on the lands of another, and is revocable at will." *Howes v. Barmon* (Idaho 1905), 81 Pac. Rep. 48; *Taylor v. Waters*, 7 Taunt. 374; *Blaisdell v. Railroad*, 51 N. H. 485; *Wiseman v. Luckinger*, 84 N. Y. 31; *Mumford v. Whitney*, 15 Wend. (N. Y.) 384; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Oliver v. Hook*, 47 Md. 301; *Desloge v. Peace*, 38 Mo. 588; *Fuhr v. Dean*, 26 Mo. 116; *Dark v. Johnston*, 55 Pa. St. 164; *Foster v. Browning*, 4 R. I. 47; *Hazelton v. Putnam*, 3 Pinn. (Wis.) 107; *s. c.* 3 Chand. (Wis.) 117; *s. c.*, 54 Am. Dec. 158; *De Haro v. U. S.*, 5 Wall. (U. S.) 599; 2 Am. Lead. Cas. (5 ed.) 549, note.

² *Wickham v. Hawker*, F. M. & W. 77; *Coleman v. Foster*, 37 Eng. Law & Eq. 489; *Ruggles v. Lesure*, 24 Pick. 187; *Blaisdell v. Railroad*, 51 N. H. 485; *Jackson v. Babcock*, 4 Johns. 418; *Wolf v. Frost*, 4 Sandf. Ch. 93; *Cox v. Levison*, 63 N. H. 283. "A license, even if a consideration is paid therefor, is revoked by the death of the licensor." *Clark v. Strong* (N. Y. Sup. 1905), 93 N. Y. S. 514.

and he will be held liable for all damages resulting from his negligence or unskillfulness; but he will not be responsible for any damage, which is but the natural consequence of the exercise of his authority.³

§ 466. *Revocation of the license.*— Since the license does not create any interest or estate in the land, as a general proposition it would seem that the continued enjoyment of the license should depend upon the will of the licensor. But the antagonism of interest and consequent loss, arising from the grant and subsequent revocation of a license, have produced no little confusion in the decisions of the courts. As long as the license remains executory there can certainly be no fixed indefeasable right to its enjoyment. The licensee has no remedy by which he may enjoin the licensor from prohibiting the exercise of his license.⁴ The power to revoke is undoubted. So also is this the case with an executed license, where the revocation will leave the parties in the same condition as they were before the license was granted. Such would be the case of a license to fish or hunt upon another's land, or to witness some performance, as where one purchases a ticket for the theater. All such licenses may be revoked at the will of the licensor. And in the case of a theatrical performance or other show, the licensee or ticket holder may be bidden to leave, and ejected by force if he refuses to do so, even though there is no valid cause for his removal.⁵ But the revocation of

³ *Selden v. Del. & Hud. Canal Co.*, 29 N. Y. 640; *Pratt v. Ogden*, 34 N. Y. 20; *Kent v. Kent*, 18 Pick. 569; *Webb v. Paternoster*, Palmer 71.

⁴ *Cook v. Stearns*, 11 Mass. 533; *Sterling v. Warden*, 57 N. H. 217, 12 Am. Rep. 80; *Dodge v. McClintock*, 47 N. H. 483; *Miller v. Auburn, etc., R. R.*, 6 Hill. 61; *Veghte v. Rariton*, 19 N. J. Eq. 154. In the late case of *Lytle v. James* (73 S. W. Rep. 287), the Court of Appeals, in Missouri, held that a license to mine granted such a possessory right to the licensee as would enable him to enjoin an interference with his rights, by third parties. For full discussion of licenses to mine and transfer, enjoyment and revocation thereof, see *White, Mines & Min. Rem.*, Secs. 190 to 204, pp. 256-270.

⁵ *Wood v. Leadbetter*, 13 M. & W. 838; *Coleman v. Foster*, 37 Eng.

the license will not be permitted to have a retroactive effect, so as to make the acts done by the licensee upon the land before revocation a trespass, or to make him liable for damages flowing naturally from the exercise of his authority.⁶ And if there is a valid subsisting contract for the grant and exercise of the license, the revocation of the license will constitute a breach of the contract, for which the licensor will be liable in an action for damages. And so also, if in the exercise of the authority the licensee has taken property of his own upon the land (as, for example, where he erects a building), or acquires a title to personal property formerly the property of the licensor (as where the license is to go upon the land and cut trees for his, the licensee's, own use), a reasonable time must be given to the licensee within which to remove his property. To that extent, under such circumstances, is the license irrevocable. The revocation does not vest in the licensor the property of the licensee found upon the land.⁷

L. & Eq. 489; *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455; *Desloge v. Pearce*, 38 Mo. 599. See *Ford v. Whitlock*, 27 Vt. 268; *Quinn v. Anderson*, 70 Cal. 454, 11 Pac. 746; *Total v. Bounefoy*, 23 Ill. App. 55, 123 Ill. 653, 24 N. E. Rep. 687; *Williams v. Flood*, 63 Mich. 487, 30 N. W. Rep. 93. Likewise, a license to cut trees is revocable. *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455; *Giles v. Simonds*, 15 Gray 444; *Tillotson v. Preston*, 7 Johns. 285; *Westcott v. Delano*, 20 Wis. 516; *Roffey v. Henderson*, 17 Q. B. 586; *Ward v. Rapps* (Mich.), 44 N. W. Rep. 934.

⁶ *Hewlins v. Shippam*, 5 B. & C. 221; *Cook v. Stearns*, 11 Mass. 533; *Bridges v. Purcell*, 1 Dev. & B. 496. A licensee who continues to exercise his license after revocation is a trespasser. *White, Mines & Min. Rem.*, Sec. 203 and cases.

⁷ *Wood v. Leadbetter*, 13 M. & W. 856; *Ashmun v. Williams*, 8 Pick. 402; *Churchill v. Hulbert*, 110 Mass. 42, 14 Am. Rep. 578; *Burk v. Hollis*, 98 Mass. 56; *White v. Elwell*, 48 Me. 360; *Town v. Hazen*, 51 N. H. 596; *Smith v. Goulding*, 6 Cush. 155; *Desloge v. Pearce*, 38 Mo. 599. "Consent by the owner of the fee that an adjoining proprietor may drain his land by cutting a ditch over the land of the one giving the consent creates an irrevocable license, where the licensee, on the faith of the license, expends money and erects valuable improvements necessary to enjoy the license." *Brantley v. Perry* (Ga. 1904), 48 S. E. Rep. 332. "A license is but a *profit a prendre*, and differs from an

§ 467. **Revocation of license — Continued.**— Where the licensee in the exercise of his license has been put to considerable expense, and a revocation of the license results in great damage to the licensee, because of the impossibility to place the parties *in statu quo*, whether the license can be revoked has been differently decided. A large number of the courts have held that such a license is, nevertheless, revocable, and the revocation will not render the licensor liable to any action for damages.⁸ While, on the other hand, a number of the cases maintain, on the equitable grounds of estoppel and part performance of a contract, that the license is irrevocable in such cases.⁹ If the authority is connected with, or is exercised in pursuance of, a contract for the grant of an easement, the licensee may prevent a revocation by an action for specific performance of the contract for an easement.¹⁰ But a simple license, which is not in the nature of an executory contract for the future grant of an easement, not being an incorporeal hereditament or an estate in lands, is not an indefeasible fixed right, and can therefore be revoked. Perhaps a failure to ob-

easement in that it can be held apart from the possession of the land." *Arnold v. Bennett*, 92 Mo. App. at p. 159; *Chitwood v. Lanyon Zinc Co.*, 93 Mo. App. 225; *White, Mines & Min. Rem.*, Sec. 192.

⁸ *Cocker v. Cowper*, 1 Crompt. M. & R. 418; *Fentiman v. Smith*, 4 East 107; *Hetfield v. Centre R. R.*, 29 N. J. L. 571; *Hazleton v. Putnam*, 3 Chand. (Wis.) 117; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 380.

⁹ *Rerick v. Kern*, 14 Serg. & R. 267; *Huff v. McCauley*, 53 Pa. St. 209; *Cook v. Prigden*, 45 Ga. 331; *Beatty v. Gregory*, 17 Iowa 114; *Snowden v. Wilas*, 19 Ind. 14. In others of the States, a middle ground is taken, that the licensor cannot revoke the license until he has re-imbursed the licensee for his expenditures. See *Woodbury v. Parshly*, 7 N. H. 237; *Addison v. Hack*, 2 Gill 221; *Rhodes v. Otis*, 33 Ala. 600, and cases cited *supra* from Iowa and Indiana. For revocation of license to mine, see *White, Mines & Mining Rem.*, Sec. 202.

¹⁰ *Veghte v. Raritan Co.*, 19 N. J. Eq. 153; *Williamston, etc., R. R. v. Battle*, 66 N. C. 546. "A verbal contract giving a railroad a right to enter upon land and remove sand therefrom cannot be revoked by the landowner by giving the railroad notice to leave the premises." *Cox v. St. Louis M. & S. E. Ry. Co.* (Mo. App. 1905), 85 S. W. Rep. 989.

serve this distinction has been the cause of the doubt and confusion to be met with in the cases.¹¹ Perhaps the better rule is that where the licensor revokes his license in violation of a valid subsisting contract for its continuance, and thereby produces damage to the licensee, such damages should be, and are, recoverable in an action for the breach of the contract.¹² But, as a corollary to the above proposition, it may be suggested that where the length of the enjoyment of the license is indefinite, as where the license is to erect and maintain a house, that being a bargain for a permanent interest in land in the nature of an easement, it can be granted only in the way in which such interests are required to be created, viz.: by deed, and therefore no action for damages will lie for its revocation. But a license upon sufficient consideration to cut and take away a certain number of trees or to dig for minerals for a specific time, and the like, are valid, subsisting contracts, and the revocation of the license would be a breach of it, for which the licensor may be held liable.¹³

¹¹ A further distinction, drawn from the law of Easements, would serve to suggest the most rational doctrine. If the license only involves the abandonment of the licensor's easement upon the licensee's land, and imposes no direct burden upon the licensor's land, the license is irrevocable, for an easement may be abandoned by parol. But if the license involves the permanent use of the licensor's land, and structures are to be maintained upon it, since that is nothing more than the grant of the easement, it may be revoked, if not granted by deed. This appears to be the position of the Illinois courts. See *Russell v. Hubbard*, 59 Ill. 337; 2 Washburn on Real Prop. 636, 639. See also *Winter v. Rockwell*, 8 East. 308; *Hewlins v. Shippam*, 5 B. & C. 221; *Morse v. Cope land*, 2 Gray 202; *Dyer v. Sandford*, 9 Metc. 395; *Veghte v. Raritan Co.*, 19 N. J. Eq. 153; *Addison v. Hack*, 2 Gill 211; *Jamieson v. Milleman*, 3 Duer 255; *Hazleton v. Putnam*, 4 Chand. (Wis.) 124. "A license to do certain acts on the lands of another may rest in parol." *Howes v. Barmon* (Idaho 1905), 81 Pac. Rep. 48.

¹² *Whitmarsh v. Walker*, 1 Metc. 316; *Giles v. Simonds*, 15 Gray 444.

¹³ "Except in extreme cases the court cannot determine as a matter of law whether the reasonable time within which the grantee of a timber privilege should exercise the same has or has not expired." *Brinson & Co. v. Kirkland* (Ga. 1905), 50 S. E. Rep. 369. See, for full discus-

§ 468. **How licenses are created.**—Licenses may be created either by express agreement, by parol,¹⁴ or they may be implied from the inducements and representation of the land owner. Thus, merchants, professional men and artisans impliedly give to the public a license to enter their places of business for the purpose of transacting business. Such would also be the case between persons sustaining social relations, in respect to the right to enter each other's premises for the purpose of visiting.¹⁵

sion of licenses to mine and the late decisions on this particular license in land, *White, Mines & Min. Rem.*, Secs. 190, 204.

¹⁴ *Wood v. Leadbetter*, 13 M. & W. 838; *King v. Horndon*, 4 M. & Sel. 562; *Muskett v. Hill*, 5 Bing. N. C. 694; *Doolittle v. Eddy*, 7 Barb.

¹⁵ *Martin v. Houghton*, 45 Barb. 60; *Adams v. Truman*, 12 Johns. 408; *Gowan v. Phila. Exchange Co.*, 5 Watts & S. 141; *Kay v. Penn. R. R.*, 65 Pa. St. 273; *Sterling v. Warden*, 51 N. H. 231, 12 Am. Rep. 80. In Alabama, a verbal license to mine or remove part of the *corpus* of the estate, is void. *Riddle v. Brown*, 20 Ala. 412. See also *Desloge v. Peirce*, 38 Mo. 595; *Lunsford v. LaMotte*, 54 Mo. 426. "In Utah it is held, a mere verbal permission to mine, acted upon, cannot be revoked, except by forfeiture for breach of condition." *Ruffati v. Societe des Mines, &c.*, 10 Utah 386, 37 Pac. Rep. 591. And see, also, *Young v. Ellis (Va.)*, 21 S. E. Rep. 480. In the absence of express authority, a license granted by the general manager of a corporation is void. *Butte, &c., Co., v. Ore Purch. Co.*, 21 Mont. 539, 55 Pac. Rep. 112; *White, Mines & Mining Rem.*, Sec. 194.

PART III

TITLES

CHAPTER XIX. GENERAL CLASSIFICATION OF
TITLES.

XX. TITLE BY DESCENT.

XXI. TITLE BY ORIGINAL ACQUISITION.

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CHAPTER XIX.

TITLES—GENERAL CLASSIFICATION OF TITLES.

SECTION 469. What is title?—By descent and purchase.

470. Original and derivative titles.

§ 469. What is title?—By descent and purchase.—A title is the means by which one may acquire a right of ownership in things; *Iusta causa possidendi quod nostrum est*.¹ When applied to real property, titles may be divided into two general classes, title by descent and title by purchase. Title by descent is that title which one acquires by law as heir to the deceased owner. It is cast upon the heir with or without his consent. His assent is not necessary, and he cannot by any disclaimer divest himself of the title so acquired.² Every other kind of title, whether vested by act of the parties or by operation of the law, is called a title by purchase. The party, in whose favor it is created, must accept it in order that any title may pass, either expressly or by acts which clearly indicate his assent. But he cannot be compelled to accept unless he has placed himself under obligations by a valid contract of sale.³

§ 470. Original and derivative titles.—Titles by purchase may be again subdivided into *original* and *derivative*. An

¹ Co. Lit. 345 b; 3 Washburn on Real Prop. 1, 2; Bart. on Real Prop., Sec. 314.

² Co. Lit. 191 a, note 77, Sec. 5, 1; Bac. Law Tracts 128; 2 Bla. Com. 201; Williams on Real Prop. 97; *Womack v. Womack*, 2 La. An. 339. But he may formally renounce in Louisiana. *Reed v. Crocker*, 12 La. An. 436.

³ 3 Cruise Dig. 317; Co. Lit. 18 b, note 106; 4 Kent's Com. 373; Williams on Real Prop. 96, 97; *Nicholson v. Wardsworth*, 2 Swanst. 365, 372.

original title is one which is acquired solely by act of the party claiming it, and is obtained by his entry into possession. It is a general rule of both natural and civil law, that things under dominion of no person may become the property of any one by mere entry into possession, and it includes not only those things which have never been under the dominion of any one, but also those, the dominion over which has been lost or abandoned. Derivative title is that by which property is acquired from another, in whom the right of property has been vested. It involves the idea of a transfer or assignment of the right of property from one to another. This transfer may be affected by act of the former owner, as by conveyance *inter vivos*, or testamentary disposition, or it may be by operation of law.⁴

⁴This subdivision is very generally used by the continental jurists instead of the division of titles into *descent* and *purchase*. See Holtzendorff's *Encyclopædie der Rechtswissenschaft*, pp. 386-390. It is here introduced in the belief that the distinction might serve to explain a few difficult questions which arise in respect to several kinds of titles, more notably titles by limitation and estoppel, as they are called by the different authors. It will be observed that in the present work they are not considered as modes of acquiring titles—only modes of perfecting titles already acquired by destroying or nullifying other outstanding rights or titles in other persons. See *post*, Secs. 507, 513, 514.

CHAPTER XX.

TITLE BY DESCENT.

SECTION 471. Definition.

- 472. *Lex loci rei sitæ*.
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- 474. How lineal heirs take.
- 475. Lineal consanguinity in the ascending series.
- 476. Collateral heirs.
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§ 471. Definition.— Title by descent is that title, by which one acquires, by operation of law, upon the death of the owner, the estates of inheritance, which the deceased has not disposed of in any other manner. The person from whom the property descends is called the ancestor.¹ The person who is appointed by the law to take the estates is called the heir. Technically, one who takes property under a will is not an heir. And the word heir is also confined to those persons who take the real estate. One cannot be an heir to personal property.² The heirs cannot be ascertained until the death of the ancestor. *Nemo est hæres viventis*.³ The heir never takes in

¹ In that sense a child might be the ancestor of his parents, a grandchild the ancestor of his grandparents. 3 Washburn on Real Prop. 18; Prickett v. Parker, 3 Ohio St. 390; Williams on Real Prop. 105. This was opposed to the common law, according to which "the inheritance lineally descends, but never lineally ascends." See *post*, Sec. 475.

² Bac. Law Tracts 128; Co. Lit. 191 a, note 77; Donahue's Estate, 36 Cal. 329; Lincoln v. Aldrich, 149 Mass. 368.

³ 2 Bla. Com. 208; 3 Washburn on Real Prop. 6; Williams on Real

pursuance of the deceased owner's intention or will; consequently no one, who by law is entitled to the property as heir, can be shut out from his inheritance by any act of the ancestor, unless such act amounts to a disposition of the property by will.⁴ And even where a will, disposing of all the ancestor's property, is produced, if it be shown that the omission of the name of an heir, especially if it be a child or a grandchild, is the result of an accident, and that the testator fully intended that he also should take under the will, such heir will be permitted to take the share of the estate to which he would have been entitled if the ancestor had died intestate. And in the absence of direct proof of the testator's intention, the failure to mention the particular heir will raise the presumption that the omission was accidental.⁵ Immediately upon the death of the ancestor, the title to all his estates of inheritance vests in the heirs, subject to the widow's dower and husband's tenancy by the curtesy, and the claims of the ancestor's creditors.⁶ And if lands have to be sold for any purpose, the proceeds of sale would descend as real estate,

Prop. 96. But in common parlance persons are recognized as possible heirs to a certain individual if they should survive him. And in view of the existence of this possibility, the common law made use of the two expressions, heirs presumptive, and heirs apparent. An heir presumptive is one who would be the heir if the ancestor were to die at the contemplated time, but whose possibility of inheritance may be destroyed by the birth of some one more nearly related, as well as by his death before the ancestor. An heir apparent was one who was sure to inherit, if the ancestor died in his life-time. These terms are of no practical importance, as no rights of property are acquired by such parties which the law in any way recognizes. *Gardner v. Pace* (Ky), 11 S. W. Rep. 779. See *Lockwood v. Jessup*, 9 Conn. 228.

⁴ *Augustus v. Seabolt*, 3 Metc. (Ky.) 161; *Roosevelt v. Fulton*, 7 Cow. 71.

⁵ *Beck v. Metz*, 25 Mo. 70; *Gage v. Gage*, 29 N. H. 533; *Bancroft v. Ives*, 3 Gray 367; *Shelby v. Shelby*, 6 Dana 60; *Bradley v. Bradley*, 24 Mo. 311.

⁶ *Willis v. Watson*, 5 Ill. 64; *Hays v. Jackson*, 6 Mass. 149; *Cowell v. Weston*, 20 Johns, 414; *Hillhouse v. Chester*, 3 Day 166. See *contra*, *Telfair v. Roe*, 2 Cranch 407; *Albriton v. Bird*, R. M. Charlt. 93.

to the persons who would have inherited the lands.⁷ He is entitled to the rents and profits to the estate until sold for the benefit of the creditors, even though the estate is insolvent.⁸ The heir need not offer proof that his ancestor died intestate. Intestacy is presumed until a will is produced.⁹

§ 472. *Lex loci rei sitæ*.—The descent of real property is governed by the law of the place where the land is situated, the *lex loci rei sitæ*. The law of the domicile, *lex domicilii*, does not apply to real property. And that law of descent governs, which was in force at the decease of the ancestor.¹⁰ The law of descent varies according to the civil polity of each State, or, as Blackstone has it, it is “the creature of civil polity and *juris positivi*.” In every State of the American Union there is a statute regulating the descent of real property, and for any special questions arising under the law of descent reference must be had to the statute of the State in which the land lies. But these statutes have many points in common, and are controlled by certain general principles which may be collated and presented in a work of this character. But for the minor details of the law, the inquirer must look to the State statutes, an excellent compendium of which may be found in the third volume of Mr. Washburn’s Treatise on the Law of Real Property.¹¹

§ 473. *Consanguinity and affinity*.—Only those persons can claim as heirs of a deceased intestate who are in some way related to him. Relationship is of two kinds, *consanguinity* and

⁷ *Wells v. Seeley*, 47 Hun 109; *Thompson’s Estate*, 6 Mackey 536; *In re McCabe*, 15 R. I. 330, 5 Atl. 79.

⁸ *Gibson v. Farley*, 16 Mass. 280; *Boynton v. Peterborough, etc.*, R. R. Co., 4 Cush. 467; *Allen v. Van Houton*, 19 N. J. L. 47. *Contra*, *Branch Bk. v. Fry*, 22 Ala. 790.

⁹ *Lyon v. Kain*, 36 Ill. 368; *Baxter v. Bradbury*, 20 Me. 260; *Stephenson v. Doe*, 8 Blackf. 508.

¹⁰ Story on Confl., Sec. 484; *Potter v. Titcomb*, 22 Me. 300; *Emmert v. Hays*, 88 Ill. 11; *Brewer v. Cox* (Md.), 18 Atl. Rep. 864.

¹¹ 3 Washburn on Real Prop., p. 21 *et sub*.

affinity. Consanguinity is that relationship which arises from a community of blood, and exists between persons who are descended from a common ancestor. This common ancestor is called the *stirps*, or root. Consanguinity is again divided into *lineal* and *collateral*. Lineal consanguinity exists between persons who descend one from the other in the direct or single line of descent. Father, grandfather, etc., in the ascending series, and son, grandson, etc., in the descending series, are related by lineal consanguinity. Collateral consanguinity is where the relationship is traced through different lines of descent up to the common ancestor. Thus, brothers, cousins, nephews, and uncles, etc., are related by collateral consanguinity, respectively, through the common father and grandfather.¹² Affinity is the relationship created between parties by marriage, either of themselves, or of their respective relatives. Thus, husband and wife, and their respective fathers and mothers-in-law, and the like, are related by affinity. At common law only kindred by consanguinity could inherit from the deceased. And this rule was so strictly observed that even the husband or wife could not lay claim to the property of each other as heir. It would be escheated to the State instead of vesting in such relations.¹³ But at the present day, in a large number of the American States, husband and wife are made capable by statute of inheriting from each other. In some States they inherit equally with the children and the descendants of deceased children, while in others they inherit only in the absence of lineal descendants, and in some they are even postponed to collateral heirs.¹⁴

¹² *Ante, idem*, pp. 9 & 10; 2 Bla. Com. pp. 202, 206.

¹³ Bla. Com. 246. See *Esty v. Clark*, 101 Mass. 36, 3 Am. Rep. 320; *Lord v. Bourne*, 63 Me. 368, 18 Am. Rep. 234; *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. Rep. 30.

¹⁴ See *Shaw v. Breeze*, 12 Ind. 392; *Nicholas v. Parcell*, 21 Iowa 265. Statutory rules of this character are to be found in Alabama, Arkansas, California, Dakota, Georgia, Illinois, Iowa, Massachusetts, Maryland, Michigan, Minnesota, Missouri, North Carolina, Nebraska, Pennsylvania, Rhode Island, South Carolina, Vermont, Wisconsin. 3 Washburn

§ 474. **How lineal heirs take.**—According to the common law, the real estate descended to the eldest son, to the exclusion of the other sons and daughters; and if there be no sons then the daughters inherited in equal shares. This was known as the law of *primogeniture*.¹⁵ And even where according to local custom, as was the case with lands held by tenure of gavel kind, the law of primogeniture did not prevail, the sons would inherit equally to the exclusion of the daughters and their descendants.¹⁶ But neither of these English rules has ever been in force in this country, and the universal rule is that the lineal descendants in the descending series inherit equally, no distinction being made between males and females.¹⁷ If the lineal descendants are all in the same degree removed from the intestate ancestor, they will inherit equally, and are said to take *per capita*. But if they are removed in different degrees, or where they consist of a son, or daughter, and the children of a deceased son or daughter, the children would inherit only that share of the deceased's estate to which their father or mother would have been entitled, if he or she had survived the deceased. Thus, in the given case, the estate would be divided into two equal parts, the surviving son or daughter taking the one part, while the other part would be divided among the children of the de-

on Real Prop. 21, note. "A plural wife does not acquire the status of a lawful wife, and is without the pale of the law of inheritance as to any property which her husband has acquired previous to her marriage or which he may thereafter acquire." *Raleigh v. Wells* (Utah 1905), 81 Pac. Rep. 908; *Mutual Inv. Co. v. Raleigh, Id.* See *Castleman v. Castleman* (Mo. 1904), 83 S. W. Rep. 757; *La Grange Mills v. Kener* (N. C. 1904), 49 S. E. Rep. 300.

¹⁵ 3 Washburn on Real Prop. 7; 1 Spence Eq. Jur. 175, 176; 2 Bla. Com. 214, 215.

¹⁶ 3 Washburn on Real Prop. 7; 2 Bla. Com. 234; 2 Bla. Com. 84.

¹⁷ 3 Washburn on Real Prop. 8, 9, 12; Walker's Am. Law 353; 4 Kent's Com. 378. In respect to the equality of inheritance by lineal heirs, the American law bears a close resemblance to the Roman law of descent. Coop. Just. 543. See, *Smith v. McDonald* (N. J. 1905), 61 Atl. Rep. 453.

ceased child. This is called inheritance *per stirpes*, or by representation. At common law all lineal descendants took *per stirpes*, but the rule in this country is generally limited to the case of descendants of unequal degrees of removal from the ancestor.¹⁸

§ 475. **Lineal consanguinity in the ascending series.**—It was a canon of the common law that the inheritance could never fall to persons related to the deceased in the ascending series. Thus, parents, grandparents, etc., of the deceased could not inherit.¹⁹ If, therefore, there were no lineal descendants, *i. e.*, issue, the property would have descended to the collateral kindred to the exclusion of the lineal relations in the ascending line.²⁰ But this rule has now generally been changed by statute, and the lineal heirs in the ascending series will take in preference to collateral kindred.²¹

§ 476. **Collateral heirs.**—But if there be no lineal descendants, and no lineal heirs in the ascending line, or no statute permitting such heirs to inherit, the estate descends to the collateral kindred in the nearest degree of relationship to the

¹⁸ Chase. Bla. Com. 389, n. 6; Walker's Am. Law 354; 4 Kent's Com. 379, 391, 408; 3 Washburn on Real Prop. 12, 13. See *Skinner v. Fulton*, 39 Ill. 484; *Den v. Smith*, 2 N. J. L. 7.

¹⁹ 33 Washburn on Real Prop. 10; 2 Bla. Com. 208, 209.

²⁰ 3 Washburn on Real Prop. 11; 2 Bla. Com. 209; *Taylor v. Bray*, 32 N. J. L. 182.

²¹ *Williams* on Real Prop. 105, 106; *Morris v. Ward*, 36 N. Y. 587; 2 Bla. Com. 220; 4 Kent's Com. 395 n; *Smallmann v. Powell*, 18 Or. 367, 23 Pac. Rep. 249; *Power v. Daugherty*, 83 Ky. 187. The rule is established by statute in Alabama, Arkansas, California, Connecticut, Dakota, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Tennessee, Vermont, Virginia, Wisconsin. 3 Washburn on Real Prop. 21, note. But see *Morse v. Hayden*, 82 Me. 227, 19 Atl. Rep. 443; *Smith v. McDonald* (N. J. 1905), 61 Atl. Rep. 453.

deceased.²² And at common law the doctrine of inheritance *per stirpes*, or by representation, as above explained, was applied to collateral kindred *ad infinitum*; but the doctrine in the United States has generally been limited in its application to the descendants of brothers and sisters, while in the case of all other collateral kindred the inheritance is divided *per capita*.²³

§ 477. **Computation of collateral relationship.**—There are two modes of computing the degree of collateral relationship; one according to the canon and common law, and the other according to the civil or Roman law. By the first rule the relationship is ascertained by counting the number of degrees or generations accruing between the common ancestor and the most remote descendant. According to this mode of computation, first cousins are related in the second degree; so also are nephews and uncles. The civil rule is to count the number of degrees or generations between the deceased and the common ancestor, and down again to the descendant, whose relationship with the deceased is in question. Thus, by this mode, brothers would be related in the second degree, cousins in the fourth, and nephew and uncle in the third.²⁴ In the American States the civil mode of computation is generally adopted by the courts, while in some of the States it is by statute made the rule of computation.²⁵

²² 2 Bla. Com. 220; 3 Washburn on Real Prop. 11; Williams on Real Prop. 106.

²³ *Quinby v. Higgins*, 14 Me. 309; *Levering v. Higbee*, 2 Md. Ch. 81; *Skinner v. Fulton*, 39 Ill. 484. This limitation is established by statute in Alabama, California, Connecticut, Delaware, Georgia, Maine, Massachusetts, Mississippi, Michigan, Minnesota, Maryland, Wisconsin, New Hampshire, New Jersey, Oregon, South Carolina, Tennessee, Vermont. See *Swazey v. Jaques*, 144 Mass. 135; *Fletcher v. Severs*, 10 N. Y. S. 6. In Pennsylvania the rule is more extended, but not unlimited. 3 Washburn on Real Prop. 21, note. See *Logon v. Bean's Admr.* (Ky. 1905), 87 S. W. Rep. 1110; *In re N. Y. Sec. & Tr. Co.*, 94 N. Y. S. 93, 46 Misc. Rep. 224.

²⁴ 3 Washburn on Real Prop. 10; 2 Bla. Com. 206, 207.

²⁵ 3 Washburn on Real Prop. 10; *McDowell v. Adams*, 45 Pa. St. 430;

§ 478. **Ancestral property.**—This term, when used in the law of descent, signifies the property which the intestate himself acquires by descent.²⁶ Where the property is acquired by purchase by the intestate, since the common-law preference of males over females does not prevail here, all the collateral kindred of equal degree would inherit alike, whether they are paternal or maternal relatives. But according to the common law, no one could be heir to ancestral property, unless he is likewise the heir of the last purchaser.²⁷ But in the United States it would seem that no such distinction is made between property acquired by purchase and by descent, unless expressly established by statute. In Indiana, Maryland, Ohio, Pennsylvania, Rhode Island and New York, statutes provide that ancestral property descends to kindred of the blood of the ancestral purchaser in preference to other kindred, but the latter inherit, if there be no heirs of the ancestral purchaser's blood.²⁸

§ 479. **Kindred of the whole and half blood.**—At common law the inheritance could only vest in kindred of the whole blood, *i. e.*, persons descended not merely from a common ancestor, but from a common couple of ancestors. Kindred of the half blood could not inherit, even where there were no kindred of the whole blood.²⁹ Probably in no State of the

Smallman v. Powell, 18 Or. 367, 23 Pac. Rep. 249. Regulated by statute in Maine, Massachusetts, Minnesota, Michigan, Mississippi, Oregon, Wisconsin. 3 Washburn on Real Prop. 21, note.

²⁶ Walker's Am. Law. 354.

²⁷ 2 Bla. Com. 220; 3 Washburn on Real Prop. 11; Williams on Real Prop. 100, 101.

²⁸ 3 Washburn on Real Prop. 21, note; *Kelsey v. Hardy*, 20 N. H. 479; *Shepard v. Taylor*, 15 R. I. 204, 3 Atl. Rep. 382. See *Kelly v. McGuire*, 15 Ark. 555; *Hyatt v. Pugsley*, 33 Barb. 373; *Pease v. Stone*, 77 Tex. 551, 14 S. W. Rep. 161; *Powers v. Dougherty*, 83 Ky. 187.

²⁹ 2 Bla. Com. 227. The only exception was where the deceased was not actually seised, and the person last seised was the common ancestor of the kindred of half blood, such kindred could inherit, not as heir to the deceased, but as heir to the common ancestor, in conformity

American Union are kindred of the half blood absolutely excluded from inheriting.³⁰ In some States no distinction is made between whole and half blood, while in others the half blood are postponed in the inheritance to the whole blood of equal degree of relationship.³¹ In a still larger number of the States it is provided by statute that kindred of the half blood shall not inherit the ancestral property of the intestate, unless they are of the blood of the ancestral purchaser.³²

§ 480. **Advancement — Hotchpot.**— In effecting a distribution of the estate among the heirs, if any one of the heirs received a part of the ancestor's estate during his lifetime, it is required that the same be considered as a part of the estate of the deceased, and be deducted from the share such heir was entitled to, under the law of descent. In determining the share of each, the property so advanced is added to the rest of the estate, and the division is then made by dividing the aggregate amount equally among the heirs, the amount advanced being treated as a part of the share of the heir, to whom it was given. In the curious etymology of the common law this doctrine was called "hotchpot."³² The doctrine is

with the common-law rule that only the heirs of the person last seised could inherit. 2 Bla. Com. 227.

³⁰ 3 Washburn on Real Prop. 15; Chase's Bla. 393, n. 8.

³¹ They inherit equally in Maryland, Indiana, North Carolina and Tennessee. *Lowe v. Maccubben*, 1 Harr. & J. 550; *Moore v. Abernathy*, 7 Blackf. 442. Half blood postponed to whole blood by statute in England, Connecticut, Delaware, Pennsylvania, South Carolina, New Jersey, Mississippi and Texas. *Clark v. Pickering*, 16 N. H. 289; *Hulme v. Montgomery*, 31 Miss. 105; 3 Washburn on Real Prop. 21, note. In Missouri and Kentucky the half blood take only one-half of what descends to the whole blood. *Talbot v. Talbot*, 17 B. Mon. 1; *Petty v. Malier*, 15 B. Mon. 501.

³² The rule prevails in Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Maine, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Tennessee, Wisconsin. 3 Washburn on Real Prop. 21, note; 4 Kent's Com. 406; *Danner v. Shissler*, 31 Pa. St. 289; *Sheffield v. Lovering*, 12 Mass. 490; *Armington v. Armington*, 28 Ind. 74; *Pennington v. Ogden*, 1 N. J. L.

now more commonly understood under the term *advancement*. In order, however, that the doctrine may apply, it must be established by competent evidence, and in some of the States certain modes of proof are prescribed and rendered necessary by statute, that the gift *inter vivos* was intended to be treated as an advancement.³³ A simple gift, without proof of such an intention, will be considered an absolute gift, and cannot affect the donee's right to an equal share in the deceased's estate.³⁴ But in no case can the donee be compelled to bring in his advancement for a redistribution. If, therefore, his advancement is of greater value than his share in the estate would be, he may refuse to bring it in, and thereby renounce his claim as an heir.³⁵

192. In New Jersey they inherit of each other only the property derived from a common ancestor. *Den v. Urison*, 2 N. J. L. 212; *Den v. Jones*, 8 N. J. L. 340.

³³ "It seemeth that this word hotch-pot is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together." Littleton, quoted by Blackstone. 2 Bla. Com. 190. But in the early common law the doctrine was made to apply to only those estates which were given to a daughter in frank-marriage — a species of estates tail, settled upon a woman at her marriage. Property so donated raised the conclusive presumption that it was intended as an advancement. 2 Bla. Com. 191. The doctrine is now applied to all kinds of advancements where it has not been abolished by statute.

³⁴ See *Chadsey v. Chadsey*, 26 Ill. App. 409; *In re Robert's Estate*, 111 N. Y. 372; *Noel's Admr. v. Noel's Admr.* (Va.), 9 S. E. Rep. 584; *Ritch v. Hawxhurst*, 114 N. Y. 512; *Re Robert*, 4 Dem. 185; *Kintz v. Friday*, 4 Dem. 540; *White v. Moore*, 23 S. C. 456; *Hill v. Bloom*, 41 N. J. Eq. 276; *Harper v. Harper*, 92 N. C. 300; *Wilson v. Kelly*, 21 S. C. 535; *Simpson v. Simpson*, 114 Ill. 603; *Long v. Long*, 19 Ill. 383; *McClintock's Appeal*, 58 Mich. 152; *Catoe v. Catoe* (S. C.), 10 S. E. Rep. 1078; *Sadler v. Huffhines* (Ky.), 12 S. W. Rep. 715; *Smith v. Brown*, 66 Texas 543, 1 S. W. Rep. 573; *Long v. Long*, 30 Ill. App. 559. "Advancements made during the lifetime of the decedent will not be presumed to be intended as gifts, without evidence to that effect." *In re Robinson* (N. Y. Sur. 1904), 92 N. Y. S. 967, 45 Misc. Rep. 551. But see, *In re Ogden's Est.*, 211 Pa. 247, 60 Atl. Rep. 785; *Brennoman v. Scheel*, 212 Ill. 356, 72 N. E. Rep. 412.

³⁵ 3 Washburn on Real Prop. 20; 4 Kent's Com. 418, 419; *Clark v.*

A gift by a father to his daughter's husband will be treated as an advancement to her, if such was the father's intention.³⁶

§ 481. **Posthumous children.**—The common law did not treat children *en ventre sa mere* as persons *in esse* for the purpose of holding or acquiring property. This capacity only attached upon their birth alive. Consequently, by the old common law, children born after the death of the ancestor were precluded from participating with the others in the distribution of the intestate's estate. But this harsh rule has now been generally changed by statute, and posthumous children in the United States inherit equally with those born during the life of the ancestor.³⁷

§ 482. **Illegitimate children.**—It is also a common-law rule that illegitimate children have no inheritable blood, and can neither inherit nor have heirs, except lineal descendants in the descending series. Bastards, therefore, could have neither collateral nor lineal heirs in the ascending line.³⁸ And the

Fox, 9 Dana 193; *Elliot's Estate v. Wilson*, 27 Mo. App. 218 (Mo.), 11 S. W. Rep. 739. The doctrine is expressly recognized and regulated by statute in Maine, Massachusetts, Vermont, California, Oregon, Wisconsin, Michigan, Minnesota, New Hampshire, New York, Alabama, Arkansas, Dakota, Ohio, Rhode Island, Connecticut, New Jersey, Pennsylvania, Virginia, North Carolina, Georgia, Mississippi, Texas, Florida, Illinois, Kansas, Kentucky, Missouri, Indiana, Tennessee and Maryland. 3 Washburn on Real Prop. 40, note.

³⁶ *Bruce v. Slemph*, 82 Va. 352.

³⁷ 4 Kent's Com. 412; *Harper v. Archer*, 4 Smed. & M. 99; *Den v. Flora*, 8 Ired. 374; *Cox v. Matthews*, 17 Ind. 367; *Haskins v. Spiller*, 1 Dana 170; *Harper v. Archer*, 12 Miss. 99. Statutes modifying the common-law rule exist in most of the States in the Union. 3 Washburn on Real Prop. 44, note. In Alabama, Arkansas, Missouri, and Texas the doctrine applies only to the posthumous children of the intestate. Ala. Code (1867), Sec. 1893; Ark. Dig. Stat. (1858), Ch. 56, Sec. 2; Mo. Gen. Stat. (1866), p. 518, Ch. 120, Sec. 2.

³⁸ 2 Bla. Com. 247, 248, 249; 2 Kent's Com. 212; *Cooley v. Dewey*, 4 Pick. 93; *Barwick v. Miller*, 4 Desau. 434; *Stover v. Boswell*, 3 Dana 233; *Bent v. St. Vrain*, 30 Mo. 268.

agreement of the putative father with the mother that their bastard child shall participate in the inheritance does not give the child any claim against the estate in the absence of statutory provision.³⁹ But by statute, in a large number of the American States, an illegitimate child is now permitted to inherit from the mother, and its maternal ancestors, and the mother, and in some States, its brothers and sisters, from the child. But it would seem likely that the illegitimate child could only inherit from the mother, where there are no legitimate children.⁴⁰ But a number of the States have adopted the rule of the civil law, that the subsequent marriage of the parents of a child born out of wedlock legitimizes such offspring for all purposes, and enables it to inherit equally with the children born after the marriage. However, the statutes generally require the putative father to acknowledge such a child, in order that the subsequent marriage may produce legitimation.⁴¹

³⁹ Willoughby v. Motley, 83 Ky. 297.

⁴⁰ See *Coe v. Bates*, 6 Blackf. 533; *Ellis v. Hatfield*, 20 Ind. 101; *Stover v. Boswell*, 3 Dana 233. Statutes to this general effect are to be found in Massachusetts, Indiana, Mississippi, Texas, Vermont, Alabama, New Hampshire, Illinois, Rhode Island, Pennsylvania, Virginia, Kentucky, Florida, Arkansas, Iowa, Missouri, New York, Maryland, Kansas, Ohio and Georgia. Williams on Real Prop. 126 n, 2; 3 Washburn on Real Prop. 41, note; *Brown v. Dye*, 2 Root 280. In New Hampshire, by express statutory provision, illegitimate children inherit equally with legitimate children; while in New York, they are expressly precluded from inheriting if there be legitimate issue. Gen. Stat. N. H. (1867), Ch. 184, Secs. 4, 5; N. Y. Laws of 1855, Ch. 547; 1 R. S. 754, Sec. 19. Under the Mississippi statute they inherit equally. *Alexander v. Alexander*, 31 Ala. 241. But wherever the statute does not expressly, or by necessary implication, remove the common-law incapacity, the common law still prevails. A statute making an illegitimate child heir to its mother does not enable it to inherit from its brothers, or transmit its own estate by descent to its mother. *Stephenson's Heirs v. Sullivan*, 5 Wheat. 260; *Little et al. v. Lake*, 8 Ohio 290; *Remington v. Lewis*, 8 B. Mon. 606. See, as to administrator's duty in final settlements, to have citation for illegitimate children, *In re Losee's Est.*, 94 N. Y. S. 1182, (1905) 46 Misc. Rep. 363.

⁴¹ Such statutes have been enacted in Massachusetts, Vermont, Mary-

§ 483. **Alienage, a bar to inheritance.**—Since an alien at common law was not permitted to hold lands, and such lands, which he did acquire, became escheated to the State after “office found,” it was held to be impossible for him to inherit from another, as the law would not cast upon him the title to lands which he could not hold.⁴² Nor did he have sufficient inheritable blood to transmit the inheritance to collateral heirs, who were citizens. Thus, brothers could not inherit from each other if their parents were aliens.⁴³ But now by statute, they inherit from each other, although they claim relationship through some person who is an alien.⁴⁴ And where an alien is specially authorized by statute to hold and take lands by descent, it seems that only those relations can inherit from him, who are citizens. At least if there are such heirs, and others who are aliens, the former will inherit to the exclusion of the latter.⁴⁵ But in a number of the States statutes

land, Virginia, Kentucky, Mississippi, Texas, Oregon, Iowa, Indiana, Arkansas, Ohio, Missouri, Illinois, New Hampshire Nebraska. *Jackson v. Moore*, 8 Dana 170; 3 Washburn on Real Prop. 41, note. In Nebraska and California, the acknowledgment of the child by the father must be in writing. Rev. Stat. Neb. (1866), p. 62; *Pina v. Peck*, 31 Cal. 359. And in Missouri the statute provides that the offspring of marriages, which have been declared null and void, shall be legitimate. Gen. Stat. Mo. (1865), p. 519, Ch. 128, Sec. 11.

⁴² 1 Bla. Com. 372; 2 *Id.* 249.

⁴³ 2 Bla. Com. 250.

⁴⁴ 2 Bla. Com. 251; Chase Bla. Com. 395, n. 9. Such is the statutory rule in Virginia, Kentucky, Florida, Arkansas, Texas, New York, Missouri and Massachusetts. 3 Washburn on Real Prop. 44, note. See next note. For New York statute abolishing disability of aliens to inherit land, followed in many States, see Laws 1893, p. 365, Ch. 207, construed in *Haley v. Sheridan* (1905), 94 N. Y. S. 864. For right of alien wife to inherit land of resident husband, see *Brown v. Jacobs*, 2 Mo. 32.

⁴⁵ *Parish v. Ward*, 28 Barb. 328; *McGregor v. Comstock*, 3 N. Y. 408. In New York it is provided by statute that the alienage of an ancestor does not prevent a person from inheriting from another, of whom the alien is a common ancestor. 1 Rev. Stat. (N. Y.) 754, Sec. 22. But it has been held by the New York courts that this statute does not enable one to take by descent through the alien, if the latter would have been heir but for the fact that he was not a citizen. *People v. Irvin*, 21

have been passed removing altogether the disability of alienage.⁴⁶

Wend. 128; McLean *v.* Swanton, 13 N. Y. 535. See Jackson *v.* Jackson, 6 Johns. 214; Orser *v.* Hoag, 3 Hill 79.

⁴⁶ Williams on Real Prop. 65, n. 1; Chase Bla. Com. 119, n. 2; Haley *v.* Sheridan (N. Y. 1905), 94 N. Y. S. 864.

CHAPTER XXI.

TITLE BY ORIGINAL ACQUISITION.

- SECTION I. *Title by occupancy.*
II. *Title by accretion.*
III. *Title by adverse possession.*
IV. *Statute of Limitations.*
V. *Estoppel.*
VI. *Abandonment.*

SECTION I.

TITLE BY OCCUPANCY.

SECTION 484. Definition.

485. Condition of public lands in the United States.
486. Estates *per auter vie*.

§ 484. Definition.—Occupancy, in the technical signification of the term, is the act of taking possession of land which before was the common property of the people or community.¹ Under the theory that in the prehistoric age lands were originally common property, this must have been the original mode of acquiring therein a right of private property.

§ 485. Condition of public lands in the United States.—According to the common law of England and of this country, there is no common property in lands. Here lands which are not the property of private persons are held to be the property of the State or the United States, according to the circumstances. England claimed by the right of discovery the title to the soil, denying any claim thereto of the aborigines, on

¹ 2 Bla. Com. 257.

the ground that their nomadic life prevented them from acquiring more than a temporary right of occupation, something in the nature of revocable or defeasible licenses or tenancies at will.² This right was in turn granted by letters patent to the various colonies, which were established under the British government, and the unappropriated lands within their boundaries became the property of the respective colonial governments.³ But all lands lying outside of the colonies remained the property of Great Britain, including both the lands acquired under the claim of discovery and those purchased from other civilized nations.⁴ And, upon the successful issue of the American revolution, these lands became the property of the United States. Subsequently a number of the States, which claimed title to extensive tracts of lands in the then unexplored West, under their charters from the crown, ceded them to the United States for the benefit of the Union. There have also been purchases by the United States from other nations, notably Louisiana, Florida, and the large tracts of territory ceded by Mexico, to the unappropriated lands of which the same theory of property in the government has been applied.⁵ There are, therefore, in this country no lands without an owner; and the so-called *public* lands being the property of the States or the United States, the legal title to them can only be acquired by grant from the government.⁶

² 3 Washburn on Real Prop. 164; 1 Story on Const. 3; *Johnson v. McIntosh*, 8 Wheat. 543; *Martin v. Waddell*, 16 Pet. 367.

³ 1 Curtis on Const. 425; *Jackson v. Hart*, 12 Johns. 81; *Worcester v. Georgia*, 6 Pet. 544; *Commonwealth v. Roxbury*, 9 Gray 478.

⁴ *Johnson v. McIntosh*, 8 Wheat. 543; *Worcester v. Georgia*, 6 Pet. 548.

⁵ 3 Washburn on Real Prop. 165, 166; 1 Story on Const. 215; 1 Kent's Com. 259; *Terrett v. Taylor*, 9 Cranch 50.

⁶ Under the laws of Congress, however, the actual settler upon public lands acquires by such act of occupation an equitable title in the nature of a right to the legal title, upon payment of the minimum price fixed by law. This right is called pre-emption, and further reference will be made to it in treating of title by public grant or patent. See *post*,

§ 486. *Estates per auter vie.*—It will be remembered, in treating of these estates, it was stated that upon the death of the tenant, *per auter vie*, during the life of the *cestui que vie*, the common law gave the estate to the first occupant in the case of an ordinary estate *per auter vie*, and he was called the *general occupant*. But where the estate was limited to the tenant and *his heirs* during the life of another, his heirs took the estate by so-called *special* occupancy to the exclusion of the *general occupant*.⁷ But this common-law doctrine has now been abolished by statute in England, and in most, of not all, of the United States. The estate is either given the quality of an estate of inheritance, and descends to the heirs of the tenant *per auter vie*, or is made a chattel real, and vests in his personal representatives.⁸

Sec. 522. For right of discoverer of mineral upon the public land in the United States to the occupation and acquisition of the land under the Acts of Congress, see, White, Mines & Mining Rem., Chap. III.

⁷ See *ante*, Sec. 47; 2 Bla. Com. 258, 259, 260.

⁸ 3 Washburn on Real Prop. 50, 51; Chase Bla. Com. 414, n. 1. See *ante*. Sec. 47.

SECTION II.

TITLE BY ACCRETION.

SECTION 487. Definition.

488. Alluvion.

489. *Filum Aquæ*.

§ 487. Definition.— It is a rule in the law of real property that whenever other species of property become attached to the land already in one's possession, it becomes a part of the land and the property of its owner, and the title thereto is generally acquired by the very act of attachment. *Quidquid plantatur solo, solo cedit*. It has been shown that this rule applies to houses and other structures erected upon the land by strangers without the consent of the owner of the land.⁹ But at present we are only concerned with the doctrine so far as it applies to the additions of foreign soil through the co-operation of natural causes, which are known under the term *alluvion*. The mode of acquiring a right of property in such cases is called *title by accretion*. It is more properly an incident to real property than a mode of acquisition of lands. But inasmuch as new property is thus acquired, the means or manner of acquisition may fitly be called a title.¹⁰

⁹ See *ante*, Sec. 2. "Land formed by gradual and imperceptible accretion, or by gradual receding of the water, belongs to the owner of the contiguous land to which the addition is made." *Nix v. Pfeifer* (Ark. 1904), 83 S. W. Rep. 951.

¹⁰ 3 Washburn on Real Prop. 55, 59; *Banks v. Ogden*, 2 Wall. 69; *Saulet v. Shepherd*, 4 Wall. 505; *Municipality v. Orleans Cotton Press*, 18 La. 122. "Persons seeking to establish title by accretion or reliction to land in the possession of another have the burden of showing the accretion or reliction by which they claim title." *Wright v. City of Council Bluffs* (Iowa 1905), 104 N. W. Rep. 492.

§ 488. **Alluvion.**—This is the soil and various other things, such as marine and water plants, sea-weeds, etc., which are washed up on the shore of a stream by the action of the water. It is a notable and common fact that the current of a stream is constantly changing by the washing away of the soil on one side of the stream and the transportation of the particles to the other side, or by their deposit on the same side below. All such accretions become a part of the land on which they are cast, and the property of the owner of the soil.¹¹ The accretions, however, become subject to all the incumbrances which have been imposed upon the original land.¹² But the title to such accretions does not rest upon the mere fact of attachment to the soil, although such attachment is a necessary element. It rests rather upon the fact that the former owner is unable to identify his property. Alluvion is the gradual formation of soil by the deposit of particles and atoms of soil, which, from the very nature of the case, the former owner cannot identify in the new shape which they have assumed. But if by some sudden *avulsion* a distinct and tangible part of the soil of one man's land is detached and deposited upon another's premises, the latter acquires no title thereto by the mere act of deposit. The former owner can still identify it, and prove his property. But if he should permit such soil to remain upon the land sufficiently long to become permanently attached, his right of property will be lost because its removal after such delay would probably injure the land.¹³

¹¹ 3 Washburn on Real Prop. 55; *Emans v. Turnbull*, 2 Johns. 322; *Steers v. Brooklyn*, 101 N. Y. 51; *Buras v. O'Brien (La.)*, 7 So. Rep. 632; *East Omaha Land Co. v. Jeffries*, 40 Fed. Rep. 386; *s. c.* 134 U. S. 178; *Prior v. Comstock (R. I.)*, 19 Atl. Rep. 1079. "Title is acquired by accretion only when the accretion is caused by a gradual and natural deposit of soil." *In re Driveway in City of New York*, 93 N. Y. S. 1107.

¹² *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

¹³ 3 Washburn on Real Prop. 59; Ang. Wat. Cour., Sec. 60; Inst. L. II, Tit. 1, Sec. 21; *Hawkins v. Barney*, 5 Pet. 467; *Dikes v. Miller*, 24 Tex. 424; *Trustees, etc., v. Dickinson*, 9 Cush. 544; *Halsey v. McCormick*, 18 N. Y. 147. "Where a river flowing over government land

So, also, will a tract of land which has been submerged on the sea-shore be reclaimable, if by the gradual operation of the water, the land should be brought above the surface again. The proprietorship of the original owner is restored, if the boundaries of the submerged land can be re-established.¹⁴

§ 489. *Filum aquæ*.—Where two tracts of land are divided by a navigable stream, the general rule is that the boundary line is the low water mark on the adjoining shore, and the soil or bed of the stream is the property of the State.¹⁵ But if the stream is not navigable, the boundary line is the center of the current of the stream, commonly called the *filum aquæ*, and the owners of the shore have a right of property in the bed of the stream up to this *filum aquæ*.¹⁶ If, therefore, an island rises in the current of a non-navigable stream, under the doctrine of accretion, it would become the property of him on whose soil it is formed. If the island is formed in the middle of the stream, the proprietors of the opposite shores would acquire a title in severalty to that part of the island which lies on their respective sides of the *filum aquæ*.¹⁷ And if the stream disappear in consequence of gradual accretions, the boundary line will be the line of contact at which the stream finally disappears.¹⁸ Where the title to the bed of the stream is in one person, and the shore belongs to another, the boundary line is low-water

changes its course, the abandoned bed becomes part of the surrounding land, and passes by the subsequent patent to the patentee." *Boglino v. Giorgetta* (Colo. App. 1904), 78 Pac. Rep. 612.

¹⁴ *Mulry v. Norton*, 100 N. Y. 424.

¹⁵ See *post*, Sec. 599, for definition of a navigable stream.

¹⁶ 3 Washburn on Real Prop. 55, 56. For a more extended discussion of this entire subject, see *post*, Secs. 597, 599.

¹⁷ 3 Kent's Com. 428; 3 Washburn on Real Prop. 56, 57, 58; Walk. Am. Law. 329; Chase's Bla. Com. 416 n; *Halsey v. McCormick*, 18 N. Y. 147; *Primm v. Walker*, 38 Mo. 99; *King v. Yarborough*, 3 B. & C. 91. See also, *Webber v. Axtell* (Minn. 1905), 102 N. W. Rep. 915.

¹⁸ *Buse v. Russell*, 86 Mo. 209.

mark; the alluvion formed on the shore belongs to the owner of the shore, but the alluvion formed in the stream belongs to the owner of the bed.¹⁹ But if the stream is navigable, since the right of property in the bed of the stream is vested in the State, an island formed in the current of the stream belongs to the State, and the owners of the shore are only entitled to whatever alluvion is deposited on their shore above low-water mark.²⁰ So also if, by some sudden change in the current of the navigable river, what was once the bed is left uncovered, the property in the soil remains in the State. The owner of the shore does not acquire the title thereto, as he does to gradual and ordinary accretions, resulting from usual and natural changes in the current.²¹

¹⁹ *Linthicum v. Coan*, 64 Md. 439. "Where a deed described the land conveyed as a certain number of acres off from one side of a government subdivision, the purchaser was not entitled to accretions lying between the land described and the river." *Perry v. Sadler* (Ark. 1905), 88 S. W. Rep. 832. The doctrine of the text is followed in some recent Missouri cases, where the grantee of land from the United States, on the bank of a navigable stream, was held to take title only to low water mark, and not to the middle of the stream. The riparian owner was held, by reason of such ownership, not to be entitled to an island, which sprang up in the midst of the river and where, by accretions to the island, its water margin had united with the main shore, the newly made land was held to become a part of the island and not of the main land and the riparian ownership was not extended by such accretions. *McBain v. Johnson*, 155 Mo. 191, 55 S. W. Rep. 1031; *Moore v. Farmer*, 156 Mo. 33, 56 S. W. Rep. 493.

²⁰ 3 Washburn on Real Prop. 58; Chase's Bla. Com. 416 n; *Attorney-General v. Chambers*, 4 De G. M. & G. 206-218; *Scrutton v. Brown*, 4 B. & C. 495; *King v. Yarborough*, 1 Gow. & C. 178; *s. c.* 3 B. & C. 91. But see, *Webber v. Axtell* (Minn. 1905), 102 N. W. Rep. 915.

²¹ *Emans v. Turnbull*, 2 Johns. 322; *Halsey v. McCormick*, 18 N. Y. 147. See *Trustees, etc., v. Dickinson*, 9 Cush. 544. But see, for contrary holding in Colorado, as to abandoned bed of river, *Boglino v. Giorgetti*, 78 Pac. Rep. 612. For title by accretion, from reservation in deed of future accretions, see, *Minor's Heirs v. New Orleans* (La. 1905), 38 So. Rep. 999.

SECTION III.

TITLE BY ADVERSE POSSESSION.

SECTION 490. Effect of naked possession.

- 491. Seisin and disseisin.
- 492. Disseisin and dispossession distinguished.
- 493. Actual and constructive possession.
- 494. Actual or constructive possession — Continued.
- 495. What acts constitute actual possession — Visible or notorious.
- 496. Possession must be distinct and exclusive.
- 497. Possession — Hostile and adverse.
- 498. Adverse possession, when entry was lawful.
- 499. Disseisor's power to alien.
- 500. Betterments.
- 501. Title by adverse possession — How defeated.
- 502. Title by adverse possession — How made absolute.

§ 490. Effect of naked possession.— It is an undisputed rule of law that naked possession, *i. e.*, possession without even a claim of title, vests a sufficient right of property in the person who has such possession, as to permit him to hold the land against all the world except the true owner.²² But he does not in strict technical language, by the mere fact of possession, acquire a title to the land, and certainly not against the true owner. Such possession may be as licensee, bailee or tenant of the real owner, or in some other way subordinate to the latter; and under such circumstances his possession is the possession of the owner. In order that his possession may vest in him a title to the land, it must be adverse to, and independent of, the real owner. What is adverse possession will appear in the following paragraphs.

²² 3 Washburn on Real Prop. 114; 2 Sharaw. Bla. Com. 196 n. "There is no presumption that the possession of real estate is adverse." Monk v. City of Wilmington (N. C. 1904), 49 S. E. Rep. 345.

§ 491. *Seisin and disseisin.*—Seisin, as has been explained in a preceding chapter,²³ is that possession which accompanies, and which is an incident of, freehold estates. Seisin is of two kinds, *seisin in fact*, which is equivalent to actual possession, and *seisin in law or deed*, being that seisin or right to seisin, which one acquires by the delivery and acceptance of a deed, or which is retained by the owner, when he parts with his possession to the tenant of a leasehold or other subordinate estate, or in any other case where he has not the actual possession.²⁴ In this connection we are not concerned with the distinctions between freehold and leasehold estates in respect to the appropriate use of the term seisin. On the contrary, in respect to the matter under consideration, the terms *seisin* and *possession* may be treated as synonymous, meaning that possession which accompanies, and is held under, a claim of title.²⁵ There cannot, however, be more than one seisin, and where, therefore, two persons are in possession, he has the seisin who can show a good title.²⁶ When one is in possession of the land, and his possession is subordinate to the claims of the real owner, although the latter has not the *seisin in fact*, he still has the *seisin in law*, for the possession of the former is subordinate and supports the seisin in law. The tenant is for that purpose a *quasi-bailee* of the owner.²⁷ But, if the one in possession holds the land in opposition to the claims of the owner, and under the assertion of a superior title, then the real owner is deprived of his seisin; for the seisin in law can only exist, apart from the seisin in fact, when the actual posses-

²³ See *ante*, Sec. 24.

²⁴ Co. Lit. 153; 2 Prest. Abst. 282; *Ruffin v. Overby*, 105 N. C. 78. See *ante*, Sec. 25.

²⁵ 3 Washburn on Real Prop. 117; *Slater v. Rawson*, 6 Metc. 439; *Smith v. Burtis*, 6 Johns. 216.

²⁶ 2 Prest. Abst. 286, 290; 4 Kent's Com. 482; *Barr v. Gratz*, 4 Wheat. 213; *Smith v. Burtis*, 6 Johns. 216; *Whittington v. Wright*, 9 Ga. 23.

²⁷ *Blair v. Johnson* (Ill. 1905), 215 Ill. 552, 74 N. E. Rep. 747; *Olsen v. Burk* (Minn. 1905), 103 N. W. Rep. 335.

sion is held by another, subject to the superior claims of the owner. The real owner is then said to be *disseised*; the act which deprives him of the seisin is a *disseisin*, and the actor is a *disseisor*. Disseisin vests in the disseisor a title to the land, and leaves in the disseisee only a right of entry, which is practically but a *chose in action*. Disseisin is synonymous with adverse possession.²⁸ So completely does disseisin divest the owner of his estate, that at common law he had nothing which he could convey; nor could he maintain an action for trespass upon the land, or for other injuries thereto. The disseisor could alone maintain such actions. Says Mr. Preston: "Disseisin is the privation of seisin. It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner of his seisin. It is the commencement of a new title, producing that change by which the estate is taken from the rightful owner and is placed in the wrongdoer. Immediately after a disseisin, the person, by whom the disseisin is committed, has the seisin or estate, and the person on whom the injury is committed has merely the right or title of entry." Again: "As soon as a disseisin is committed, the title consists of two divisions; *first*, the title under the estate or seisin, and, *secondly*, the title under the former ownership."²⁹ And since the disseisor claims the land independent of all others, his estate cannot be less than an absolute and unqualified fee.³⁰

²⁸ "Disseisin and ouster mean very much the same thing as adverse possession," say the court in *Magee v. Magee*, 37 Miss. 151. *Holley v. Hawley*, 39 Vt. 531; Ang. on Lim. 410; Com. Dig. Seisin, A. 1, A. 2.

²⁹ 2 Prest. Abst. 284. See also, 3 Washburn on Real Prop. 292-295; Rawle Cov. (3 ed.) 23, 24; 2 Smith Ld. Cas. 529, 530, 531. "Adverse possession is a possession in opposition to the true title and real owner, and implies that it commenced in wrong (by ouster or disseisin), and is maintained against right." *Swope v. Ward* (Mo. 1904), 84 S. W. Rep. 895.

³⁰ Co. Lit. 271 a; 2 Prest. Abst. 293; *Wheeler v. Bates*, 21 N. H. 460; *McCall v. Neely*, 3 Watts 71. Query: If one enters into possession under the claim of a long term of years, or an estate for life, or an estate tail, will not this qualification of the claim of title under which

§ 492. **Disseisin and dispossession distinguished.**—It is not every dispossession which constitutes a disseisin. In the first place, a dispossession may be effected under a complete and lawful title; a disseisin is always a wrongful dispossession, *i. e.*, it is never supported by a good title.³¹ Nor is even every wrongful dispossession a disseisin. In order that a wrongful dispossession may constitute a disseisin, the possession thus acquired must be *actual or constructive, visible or notorious, distinct and exclusive, hostile or adverse*.³² It is always a question for the jury whether a possession has all the elements necessary to make it a case of disseisin.³³

§ 493. **Actual or constructive possession.**—Possession may be actual or constructive. Thus, where one receives a deed of conveyance, by the very delivery of the deed, he is considered as being in constructive possession of the land, although he has not acquired the actual possession. So, also,

he enters limit the estate which he would acquire by disseisin or adverse possession? See, for character of disseisor's title, *Franklin v. Cunningham* (Mo. 1905), 86 S. W. Rep. 79.

³¹ *Slater v. Rawson*, 6 Metc. 439; *Smith v. Burtis*, 6 Johns. 216.

³² 4 Kent's Com. 488; 2 Smith Ld. Cas. 529, 560, 561; *Melvin v. Proprs. of Locks, etc.*, 5 Metc. 15; *Smith v. Burtis*, 5 Johns. 218; *Daswell v. De La Lanza*, 20 How. 32; *Jackson v. Wheat*, 18 Johns. 44; *Flaherty v. McCormick*, 113 Ill. 538; *Dothard v. Denson*, 75 Ala. 541; *Davis v. Bowmar*, 55 Miss. 671; *Ringo v. Woodruff*, 43 Ark. 469; *Bracken v. Jones*, 63 Tex. 184; *Unger v. Mooney*, 63 Cal. 586; *Hawks v. Senseman*, 6 S. & R. (Pa.) 21; *Partch v. Spooner*, 57 Vt. 583; *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Dietrick v. Noel*, 42 Ohio St. 18; *s. c.* 51 Am. Rep. 788. See *Cobley v. Cobley* (Mo. 1905), 87 S. W. Rep. 957.

³³ *Poignard v. Smith*, 6 Pick. (Mass.) 172; *Gross v. Welwood*, 90 N. Y. 638; *Madison Am. Church v. Oliver St. Church*, 73 N. Y. 82; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Boogher v. Neece*, 75 Mo. 384; *Magee v. Magee*, 37 Miss. 490; *Holliday v. Cronwell*, 37 Tex. 437; *McNair v. Funt*, 5 Mo. 300; *Macklot v. Dubreuil*, 9 Mo. 473; *s. c.* 43 Am. Dec. 550. See, *Archer v. Beihl*, 136 Fed. Rep. 113; *Kennedy v. Moness* (N. C. 1905), 50 S. E. Rep. 450; *Young v. Grieb* (Minn. 1905), 104 N. W. Rep. 131.

does the heir or devisee acquire constructive possession by force of the descent cast or of the devise. Such a grantee, heir or devisee, acquires the seisin in law, and the constructive possession, raised by implication of law, is but the consequence of the transfer of this seisin. Seisin in law and constructive possession may for all practical purposes be considered synonymous.³⁴ But where there is an *actual adverse* possession by one, there can be no constructive possession acquired by another. "Two persons cannot be in adverse constructive possession of the same land at the same time."³⁵ But in order that a disseisin may be effected, there must be an actual occupation of the land to some extent. The simple acceptance of a title by deed adverse to the rightful owner will not work a disseisin, unless an actual entry is made upon the land.³⁶ Possession through a tenant or agent is of course

³⁴ Co. Lit. 153; 2 Prest. Abst. 282; Barr v. Gratz, 4 Wheat. 213; Green v. Litter, 8 Cranch 229; Wyman v. Brown, 50 Me. 160; Hodges v. Eddy, 38 Vt. 344; Caldwell v. Fulton, 44 Pa. St. 475; Effinger v. Lewis, 32 Pa. St. 367; Matthews v. Ward, 10 Gill & J. 443; Breckenridge v. Ormsby, J. J. Marsh. 244.

³⁵ 3 Washburn on Real Prop. 118; Hodges v. Eddy, 38 Vt. 344; Farrar v. Heinrich, 86 Mo. 521; Garrett v. Ramsey, 26 W. Va. 345; Cook v. McKinney (Cal.), 11 Pac. Rep. 799; Echoles v. Hubbard (Ala.), 7 So. Rep. 817; Jones v. Gaddis (Miss.), 7 So. Rep. 489; Stevens Lumber Co. v. Hughes (Miss. 1905), 38 So. Rep. 769; Raleigh v. Wells (Utah 1905), 81 Pac. Rep. 908; Robinson v. Nordman (Ark. 1905), 88 S. W. Rep. 592; Proctor v. Maine Cent. Co. (Me. 1905), 60 Atl. Rep. 423. "In a controversy between adjoining landowners as to an intervening strip of land, an instruction that one cannot be in constructive possession, and another in actual possession, of the same piece of land at the same time, was proper." Crouch v. Colbert (Mo. App. 1905), 84 S. W. Rep. 992.

³⁶ Putnam Schools v. Fisher, 38 Me. 324; Cook v. Babcock, 11 Cush. 210; 3 Smith Ld. Cas. 561; Berniand v. Beecher, 71 Cal. 38, 11 Pac. Rep. 802; Stanley v. Shoolbred, 25 S. C. 181; Aiken v. Ela, 62 N. H. 400; Huntington v. Allen, 44 Miss. 654; Denham v. Holeman, 26 Ga. 182; s. c. 71 Am. Dec. 193; Eagle, etc., Co., v. Bank, 55 Ga. 44; Satterwhite v. Rosser, 61 Tex. 166; Bracken v. Jones, 63 Tex. 184; Bradley v. West, 60 Mo. 33; Ringo v. Woodruff, 43 Ark. 469; Yelverton v. Steele, 40 Mich. 538; Sparrow v. Hovey, 44 Mich. 63; Peterson v. McCullough, 50 Ind. 35; Pepper v. O'Dowd, 39 Wis. 548; Jewett v. Hussey,

sufficient actual possession to support the claim of adverse possession.³⁷ But when an actual occupation of a part of the premises has taken place, then the doctrine of constructive possession will, under certain circumstances, apply and extend the disseisin beyond that part of the land which is in the actual possession of the disseisor. If possession is taken under no color of title, the disseisin extends no farther than the actual possession.³⁸

§ 494. Actual or constructive possession — Continued.— On the other hand, where entry is made under color of title, *i. e.*, under some instrument of writing, such as a deed or will, which purports to convey a title, the actual entry will place

70 Me. 433; *Cook v. Babcock*, 11 Cush. (Mass.) 209; *Huntington v. Whaley*, 29 Conn. 391; *Ogden v. Jennings*, 66 Barb. (N. Y.) 301, 62 N. Y. 526; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Parker v. Banks*, 79 N. Car. 480; *Malloy v. Bowden*, 86 N. Car. 251; *Pegues v. Warley*, 14 S. Car. 180. "To constitute adverse possession such as will work a disseisin of the lawful owner, there must be actual possession and occupancy of the premises for the requisite period." *Proctor v. Maine Cent. R. Co.* (Me. 1905), 60 Atl. Rep. 423.

³⁷ *Elliott v. Dycke*, 78 Ala. 150.

³⁸ *Brimmer v. Longwarf*, 5 Pick. 131; *Davidson v. Beatty*, 3 Har. & McH. 594; *Sicard v. Davis*, 6 Pet. 124; *Cresap v. Huston*, 9 Gill 269; *Marble v. Price*, 54 Mich. 406; *Flaherty v. McCormick*, 113 Ill. 538; *King v. Hunt* (Ky.), 13 S. W. Rep. 214; *Clarke v. Wagner*, 74 N. Car. 791; *Scott v. Elkins*, 83 N. Car. 424; *Parker v. Banks*, 79 N. Car. 480; *Moore v. Thompson*, 69 N. Car. 120; *Humphries v. Huffman*, 30 Ohio St. 395; *Dothard v. Denson*, 75 Ala. 482; *Burks v. Mitchell*, 78 Ala. 61; *Hall v. Gay*, 68 Ga. 442; *Hammond v. Crosby*, 68 Ga. 767; *Anderson v. Dodd*, 65 Ga. 402; *Creekmur v. Creekmur*, 75 Va. 431; *Peterson v. McCullough*, 50 Ind. 35; *Gore v. Faupel*, 24 W. Va. 238; *Brown v. Leete*, 6 Sawy. (U. S.) 332. Compare *Wilson v. McEwan*, 7 Oregon 87; *Bracken v. Jones*, 63 Texas 184; *Bristol v. Carroll County*, 98 Ill. 84; *Botsch*, 90 Ill. 577; *Coleman v. Billings*, 89 Ill. 183; *Meade v. Leffingwell*, 83 Pa. St. 187; *Wells v. Jackson Mfg. Co.*, 48 N. H. 491; *Smith v. Hosmer*, 7 N. H. 436; *s. c.* 28 Am. Dec. 354. "One who holds land adversely, but without paper color of title, holds only that land which he has reduced to actual possession." *Chastang v. Chastang* (Ala. 1904), 37 So. Rep. 799.

the holder in constructive possession of the whole tract of land described in the instrument.³⁹ And this, too, where there is no doubt as to the invalidity of the deed, whether such invalidity arises from a defective execution, or a defective title or from a total want of title in the grantor.⁴⁰ Sheriff's deeds,

³⁹ *Munro v. Merchant*, 28 N. Y. 9; *Parker v. Wallis*, 60 Md. 15; *s. c.* 45 Am. Rep. 703; *Creekmur v. Creekmur*, 75 Va. 431; *Johnson v. Parker*, 79 N. Car. 475; *Stanton v. Mullins*, 92 N. Car. 624; *Veal v. Robinson*, 70 Ga. 809; *Childers v. Calloway*, 76 Ala. 130; *Hymes v. Burnstein*, 72 Ala. 546; *Burks v. Mitchell*, 78 Ala. 61; *Wilson v. Williams*, 52 Miss. 487; *Hunnicutt v. Peyton*, 102 U. S. 333; *Pike v. Evans*, 94 U. S. 6; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *Evitts v. Roth*, 61 Tex. 81; *Tremaine v. Weatherby*, 58 Iowa 615; *Barger v. Hobbs*, 67 Ill. 592; *Furlong v. Garrett*, 44 Wis. 111; *Humphries v. Huffman*, 33 Ohio St. 395; *Smith v. McKay*, 30 Ohio St. 409; *Gardner v. Gooch*, 48 Me. 487; *Bailey v. Carleton*, 12 N. H. 9; *s. c.* 37 Am. Dec. 190; *Jakway v. Barrett*, 38 Vt. 316; *Swift v. Gage*, 26 Vt. 224; *Thompson v. Burhans*, 61 N. Y. 52; *Boynnton v. Ashbrunter* (Ark. 1905), 88 S. W. Rep. 568. One who enters on unoccupied land under a deed, with intention of taking possession of the whole, acquires possession of all the land described. *Cuyler v. Bush* (Ky. 1905), 84 S. W. Rep. 579, 27 Ky. Law Rep. 148.

⁴⁰ 2 *Smith's Ld. Cas.* 563; *Brackett, Petitioner*, 53 Me. 228; *Ellicott v. Pearl*, 10 Pet. 412; *Gardner v. Gooch*, 48 Me. 492; *Jackson v. Newton*, 18 Johns. 355; *Green v. Lighter*, 8 Cranch 250; *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. Rep. 184; *Kenrick v. Latham* (Fla.), 6 So. Rep. 871; *McMillan v. Gambill*, 106 N. C. 359, 11 S. E. Rep. 273; *Stumpf v. Osterhage*, 111 Ill. 82; *Advent v. Arrington*, 105 N. C. 377, 10 S. E. Rep. 991; *Stanley v. Shoolbred*, 25 S. C. 181; *Hecock v. Van Dusen* (Mich.), 45 N. W. Rep. 343; *Harbison v. School Dist.*, 89 Mo. 184, 1 S. W. Rep. 30; *Weeks v. Martin* (N. Y.), 10 N. Y. S. 656. But see *Cooter v. Dearborn*, 115 Ill. 509; *Hargis v. Kansas City, etc., R. R. Co.*, 100 Mo. 210, 13 S. W. Rep. 530; *Smythe v. Henry*, 41 Fed. Rep. 705; *Ege v. Medlar*, 82 Pa. St. 86; *Cheney v. Ringold*, 2 H. & J. (Md.) 87; *Baker v. Swan*, 32 Md. 355; *Creekmur v. Creekmur*, 75 Va. 430; *Core v. Faupel*, 24 W. Va. 238; *Stevens v. Hollister*, 18 Vt. 204; *s. c.* 46 Am. Dec. 154; *Mylar v. Hughes*, 60 Mo. 105; *Packard v. Moss*, 8 Pac. Rep. (Cal.) 818; *Janio v. Patterson*, 62 Ga. 527; *Veal v. Robinson*, 70 Ga. 309; *Welborn v. Anderson*, 37 Miss. 155; *Chiles v. Conley*, 9 Dana (Ky.) 385; *Golson v. Hook*, 4 Strob. (S. Car.) 23. "Where a will of a foreign state was executed before two witnesses only, though insufficient to pass title to land, it is available as color of title." *Love v. Turner* (S. C. 1905), 51 S. E. Rep. 101, 71 S. C. 322.

and other involuntary conveyances, will serve as color of title.⁴¹ But a mere quit-claim deed, releasing all one's interest in the land, will not be sufficient color of title to give the disseisor constructive possession of the part not in actual possession. Only such deeds are generally color of title, as the term is here understood and employed, which operate as a primary conveyance.⁴² But a deed, which is in form a quit-claim, may operate as a primary conveyance, where the possession is transferred with it.⁴³ Where the disseisor is one who denies the validity of a sale of his own land under execution, he holds adverse possession under color of the original title conveyed to him, so as to give him constructive possession of the whole tract.⁴⁴ In order that the rightful owner may be divested of the whole tract described in the deed, the partial occupation must be of land included in the description of the deed which is to serve as color of title,⁴⁵ and the actual pos-

⁴¹ *Kendrick v. Latham* (Fla.), 6 So. Rep. 871; *Falls of Neuse Mfg. Co. v. Brooks*, 106 N. C. 107, 11 S. E. Rep. 456; *Davis v. Burroughs*, 8 N. Y. S. 379; *Goodman v. Nichols* (Kan.), 23 Pac. Rep. 957; *Seemuller v. Thornton*, 77 Tex. 156, 13 S. W. Rep. 846; *Miller v. Pence* (Ill.), 23 N. E. Rep. 1030; *Bakewell v. McKee* (Mo.), 14 S. W. Rep. 119; *Kile v. Fleming*, 78 Ga. 1; *Karn v. Haisley*, 22 Fla. 317. See also, *Adams v. Carpenter* (Mo. 1905), 86 S. W. Rep. 445; *Brigham v. Rean* (Mich. 1905), 102 N. W. Rep. 845; *Tyee Con. Min. Co. v. Longstedt*, 136 Fed. Rep. 124. "A deed in which the description is so indefinite as to afford no means to identify the land is inoperative, either as conveyance of title or as color of title." *Pitts. v. Whitehead* (Ga. 1905), 49 S. E. Rep. 693.

⁴² *Woods v. Banks*, 14 N. H. 111; *Wright v. Tichenor*, 104 Ind. 185.

⁴³ *Minot v. Brooks*, 16 N. H. 376; *Swift v. Mulkey*, 14 Ore. 59, 12 Pac. Rep. 76. See generally, *Pillow v. Roberts*, 13 How. 472; *Jackson v. Elston*, 12 Johns. 454; *Kimball v. Lohmas*, 31 Cal. 154; *Smith v. Shattuck*, 12 Ore. 362 (tax deed). In Colorado it is said that there may be constructive adverse possession, although the disseisor does not hold possession under some written instrument of conveyance. *Lebanon Mining Co. v. Rogers*, 8 Colo. 34.

⁴⁴ *Gaines v. Saunders*, 87 Mo. 557.

⁴⁵ *Jenkins v. Trager*, 40 Fed. Rep. 726; *Stanley v. Shoolbred*, 25 S. C. 181; *Casey v. Dunn*, 57 N. Y. Super. Ct. 381, 8 N. Y. S. 305; *Davis v. Stroud*, 104 N. C. 484, 10 S. E. Rep. 666; *Weeks v. Martin*, 10 N. Y. S. 656; *Deputron v. Young*, 134 U. S. 241; *Aiken v. Ela*, 62 N. H. 400.

session of a part must be of such a character as to give rise to a reasonable presumption that the owner knows that the entry was made under color of title. If this presumption be not reasonable under the circumstances of the case, the disseisin will not extend beyond the actual occupation. The description must indicate clearly the metes and bounds of the land. Any obscurity in the description will destroy the claim of constructive possession.⁴⁶ So, also, if the title was only void as to a part of the land conveyed, the occupation of that part to which the grantor had title will not give the grantee constructive possession of the other part to which he has no title, so as to disseise the real owner.⁴⁷ And it would seem reasonable that the term *color of title* should apply only to deeds and other instruments of conveyance, which have been recorded.⁴⁸ So, also, if the deed conveys two separate and distinct parcels of land, entry and actual occupation of one tract will not give constructive possession to the other.⁴⁹

§ 495. What acts constitute actual possession — Visible or notorious.— No particular act or series of acts are necessary to be done on the land, in order that the possession may be actual. Any visible or notorious acts, which clearly evi-

⁴⁶ Price v. Jackson, 91 N. C. 11; Etowah, etc., Mining Co. v. Parker, 73 Ga. 51; Davis v. Strowd, 104 N. C. 484, 10 S. C. 666. But see Holbrook v. Forsythe, 112 Ill. 306. See, Pitts v. Whitehead (Ga. 1905), 49 S. E. Rep. 693.

⁴⁷ Bailey v. Carleton, 12 N. H. 9. See Little v. Mequiner, 2 Me. 176; Sharp v. Brandon, 15 Wend. 599; Barber v. Schaffer, 76 Ga. 285; Garrett v. Ramsey, 26 W. Va. 345; Staton v. Mullis, 92 N. C. 623; Coal Creek Mining Co. v. Heck, 15 Lea 497; Morris v. McClary, 43 Minn. 346.

⁴⁸ Hodges v. Eddy, 38 Vt. 345; Van Sickle v. Catlett, 75 Texas 404, 13 S. W. Rep. 31. But see *contra*, Hunter v. Kelly, 92 N. C. 283; Brown v. Brown, 106 N. C. 451, 11 S. E. Rep. 647; Bellows v. Jewell, 60 N. H. 420; Minot v. Brooks, 16 N. H. 374; Chastain v. Phillips, 11 Ired. (N. Car.) 225; Hardin v. Barrett, 6 Jones (N. Car.) 159; Know v. Hinson, 8 Jones (N. Car.) 347; Davis v. Higgins, 91 N. Car. 382; Rawson v. Fox, 65 Ill. 200; Dickinson v. Bruden, 30 Ill. 279; Lea v. Polk Co. Copper Co., 21 How. (U. S.) 493.

⁴⁹ Grimes v. Ragland, 28 Ga. 123; Barber v. Shaffer, 76 Ga. 285.

dence the intention to claim ownership and possession, will be sufficient to establish the claim of adverse possession.⁵⁰ A clandestine use of the premises of so secret a character that the owner is not likely to know of it, will not constitute a disseisin. The occupation must be so notorious and open, that the owner may be presumed to have notice of it and of its extent.⁵¹ There are some acts, so notorious in their character, that they raise a conclusive presumption of notice to the owner of the adverse claim. Such are the maintenance of fences and other substantial inclosures, and the erection of buildings.⁵² But in the case of the erection of buildings,

⁵⁰ *Ewing v. Burnett*, 11 Pet. 41; *Bailey v. Carleton*, 12 N. H. 9; *La Frombois v. Jackson*, 8 Cow. 604; *Faught v. Holway*, 50 Me. 24; *Ford v. Wilson*, 35 Miss. 504; *Ewing v. Burnett*, 11 Pet. (U. S.), 41; *Faught v. Holway*, 50 Me. 24; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412. Sales by persons claiming to have been in possession of certain swamp lands as owners for 30 years are admissible as part of the acts showing adverse possession. *Dowdell v. Orphans' Home Soc.* (La. 1905), 38 So. Rep. 16; *Orphans' Home Soc. v. Dowdell*, *Id.*

⁵¹ 2 Smith Ld. Cas. 563; *Cook v. Babcock*, 11 Cush. 210; *Price v. Brown*, 101 N. Y. 669; *Mauldin v. Cox*, 07 Cal. 387; *Wait v. Gove* (Ky.), 12 S. W. Rep. 1068; *Watkins v. Lynch*, 71 Cal. 21, 11 Pac. Rep. 808; *Barker v. Deignan*, 25 S. C. 252; *Wilson v. Williams*, 52 Miss. 488; *Moore v. Thompson*, 69 N. Car. 120; *Unger v. Mooney*, 63 Cal. 586; *s. c.* 49 Am. Rep. 100; *Miller v. Myles*, 46 Cal. 539; *Thompson v. Pioche*, 44 Cal. 508; *Soule v. Barlow*, 49 Vt. 329; *Samuel v. Borrowscale*, 104 Mass. 207; *Clark v. Gilbert*, 39 Conn. 97; *School Dist. v. Lynch*, 33 Conn. 334; *Trustees v. Kirk*, 84 N. Y. 215; *s. c.* 38 Am. Rep. 505; *Culver v. Rhodes*, 87 N. Y. 354; *Foulke v. Bond*, 41 N. J. L. 527; *Wilson v. Williams*, 52 Miss. 488; *Campau v. Dubois*, 39 Mich. 274. "A possession which was at its inception friendly and in subordination to the true title does not become adverse merely by change of mental attitude." *Coberly v. Coberly* (Mo. 1905), 87 S. W. Rep. 957.

⁵² *Poignard v. Smith*, 6 Pick. 172; *Cutter v. Cambridge*, 6 Allen 20; *Price v. Brown*, 101 N. Y. 669; *Smith v. Roberts*, 62 Ala. 83; *Allen v. Allen*, 58 Wis. 205; *Sedg. & W. Trial of Title to Land*, Sec. 758; *Angell on Lim.*, Secs. 390, 391, 392, and cases cited in the notes; *Bell v. Denison*, 56 Ala. 444; *Leeper v. Baker*, 68 Mo. 405; *Turner v. Hall*, 60 Mo. 275. See *Ford v. Wilson*, 35 Miss. 505; *Martin v. Judd*, 81 Ill. 488; *Smith v. Jackson*, 76 Ill. 254; *Clement v. Perry*, 34 Iowa 567; *Hunton v. Nichols*, 55 Tex. 217; *Read v. Allen*, 63 Tex. 154; *Door v. School Dist.*, 40 Ark. 243; *Humphries v. Huffman*, 33 Ohio St. 403; *Bowen v.*

without other accompanying acts of ownership, the disseisin would only extend to the land covered by the buildings, together with the necessary right of ingress and egress.⁵³ Merely surveying the land, and causing a line to be run around it, and lopping or slashing trees to indicate the course of the line, will not be sufficient. The inclosure must, in all ordinary cases, be substantial.⁵⁴ But there are cases where an enclosure is not necessary. Notice of possession may then be presumed from other acts of ownership, as where taxes are paid on unoccupied land by one who claims it under color of title.⁵⁵ So, also, where the property is of such a character, and is so circumstanced, that there can be neither actual

Guild, 130 Mass. 121; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Gerham v. Erdman*, 105 Pa. St. 371; *Waltemeyer v. Baughman*, 63 Md. 200; *Torey v. Bigelow*, 56 Iowa 381; *Pike v. Robertson*, 79 Mo. 615; *Elliott v. Dycke*, 78 Ala. 150; *Watts v. Owens*, 62 Wis. 512; *Eastern R. v. Allen*, 135 Mass. 13. Compare *Clarke v. Wagner*, 74 N. Car. 791; *Morrell v. Ingle*, 23 Kan. 32; *Real Property Trials (Malone)*, Secs. 277-278; *Trial of Titles to Land (Serg. & Wait.)*, Sec. 707; *Watson v. Mancil*, 76 Ala. 600. See *McCreary v. Everding*, 44 Cal. 246. Compare *Pullen v. Hopkins*, 1 Lea (Tenn.) 741.

⁵³ *Poignard v. Smith*, 6 Pick. 172; *Bennett v. Clemence*, 6 Allen 18; *Erwin v. Olmsted*, 7 Edw. 229; *Stedman v. Smith*, 8 E. & Bla. 1. See *Sweope v. Ward* (1904), 84 S. W. Rep. 895.

⁵⁴ *Kennebec Purchase v. Springer*, 4 Mass. 416; *McLean v. Smith*, 106 N. C. 172, 11 S. E. Rep. 184; *Carley v. Parton*, 75 Tex. 98, 12 S. W. Rep. 950; *Barker v. Deignan*, 25 S. C. 252; *O'Hara v. Richardson*, 46 Pa. St. 391; *Slice v. Derrick*, 2 Rich. (S. Car.) 627; *Morrison v. Chapin*, 97 Mass. 72; *Kerr v. Hitt*, 75 Ill. 51; *Soule v. Barlow*, 48 Vt. 132; *Walsh v. Hill*, 41 Cal. 571; *Smith's L. C.* 717, *et seq.*

⁵⁵ *Holbrook v. Gouverneur*, 114 Ill. 623; *Cooter v. Dearborn*, 115 Ill. 509; *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. Rep. 251; *Stockton v. Geissler*, 43 Kan. 612, 23 Pac. Rep. 619; *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. Rep. 742; *Snowden v. Rush*, 76 Tex. 197, 13 S. W. Rep. 189; *Wren v. Parker*, 57 Conn. 529, 18 Atl. Rep. 790; *Perry v. Barton*, 111 Ill. 138; *Stumpf v. Osterhage*, 111 Ill. 827. In some of the States, the payment of taxes is a requisite to the claim of adverse possession. *McNoble v. Justiniano*, 70 Cal. 395, 11 Pac. Rep. 742; *Snowden v. Rush*, 76 Texas 197; *Juck v. Fewell*, 42 Fed. Rep. 517. On an issue as to adverse possession, the payment of taxes is admissible as a circumstance in determining the fact and extent of possession. *Chastang v. Chastang* (Ala. 1904), 37 So. Rep. 799. See also, *Murphy v. Nelson*

permanent occupation nor residence, on account of its incapacity to receive any permanent improvement, these acts will not be necessary. The disseisin may be manifested by any other public acts of ownership which were possible with property of that kind.⁵⁶ Very often the Statutes of Limitations in the different States state expressly what acts will constitute a visible or notorious possession, and what will not. Wherever there are such provisions, they will supersede the presumptive conclusions of law explained and presented in this paragraph.⁵⁷

§ 496. Possession must be distinct and exclusive.—The possession must also be distinct and exclusive, *i. e.*, the owner must be actually ousted of possession. A joint possession, even though adverse to each other, will not be a disseisin. Where two are in possession, the seisin follows the title, and there can be no disseisin, unless the rightful owner is altogether deprived of possession.⁵⁸ If the wrong-doer disturbs

(S. D. 1905), 102 N. W. Rep. 691; *Glos v. Miller*, 213 Ill. 22, 72 N. E. Rep. 714; *Towson v. Denson* (Ark. 1905), 86 S. W. Rep. 661.

⁵⁶ *Ewing v. Burnett*, 11 Pet. 41; *Blood v. Wood*, 1 Metc. 528; *Faught v. Holway*, 50 Me. 24; *Den v. Hunt*, Spenc. 487; *Brett v. Farr*, 66 Iowa 684 (cutting timber); *Costello v. Edson*, 44 Minn. 135, 46 N. W. Rep. 299 (cutting away underbrush and grubbing); *Stockton v. Geissler*, 43 Kan. 612, 23 Pac. Rep. 619 (advertising and offering for sale); *Ford v. Wilson*, 35 Miss. 490; *s. c.* 72 Am. Dec. 137; *Moss v. Scott*, 2 Dana (Ky.) 275; *Royall v. Lisle*, 15 Ga. 545; *s. c.* 60 Am. Dec. 712; *Dorr v. School Dist.*, 40 Ark. 237; *Draper v. Shoot*, 25 Mo. 197; *s. c.* 69 Am. Dec. 462; *Sleeper v. Baker*, 68 Mo. 400; *Merchants' Bank v. Calvin*, 60 Mo. 559; *Coleman v. Billings*, 89 Ill. 183; *Clement v. Perry*, 34 Iowa 567; *Brumagin v. Bradshaw*, 39 Cal. 24; *Robinson v. Sweet*, 3 Me. 315; *Ewing v. Burnett*, 11 Pet. (U. S.) 41; *Ellicott v. Pearl*, 10 Pet. (U. S.) 412. "Cutting down a few trees in swamps, without it appearing definitely whether the intent was to enter into possession, is not sufficient to establish a title by prescription." *Dowdell v. Orphans' Home Soc.* (La. 1905), 38 So. Rep. 16; *Orphans' Home Soc. v. Dowdell*, *Id.*

⁵⁷ *Price v. Jackson*, 91 N. C. 11.

⁵⁸ *Hawk v. Senseman*, 6 Serg. & R. 21; *Hodgkin v. McVeigh* (Va.), 10 S. E. Rep. 1065; *Gafford v. Strouse* (Ala.), 7 So. Rep. 248; *Lawrence v. Lawrence*, 14 Ore. 77, 12 Pac. Rep. 186; *McQueen v. Fletcher*, 77 Ga.

the real owner by his entry and joint possession, the latter may elect to consider himself disseised, and by abandoning possession may bring his action of ejectment. But disseisin by election is not sufficient to create such an adverse possession as will ripen into a good title. In order that the disturbance of possession may be treated by the owner as a disseisin, he must abandon the possession which he has. If he does not elect to abandon the premises to the intruder, the intrusion of the wrong-doer does not work a disseisin.⁵⁹ But the wrong-doer need not be in exclusive possession of the entire premises. His exclusive possession of a part, if he only claims title to that part, will work a disseisin as to that part as effectually as if the owner had been driven out of possession of the whole tract of land.⁶⁰

§ 497. **Possession — Hostile and adverse.**— Under the early common law, it was required that the disseisor should be recognized by the lord of the manor, and his other tenants, as one of the peers of the baron's court in order that a complete disseisin may be effected. But this rule has long since become obsolete in England, and never did exist in this country.⁶¹ And instead of this complicated process, it is now

444; *Pepper v. O'Dowd*, 39 Wis. 538; *Furlong v. Garrett*, 44 Wis. 111; *Wilson v. Williams*, 52 Miss. 488; *Dixon v. Cook*, 47 Miss. 220; *Satterwhite v. Rosser*, 61 Tex. 166; *Bracken v. Jones*, 63 Tex. 184; *Thompson v. Pioche*, 44 Cal. 508; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Armstrong v. Morrill*, 14 Wall. (U. S.) 120; *Malloy v. Bowden*, 86 N. Car. 251; *Ekey v. Inge*, 87 Mo. 493; *Pike v. Robertson*, 79 Mo. 615; *Creekmur v. Creekmur*, 75 Va. 430; *Turpin v. Saunders*, 32 Gratt. (Va.) 27; *Core v. Faupel*, 24 W. Va. 238; *Doe v. Campbell*, 10 Johns. (N. Y.) 477; *Cahill v. Palmer*, 45 N. Y. 484; *Saxton v. Hunt*, 20 N. J. L. 487.

⁵⁹ *Taylor v. Horde*, 1 Burr. 60; *Doe v. Hull*, 2 D. & R. 38; *Propers v. McFarland*, 12 Mass. 327; *Munro v. Ward*, 6 Allen 150; *Burns v. Lynde*, 6 Allen 312; *Smith v. Burtis*, 6 Johns. 215.

⁶⁰ *Kellogg v. Mullen*, 39 Mo. 174; *Tamm v. Kellogg*, 49 Mo. 118; *Soule v. Barlow*, 49 Vt. 329; *Russell v. Maloney*, 39 Vt. 583; *Bartholomew v. Edwards*, 1 Houst. 17; *Den v. Hunt*, 20 N. J. L. 487; *Allen v. Peters*, 77 Texas 599; *Coombs v. Parsons*, 82 Me. 326, 19 Atl. Rep. 826.

⁶¹ Co. Lit. 266 b, *Butler's note* 217; 3 Washburn on Real Prop. 126; 2 Prest. Abst. 284.

only required that the possession should be *hostile* and *adverse* to the rightful owner.⁶² That is, it must be held under a claim of title which is adverse to the disseisee's title, and the intention must be to resist the title of the latter.⁶³ If this intention to claim a *hostile* and *adverse* title is not established, the disposition is only a trespass, and, however long continued, will not make a disseisin.⁶⁴ On the other hand, the intention to claim an adverse title to the true owner, and an entry under a defective claim of title, will not prevent such a one from showing that he did have the true title by another conveyance.⁶⁵ But there need not be a willful entry to deprive the owner of what is lawfully his. All that is necessary is to

⁶² *Newhall v. Wheeler*, 7 Mass. 189; *Coburn v. Hollis*, 3 Metc. 125; *Slater v. Rawson*, 6 Metc. 439; *Lund v. Parker*, 3 N. H. 49.

⁶³ *Bradstreet v. Huntington*, 5 Pet. 439; *Ewing v. Burnet*, 11 Pet. 41; *Bath v. Valdez*, 70 Cal. 350, 11 Pac. Rep. 725; *Smith v. City of Osage (Iowa)*, 45 N. W. Rep. 404; *Core v. Faupel*, 24 W. Va. 238; *Hudson v. Putney*, 14 W. Va. 561; *Beatty v. Mason*, 30 Md. 409; *O'Daniel v. Bakers' Union*, 4 Houst. (Del.) 488; *Snoddy v. Kreutch*, 3 Head (Tenn.) 304; *Cordon v. Sizer*, 39 Miss. 805; *Magee v. Magee*, 37 Miss. 152; *Ringo v. Woodruff*, 43 Ark. 469; *Cracken v. Jones*, 63 Tex. 184; *Pepper v. O'Dowd*, 39 Wis. 548; *Morse v. Churchill*, 41 Vt. 649; *Soule v. Barlow*, 49 Vt. 329; *Russell v. Davis*, 38 Conn. 562; *Smith v. Burtis*, 6 Johns (N. Y.) 218; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Creekmur v. Creekmur*, 75 Va. 430; *Clark v. McClure*, 10 Gratt. (Va.) 305. "Notorious adverse possession sufficiently establishes actual notice to holder of legal title." *Love v. Turner* (S. C. 1905), 51 S. E. Rep. 101, 71 S. C. 322.

⁶⁴ *Putnam School v. Fisher*, 38 Me. 324; *Grant v. Fowler*, 39 N. H. 101; *Hodges v. Eddy*, 41 Vt. 488; *Beatty v. Mason*, 30 Md. 409; *Carroll v. Gillion*, 33 Ga. 539; *Magee v. Magee*, 37 Miss. 152; *Cook v. Babcock*, 11 Cush. 210; *Grube v. Wells*, 34 Iowa 148; *Musick v. Barney*, 49 Mo. 458; *McCall v. Wells*, 55 Mich. 171; *Dixon v. Ahern (Nev.)*, 24 Pac. Rep. 337; *Horton v. Davidson (Pa.)*, 19 Atl. Rep. 934; *People v. Lowndes*, 55 Hun 469; *Durham v. Townsend*, 118 N. Y. 281, 23 N. E. Rep. 367; *Maple v. Stevenson*, 122 Ind. 368, 23 N. E. Rep. 854; *Chicago, etc., Ry. Co., v. Galt (Ill.)*, 23 N. E. Rep. 425, 24 N. E. Rep. 674; *Lawrence v. Lawrence*, 14 Ore. 77, 12 Pac. Rep. 186. "A possessor without title and in bad faith cannot complain of the staleness of a demand for restitution." *Messi v. Frechede (La. 1904)*, 37 So. Rep. 600.

⁶⁵ *Logan v. Fitzgerald*, 92 N. C. 644. "In order to show adverse possession under color of title, the land must be located within the bounda-

show an unequivocal claim of title adverse to the real owner. And if the claim is made under a mistake of fact or law, and the alleged disseisor honestly believes the land to belong to him, it will be just as much an act of disseisin as if it had been done knowingly, and with the express purpose to defraud the rightful owner.⁶⁶ It is now provided by statute in some of the States that there can be no adverse possession, except when the claim of title is made in good faith and under color of title.⁶⁷ An apparent exception to this rule arises where one occupies land up to a certain line, whether indicated by a fence or not, under a mistaken belief that it was the true line, but with no intention to claim beyond the actual line, or legal boundary. Such possession will not be deemed so adverse as to cause the Statute of Limitations to run against the rightful claim.⁶⁸ But if the adjoining owners orally agreed upon a dividing line as the true line, the

ries of the deed conferring such color of title." *Marshall v. Corbett* (N. C. 1905), 50 S. E. Rep. 210.

⁶⁶ *Johnson v. Gorham*, 38 Conn. 521; *Bryan v. Atwater*, 5 Day 181; *Robinson v. Phillips*, 65 Barb. 418; *s. c.* 56 N. Y. 634; *Russell v. Maloney*, 39 Vt. 583; *Faught v. Holway*, 50 Me. 24; *Carmody v. Chicago*, etc., R. R. Co., 111 Ill. 69; *Vandall v. Martin*, 42 Minn. 163, 44 N. W. Rep. 525; *McCormick v. Silsby*, 82 Cal. 72, 22 Pac. Rep. 874; *Grand Tower, etc., Co., v. Gill*, 111 Ill. 541. "One may acquire title by adverse possession to land adjoining his lot, though he takes and holds possession of it under a mistake as to the location of the boundary." *Rennert v. Shirk* (Ind. 1904), 72 N. E. Rep. 546.

⁶⁷ *Arnold v. Woodward* (Colo.), 23 Pac. Rep. 444.

⁶⁸ *Huntington v. Whaley*, 29 Conn. 391; *Holton v. Whitney*, 30 Vt. 410; *Winn v. Abeles*, 35 Kan. 85; *Alexander v. Wheeler*, 78 Ala. 167; *Wait v. Gover* (Ky.), 12 S. W. Rep. 1068; *McLean v. Smith*, 106 N. C. 172, 11 S. E. Rep. 184; *Winn v. Abeles*, 10 Pac. Rep. (Kan.) 443; *Huckshorn v. Hartwig*, 81 Mo. 648; *Acton v. Dooley*, 74 Mo. 63; *Alexander v. Wheeler*, 69 Ala. 332; *s. c.* 78 Ala. 167; *Howard v. Reedy*, 29 Ga. 152; *Worcester v. Lord*, 56 Me. 265; *Dow v. McKenney*, 64 Me. 138; *Bicker v. Hibbard*, 73 Me. 105; *Robinson v. Kinne*, 70 N. Y. 147. Where a party claims real estate only to a given line, and makes no claim as to where the line is located, his adverse possession is limited to the line wherever it may be established. *Wilcox v. Smith* (Wash. 1905), 80 Pac. Rep. 803.

possession would be adverse to the line so agreed upon, and would ripen into a good title by the lapse of time. But not so, if they merely agreed to build a fence for convenience, and without any intention to consider it the true line.⁶⁹ Adverse possession would also be presumed from a location of a fence in accordance with a survey, and the title so acquired would not be affected by a resurvey, which might be made after the expiration of the statutory period of limitation.⁷⁰ As a general proposition, any acts of ownership exercised by the wrongdoer, which would make his possession sufficiently visible and notorious as to raise the presumption of notice to the owner of such adverse holding, will be ample evidence of the adverse claim of title, and actual notice to the owner or an express claim or affirmation of such claim of title is not required to establish its existence.⁷¹ But such a possession never raises a conclusive presumption of an adverse claim. It is only *prima facie* proof of it, and may be rebutted by the proof of other facts, which show that the holding was not intended to be adverse to the rightful owner. This is a question for the jury.⁷² And where the character of the possession, i. e., whether subordinate or adverse, is doubtful, the pre-

⁶⁹ *Burrell v. Burrell*, 11 Mass. 294; *Doe v. Bird*, 11 East 49; *Quinn v. Windmill*, 67 Cal. 461; *Bosworth v. City of Mt. Sterling* (Ky.), 13 S. W. Rep. 920; *Irvin v. Adler*, 44 Cal. 559; *Grim v. Curley*, 43 Cal. 251; *Shiels v. Roberts*, 64 Ga. 370; *Boho v. Richmond*, 25 Ohio St. 115; *Adams v. Rockwell*, 16 Wend. (N. Y.) 285; *Brown v. Leete*, 6 Sawy. (U. S.) 332; *Sherman v. Kane*, 37 N. Y. 57; *Tobey v. Secor*, 60 Wis. 310; *Bader v. Zeise*, 44 Wis. 96; *Bartlett v. Secor*, 56 Wis. 520; *Tracy v. Newton*, 57 Iowa 210; *Heinrichs v. Terrell*, 65 Iowa 25; *Bitter v. Seathoff*, 98 Ill. 266; *White v. Hopeman*, 43 Mich. 267; s. c. 38 Am. Rep. 178; *Brown v. Cockerell*, 33 Ala. 38.

⁷⁰ *Carpenter v. Monks* (Mich.), 45 N. W. Rep. 477; *Hughes v. Pickering*, 14 Pa. St. 297. See, *Wilcox v. Smith* (Wash. 1905), 80 Pac. Rep. 803.

⁷¹ *Liddon v. Hodnett*, 22 Fla. 442. "A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse." *McCaughn v. Young* (Miss. 1905), 37 So. Rep. 839.

⁷² *Thompson v. Kauffelt*, 110 Pa. St. 209, 1 Atl. Rep. 867; *Thompson*

sumption of law is that it is subordinate and not adverse to the lawful owner.⁷³ The fact that the disseisor accepts a deed of conveyance to the land which he previously had in adverse possession does not necessarily destroy the adverse character of his possession.⁷⁴ And where property held subordnately descends upon the tenant's death, and is occupied by his widow, the holding by her is presumed, in the absence of any proof to the contrary, to continue to be subordinate to the rightful owner.⁷⁵

§ 498. **Adverse possession, when entry was lawful.**— It is a legal maxim that when once the seisin is proved to be in one, it will be presumed to continue in that person until the presumption is overthrown by the proof of facts inconsistent therewith.⁷⁶ If, therefore, the entry is made with the consent of the owner, and subservient to his claim of title, the law will presume that the continued possession is subordinate to the superior title of the owner.⁷⁷ So it has been held where one enters under a bond for a deed without paying the consideration, or with the intent to purchase, and not to claim adverse title to the owner, he cannot claim title by adverse possession.⁷⁸ The possession of a devisee is not presumed to

v. Phila., etc., Coals Iron Co. (Pa.), 19 Atl. Rep. 346; *Holbrook v. Bowman*, 62 N. H. 313.

⁷³ *Smith v. Burtis*, 6 Johns. 218; *Jackson v. Sharp*, 9 Johns. 163; *Stevens v. Taft*, 11 Gray 36; *Greer v. Tripp* (Cal.), 12 Pac. Rep. 301; *McLean v. Smith*, 106 N. C. 272, 11 S. E. Rep. 184; *Spencer v. O'Neill*, 100 Mo. 49, 12 S. W. Rep. 1054; *Boohe v. Best*, 75 Texas 568, 12 S. W. Rep. 1000; *Monk v. Wilmington* (N. C. 1904), 49 S. E. Rep. 345.

⁷⁴ *Garvin v. Garvin*, 31 S. C. 581, 19 S. E. Rep. 507; *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. Rep. 722.

⁷⁵ *Drury v. Saunders*, 77 Texas 278.

⁷⁶ *Long v. Mast*, 11 Pa. St. 189; *Babcock v. Utter*, 1 Abb. App. 27; *Stephens v. McCormick*, 5 Bush 181.

⁷⁷ *Union Pac. Ry. Co. v. Kindred*, 43 Kan. 134; 23 Pac. 112; *Curtis v. LaGrande Water Co. (Ore.)*, 23 Pac. Rep. 808.

⁷⁸ *Knox v. Hook*, 12 Mass. 329; *Brown v. King*, 5 Mete. 173; *Vrooman v. Shepherd*, 14 Barb. 441; *Den v. Kip*, 29 N. J. L. 351; *Coogler v. Rogers* (Fla.), 7 So. Rep. 391; *Anderson v. McCormick*, 18 Ore. 301, 22

be adverse to the creditors of the deceased.⁷⁹ The same rule is held to apply to possession under a 'void judicial sale.'⁸⁰ But if the purchase money has been paid, the possession is presumed to be adverse.⁸¹ Such also is the rule in regard to the possession of the joint estate by one of several tenants in common.⁸² Such also is the case with the possession of the

Pac. Rep. 1062; *Mhoon v. Cain*, 77 Texas 316, 14 S. W. Rep. 24; *Stamper v. Griffin*, 12 Ga. 457; *Jackson v. Foster*, 12 Johns. (N. Y.) 490; *Re Public Parks Depart.*, 73 N. Y. 560; *Den v. Kip*, 2 Dutch. (N. J.) 351; *Harris v. Richey*, 56 Pa. St. 395; *Osterman v. Baldwin*, 6 Wall. (U. S.) 116; *Hermans v. Schmaltz*, 7 Fed. Rep. 566; *s. c.* 10 Biss. (U. S.) 323. See *Adams v. Fullam*, 47 Vt. 558; *Walker v. Crawford*, 70 Ala. 567; *Potts v. Coleman*, 67 Ala. 221; *Beard v. Ryan*, 78 Ala. 37; *Moring v. Ables*, 62 Miss. 263; *Benson v. Stewart*, 30 Miss. 49; *Core v. Faupel*, 24 W. Va. 238; *Williams v. Cash*, 27 Ga. 507. "In ejectment, where defendant claims by adverse possession, contracts signed by him with plaintiff for the purchase of the land were admissible in evidence." *Olson v. Burk* (Minn. 1905), 103 N. W. Rep. 335. "Where a party goes into possession of land under a parol purchase, and surrenders it before having paid any of the purchase money, his possession will not inure to his benefit, as against the one from whom he purchased." *Moore v. Mobley* (Ga. 1905), 51 S. E. Rep. 351.

⁷⁹ *Roberts v. Smith*, 21 S. C. 445. "Where a devisee for life in possession suffered the property to be sold for nonpayment of taxes, and his wife became the purchaser at the tax sale, her possession could not be adverse to his so as to create a title in her by limitation." *Blair v. Johnson* (Ill. 1905), 74 N. E. Rep. 747, 215 Ill. 552.

⁸⁰ *Hall v. Hall*, 27 W. Va. 468.

⁸¹ *Brown v. King*, 5 Metc. 173; *Pace v. Payne*, 73 Ga. 670; *Newton v. Mayo*, 62 Ga. 11; *Taylor v. Dugger*, 66 Ala. 444; *Moring v. Ables*, 62 Miss. 263; *Niles v. Davis*, 60 Miss. 750; *Catlino v. Decker*, 38 Conn. 262; *Potts v. Coleman*, 67 Ala. 221; *Tillman v. Spann*, 68 Ala. 102; *Taylor v. Dugger*, 66 Ala. 445. Compare *Core v. Faupel*, 24 W. Va. 238.

⁸² *McClung v. Ross*, 5 Wheat. 124; *Zeller's Lessee v. Eckert*, 4 How. 295; *Campbell v. Laclede Gas Co.*, 84 Mo. 352; *Campau v. Campau*, 44 Mich. 31; *Neely v. Neely*, 79 N. Car. 478; *Linker v. Benson*, 67 N. Car. 150; *Foulke v. Bond*, 41 N. J. L. 527; *Stevens v. Wait*, 112 Ill. 544; *Ball v. Palmer*, 81 Ill. 370; *Knowles v. Brown*, 28 N. W. Rep. (Iowa) 409; *Burns v. Byrne*, 45 Iowa 285; *Bath v. Valdez*, 11 Pac. Rep. (Cal.) 724; *Tully v. Tully*, 9 Pac. Rep. (Cal.) 841; *Unger v. Mooney*, 63 Cal. 586; *Millard v. McMullin*, 68 N. Y. 352; *Woolsey v. Morss*, 19 Hun (N. Y. 273; *Culver v. Rhodes*, 86 N. Y. 348; *Clymer v. Dawkins*, 3 How. (U. S.) 674; *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Union, etc., M.*

cestui que trust and trustee under the trust,⁸³ and the possession of a guardian, and of the mortgagor and mortgagee.⁸⁴ They are all subordinate to the holder of the paramount paper title. So, also, where one has held possession subordinate to the claims of another to some superior right in or title to the land, the widow, heir or devisee of the person having such possession would presumptively receive such possession in subordination to the superior right or title in the other person.⁸⁵ And where one holds over after the termination of a

Co. v. Taylor, 100 U. S. 37; Lapeyre v. Paul, 47 Mo. 590; McQuiddy v. Ware, 67 Mo. 74. See *ante*, Sec. 186.

⁸³ Perry on Trusts, Secs. 863, 864; Janes v. Throckmorton, 57 Cal. 308; Hearst v. Pujol, 44 Cal. 235; Oliver v. Piatt, 3 How. (U. S.) 333; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152; Chick v. Rollins, 44 Me. 104; Roberts v. Littlefield, 48 Me. 61; Milner v. Hyland, 77 Ind. 458; Lewis v. Hawkins, 23 Wall. (U. S.) 119; Seymour v. Treer, 8 Wall. (U. S.) 202; Prevost v. Gratz, 6 Wheat. (U. S.) 481; Norris's App. 71 Pa. St. 106; Janes v. Throckmorton, 57 Cal. 308; Catlion v. Decker, 38 Conn. 362; McCarthy v. McCarthy, 78 Ala. 546; Edwards v. University, 1 D. & B. Eq. (N. Car.) 325; s. c. 30 Am. Dec. 170; Smith v. King, 16 East 283; Gaylord v. Respass, 92 N. C. 553; Saunders v. Farmer, 62 N. H. 572. That is, the *cestui que trust* may disseise his trustee and divest him of his legal estate, if the intention to disseise is manifest, although his possession is usually presumed to be subject to the trust. Whiting v. Whiting, 4 Gray 241. It has been held that in no case will the possession of the trustee be deemed to be adverse to the *cestui que trust*. He cannot disseise the *cestui que trust*. Zeller's Lessee v. Eckert, 4 How. 295; Decouche v. Savetier, 3 Johns. Ch. 216. But see *contra*, Schlessinger v. Mallard, 70 Cal. 326, 11 Pac. 728; Hall v. Ditto (Ky.), 12 S. W. 941. But a disseisin of the trustee will work a disseisin of the *cestui que trust*. See *ante*, Sec. 337. "Where a trustee and his heir at law have held possession of land for 20 years, a grant will be presumed." Uzzell v. Horn (S. C. 1905), 51 S. E. Rep. 253, 71 S. C. 426.

⁸⁴ See *ante*, Sec. 247.

⁸⁵ Oury v. Saunders, 77 Texas 278, 138 S. W. 1030; Dean v. Tucker, 58 Miss. 487; Leonard v. Hart, 2 Atl. Rep. (N. J.) 136; Wilkerson v. Thompson, 82 Mo. 317; Elwell v. Hinckley, 138 Mass. 225; Silva v. Wimpenny, 136 Mass. 253; Creekmur v. Creekmur, 75 Va. 431; Whipple v. Whipple, 109 Ill. 418; Allen v. Allen, 58 Wis. 202; Eddy v. St. Mars, 53 Vt. 462; s. c. 38 Am. Rep. 692; Roebke v. Andrews, 26 Wis. 311; Woodward v. McReynolds, 2 Pin. (Wis.) 268; Bartlett v. Secor,

lawful estate he is tenant at sufferance, and does not by such holding over disseise the reversioner.⁸⁶ The continued possession of the defendant, in an ejectment or equitable action for quieting of title, after decree or judgment has been given for the plaintiff, is presumed to be subordinate to the right of the plaintiff as determined by the court.⁸⁷ But these legal presumptions in the different cases mentioned are all disputable presumptions; and although it has been held that adverse possession cannot be acquired by one co-tenant against the others, yet now it is the universal rule that in any of the above mentioned cases of lawful entry the lawful and subordinate holding may be changed to a hostile and adverse possession by a distinct and unequivocal disavowal of the owner's superior title, and actual notice to him of such disclaimer. In all these cases the disavowal or disclaimer must be accompanied and established by visible and notorious acts, inconsistent with the ownership of the supposed disseisee, such as a refusal to recognize the claim to the profits, or a share therein.⁸⁸

§ 499. *Disseisor's power to alien.*—It is generally accepted, that mere naked possession will be sufficient to enable the one in possession to make a deed of conveyance with or without covenants of warranty, and the grantee would thereby acquire

56 Wis. 520; *Plimpton v. Converse*, 44 Vt. 158; *Morrill v. Titcomb*, 8 Allen (Mass.) 100; *Sherman v. Kane*, 86 N. Y. 57; *Alexander v. Wheeler*, 69 Ala. 332; *Collins v. Johnson*, 57 Ala. 304; *Davenport v. Ledring*, 52 Iowa 365. Compare *Heiskell v. Cobb*, 11 Heisk. (Tenn.) 638; *Ford v. Holmes*, 61 Ga. 419.

⁸⁶ See *ante*, Sec. 171.

⁸⁷ *Woolworth v. Root*, 40 Fed. Rep. 723. But see *Bath v. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724. As to want of presumptions of law that real estate is held adversely, see *Monk v. Wilmington* (N. C. 1904), 49 S. E. Rep. 345.

⁸⁸ *Lafavour v. Homan*, 3 Allen 355; *Roberts v. Morgan*, 30 Vt. 319; *Holley v. Hawley*, 39 Vt. 534; *Jackson v. Moore*, 13 Johns. 516; *Ripley v. Bates*, 110 Mass. 162; *Watson v. Sutro* (Cal.), 24 Pac. Rep. 172; *Mitchell v. Campbell* (Oreg.), 24 Pac. Rep. 455, vendee in possession; *Woolworth v. Root*, 40 Fed. 723. See *ante*, Secs. 171, 186, 247.

a good title which can only be defeated by the true owner. So much the more certain is it that, where such possession amounts to a disseisin, and the intruder has therefore gained a title even against the real owner, the disseisor has sufficient seisin to convey the estate.⁸⁹ In fact, according to the common law, he alone had the power to make a conveyance. The disseisee had nothing but a *chose in action*, which was not assignable.⁹⁰ The estate also descends to the disseisor's heirs, and at common law the descent cast in such a case vested in the heir so complete a title that the right of entry was taken away, and the estate could only be defeated by an action for recovery of the possession.⁹¹

§ 500. **Betterments.**—At common law if a *bona fide* holder of a defeasible title made improvements, while he was in possession of the land, he could not claim compensation for them from the rightful owner. The improvements became a part of the realty, since they were attached without the consent of the lawful owner. Nor could a *bona fide* disseisor claim the right to remove them.⁹² But where the real owner in his ejectment suit asked for judgment for *mesne* profits, the *bona fide* disseisor could off-set the same by his claim for his improvements.⁹³ Statutes, however, have been passed in some of the States enabling the disseisor to bring an original action for improvements.⁹⁴

⁸⁹ *Currier v. Gale*, 9 Allen 525; *Slater v. Rawson*, 6 Metc. 439; *Hubbard v. Little*, 9 Cush. 475; *Overfield v. Christie*, 7 Serg. & R. 173. See *Christy v. Alford*, 17 How. 601; *Haynes v. Boardman*, 119 Mass. 414; *Alexander v. Stewart*, 50 Vt. 87.

⁹⁰ See *post*, Sec. 559.

⁹¹ 3 Washburn on Real Prop. 150; Co. Lit. 238 a; *Smith v. Burtis*, 6 Johns. 217.

⁹² *Powell v. M. & B. Mfg. Co.*, 3 Mason 369; 2 Kent's Com. 334-338; *West v. Stewart*, 7 Pa. St. 122; *ante*, Sec. 2.

⁹³ *Murray v. Gouverneur*, 2 Johns. 438; *Jackson v. Loomis*, 4 Cow. 168; *Green v. Biddle*, 8 Wheat. 181.

⁹⁴ 3 Pars. on Con. 221; *Cooley on Torts* 433; 2 Kent's Com. 335. See *Bright v. Boyd*, 1 Story 494; *Lamar v. Minter*, 13 Ala. 31; *Fisher v. Edington*, 12 Lea 189.

§ 501. Title by adverse possession — How defeated.— The title which is acquired by adverse possession or by disseisin is not an absolute title. It may be defeated by the rightful owner. Disseisin leaves in the owner only a *chose in action*, for the vindication of which are provided two principal remedies. One is the right of entry without the aid of the courts, and the other is the recovery of the possession by the judgment of the court. A mere re-entry upon the land by the disseisee or by his authorized agent, with the intention to recover the seisin, is sufficient to regain the seisin, even though the disseisor is not actually expelled, since the joint-possession by them destroys the element of the exclusiveness, necessary to disseisin.⁹⁵ And although a casual entry without an intention to regain the seisin, is not sufficient for this purpose, it is not necessary for the disseisee to make any express declaration of his intention to the disseisor.⁹⁶ So also does an abandonment of the possession by the disseisor revert the seisin in the rightful owner.⁹⁷ Of course the seisin so gained may be again lost by an ouster, and such an ouster is a redisseisin.⁹⁸ The exact form of action, where the aid of a court is called into requisition, depends upon the local laws and practice. The usual remedy is the common law action of ejectment.

⁹⁵ "Where the holder of the legal title to land enters on the same under a claim of right, and holds possession even jointly with another, it is an interruption of the continuous adverse possession of the other." *Chastang v. Chastang* (Ala. 1904), 37 So. Rep. 799. "An acknowledgment by adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent possession." *Olson v. Burk* (Minn. 1905), 103 N. W. Rep. 335.

⁹⁶ *Peabody v. Hewett*, 52 Me. 46; *Brickett v. Spofford*, 14 Gray 514; *Burrows v. Gallup*, 32 Con. 499; *O'Hara v. Richardson*, 46 Pa. St. 390.

⁹⁷ *Melvin v. Proprs.*, etc., 5 Metc. 15; *Sawyer v. Kendall*, 10 Cush. 241; *Potts v. Gilbert*, 3 Wash. C. Ct. 475; *Cleveland v. Jones*, 3 Strobb. 479 n. Unless there are two joint disseisors, when the abandonment by one would only make the other disseisor *sole seised*. *Allen v. Holton*, 20 Pick. 458.

⁹⁸ 3 Washburn on Real Prop. 130.

§ 502. Title by adverse possession — How made absolute.—

Inasmuch as disseisin leaves only a *chose in action* in the disseisee, and the disseisor acquires thereby a title good and perfect against all the world except the true owner; if, for any reason, the law takes away the right of action, the title will become absolute in the disseisor.⁹⁹ The remedies for the recovery of real property may be barred by one of two causes, *first*, by the lapse of time under the Statute of Limitations, and *secondly*, by estoppel. These will constitute the subjects of the two following sections.

⁹⁹ "Adverse possession of land for the statutory period not only bars an action to recover the same, but also confers title to the land." *Franklin v. Cunningham* (Mo. 1905), 86 S. W. Rep. 79. For effect upon title of mineral owner, by adverse possession of the surface of the land and *vice versa*, where the titles have been separated, see *White, Mines & Min. Rem.*, Sec. 436. See, also, *Brady v. Brady* (N. Y. 1903), 84 N. Y. S. 1119. Where the minerals in land are reserved in a deed, the occupancy of the surface of the land by the grantee thereof is not adverse as to the underlying minerals. *Manning v. Kansas & T. Coal Co.* (Mo. 1904), 81 S. W. Rep. 140. One who secretly enters on coal through an opening in land other than that in which the coal is situated cannot obtain title to the coal by adverse possession, even by continuous mining. *Pierce v. Barney* (Pa. 1904), 58 Atl. Rep. 152, 209 Pa. 132.

SECTION IV.

STATUTE OF LIMITATIONS.

SECTION 503. What the statute enacts.

504. Adverse possession — Continuous and uninterrupted.

505. Against whom the statute runs.

506. How and when statute operates.

507. Effect of the statute.

§ 503. What the statute enacts.— In general, every Statute of Limitations enacts that no action for the recovery of real property can be maintained, and no such right of entry, if any exists, can be exercised, unless instituted within the period of time limited by the statute, after the right has accrued. The first statute for the limitation of real actions was passed in 32 Hen. VIII, ch. 2, and a more general one in 21 Jac. I.¹ But the limitation of actions is governed by the *lex fori*,² and as each State in the American Union has its own Statute of Limitations, varying widely in detail, the limits of this book will only permit of a discussion of the general effect of such statutes, referring the student to the different statutes for the details. The statute, 21 Jac. I, placed the limitation of actions for the recovery of real property at twenty years from the time the right of action accrued, and this period has been more or less adopted in this country, although in a number of States the period has been reduced to ten years, while in others a different period has been established.³

¹ Ang. on Lim. 1-6.

² Ang. on Lim. 65. Statutes of limitations, so called, affect the remedy, but not the right of action. Necessarily, therefore, the *lex fori* must control in all matters of procedure. *Van Schuyver v. Hartman* (Alaska 1902), 1 Alaska 431.

³ In Montana, it is three years. *Dunphy v. Sullivan*, 117 U. S. 346.

§ 504. Adverse possession — Continuous and uninterrupted.

— But in all of the States the person who claims the benefit of the statute, together with his privies, must have held adverse possession for the entire period of limitation. That is, there must not only have been an actual and complete disseisin, as explained in the preceding section, but such disseisin must be continued and uninterrupted during the statutory period. Any discontinuance or abandonment of the possession will prevent the statute from operating.⁴ Any yielding of possession to the claim of the owner, or abandonment of

See generally *Detweiler v. Schultheis*, 122 Ind. 155, 23 N. E. Rep. 709; *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. Rep. 777; *Charles v. Morrow*, 99 Mo. 638, 12 S. W. Rep. 903; *Norris v. Moody*, 84 Cal. 143, 24 Pac. Rep. 37. "As a general rule, statutes of limitations will not be given a retroactive effect, unless it clearly appears that the Legislature so intended." *Curtis v. Boquillas Land & Cattle Co.* (Ariz. 1904), 76 Pac. Rep. 612. Statutes of limitations may be retrospective in nature, provided they do not impair contracts or disturb vested rights. *Edelstein v. Carlisle* (Colo. 1904), 78 Pac. Rep. 680.

⁴ *Doswell v. De La Lanza*, 20 How. 32; *Thomas v. Marshfield*, 13 Pick. 250; *McAninch v. Smith*, 19 Mo. App. 240; *Stewart v. Duffy*, 116 Ill. 47; *Creekmur v. Creekmur*, 75 Va. 430; *Bell v. Denison*, 56 Ala. 444; *Beard v. Ryan*, 78 Ala. 37; *Laramore v. Minish*, 43 Ga. 282; *Morse v. Williams*, 62 Me. 445; *Soule v. Barlow*, 49 Vt. 329; *Bliss v. Johnson*, 94 N. Y. 235; *Wheeler v. Spinola*, 54 N. Y. 377; *McMullin v. Erwin*, 58 Ga. 427; *Bracken v. Jones*, 63 Texas 184; *Sparrow v. Hovey*, 44 Mich. 65; *Unger v. Mooney*, 63 Cal. 586; s. c., 77 Am. Rep. 100; *Williams v. Wallace*, 78 N. Car. 354; *Malloy v. Bruden*, 86 N. Car. 251; *Ruffin v. Overly*, 105 N. C. 78, 11 S. E. Rep. 251; *Wren v. Parker*, 57 Conn. 529, 18 Atl. Rep. 790; *Warren v. Fredericks*, 76 Tex. 647, 13 S. W. Rep. 643; *Morris v. McClary*, 43 Minn. 346, 46 N. W. Rep. 238; *Louisville & M. R. R. Co. v. Philyan*, 88 Ala. 264, 6 So. Rep. 837; *Garlington v. Copeland* (S. C.), 10 S. E. Rep. 616; *Deans v. Wilcozen* (Fla.), 7 So. Rep. 163; *Hicklin v. McClear*, 18 Oreg. 126, 22 Pac. Rep. 1057. "Adverse possession, to be sufficient to defeat the title of the real owner, must be hostile, actual, visible, notorious, exclusive, continuous and under a claim of title." *Roby v. Calumet & Co. Canal & Dock Co.* (Ill. 1904), 71 N. E. Rep. 822, 211 Ill. 173. "Notice of claim of adverse possession by grantor remaining in possession may be brought home to his grantee by acts so open, notorious, and hostile as to show adverse claim." *Kelly v. Palmer* (Minn. 1903), 91 N. W. Rep. 578.

actual possession, although with no intention to give up his claim of adverse possession; or, if at any time during the statutory period the rightful owner could not find an actual occupant against whom to bring his action of ejectment;⁵ any of these acts or incidents will constitute such a discontinuance of the disseisin or adverse possession as will prevent the operation of the statute.⁶ There must, however, be a successful interruption of the adverse possession. An ineffectual protest against the adverse use or possession will not break its continuity.⁷ And so, likewise, is there no interruption of the adverse possession where there have been only occasional acts of trespass with no apparent intention to assert and exercise the right of possession,⁸ or where there is merely a temporary non-user, without any pressure from the disseisee.⁹ So, also, where the disseisor has held possession without color of title for some time and then took a deed from one whom he supposed to be the owner, there is no discontinuance or change of his original adverse possession, and he can claim

⁵ But it must be something more than mere temporary occupation of the building. *Stettinische v. Lamb*, 18 Neb. 619; *Stettinische v. Lamb*, 26 N. W. Rep. (Neb.) 374; *De la Vega v. Butler*, 47 Tex. 529; *Harper v. Tapley*, 35 Miss. 506; *Costello v. Edson*, 44 Minn. 135, 46 N. W. Rep. 299; *Thompson v. Kauffelt*, 110 Pa. St. 209, 1 Atl. Rep. 267; *Van Schuler v. Hartman* (1902), 1 Alaska 431.

⁶ *Pederick v. Searle*, 5 Serg. & R. 240; *Den v. Mulford*, Hayw. 320; *Webb v. Richardson*, 42 Vt. 465; *San Francisco v. Fulde*, 37 Cal. 349; *Ruffin v. Overly*, 105 N. C. 78, 11 S. E. Rep. 251; *Bliss v. Johnson*, 94 N. Y. 235; *Sherman v. Kane*, 86 N. Y. 56; *Steeple v. Downing*, 60 Ind. 478; *Crispin v. Hannavan*, 50 Mo. 536; *Malloy v. Bruden*, 86 N. Car. 251; *Virgin v. Land*, 32 Ga. 572; *Armstrong v. Merrill*, 14 Wall. (U. S.) 120; *Susquehanna, etc., R. Co. v. Quick*, 68 Pa. 189; *Griffith v. Schwendeman*, 27 Mo. 412.

⁷ *Jordan v. Lang*, 22 S. C. 159. See *Clark v. White* (Ga. 1904), 48 S. E. Rep. 357.

⁸ *Duren v. Sinclair*, 22 S. C. 361; *Bell v. Denson*, 56 Ala. 444. See *Doe v. Eslava*, 11 Ala. 1028; *Raynor v. Lee*, 20 Mich. 384. Compare *Walley v. Small*, 29 Iowa 288; *Hoffman v. White* (Ala.), 7 So. Rep. 816.

⁹ *Hesperia Land, etc., Co. v. Rogers*, 83 Cal. 10, 23 Pac. Rep. 196; *Jones v. Gaddis* (Miss.), 7 So. Rep. 489.

against the real owner a continuous adverse possession for the entire time of his possession before and after receiving the deed of conveyance.¹⁰

But it need not be a continuous adverse possession in the one person. The title by disseisin may be assigned, and it descends to the disseisor's heirs. If, therefore, two or three disseisors hold the land successively and in privity with each other, whether by purchase or by descent, and their several periods of holding make up the requisite statutory period, the owner will be just as effectually barred as if the land had been held by one person during the entire time.¹¹ If, however, the first disseisor held possession without color of title and his deed of conveyance purported to convey a larger tract of land than he had had in his actual possession, he conveyed to his grantee a title by adverse possession to only that part of the land of which he had actual possession. And the grantee's adverse constructive possession of the remainder of the land covered by the description in the deed, began with

¹⁰ *Sanders v. Logue*, 88 Tenn. 355, 12 S. W. 722; *Brown v. Brown*, 106 N. C. 451, 11 S. E. Rep. 647; *Jones v. Gaddis* (Miss.), 7 So. Rep. 489. But see *Hods v. Tiernan* (Pa. 1904), 25 Pa. Sup. Ct. 14.

¹¹ *Melvin v. Proprietors, etc.*, 5 Metc. 15; *Sawyer v. Kendall*, 10 Cush. 241; *Alexander v. Pendleton*, 8 Cranch 462; *Doe v. Campbell*, 10 Johns. 477; *Jackson v. Leonard*, 9 Cow. 653; *Doe v. Barnard*, 13 Q. B. 945; *Outcalt v. Ludlow*, 32 N. J. 239; *Clock v. Gilbert*, 39 Conn. 94; *Coogler v. Rogers* (Fla.), 7 So. Rep. 391; *Faloon v. Sinshauser*, 130 Ill. 647, 649, 22 N. E. Rep. 835; *Riggs v. Girard* (Ill.), 24 N. E. Rep. 1031. But the possession of the tenants of dower or curtesy cannot be tacked on to the possession of the husband or wife, respectively, in order to make up the statutory period of adverse possession. *Doe v. Wing*, 6 C. & P. 538, and cases cited *supra*. See, generally, in support of the text, *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 394; *Hammond v. Crosby*, 68 Ga. 767; *Brownson v. Scanlan*, 59 Texas 222; *Furlong v. Garrett*, 44 Wis. 111; *McNeely v. Langdan*, 22 Ohio St. 32; *McEntire v. Brown*, 28 Ind. 347; *Hanson v. Johnson*, 62 Md. 25; s. c. 50 Am. Rep. 199; *Riggs v. Fuller*, 54 Ala. 141; *San Francisco v. Fulde*, 37 Cal. 349; *Shuffleton v. Nelson*, 2 Sawy. (U. S.) 540; *Lea v. Polk County*, 21 How. (U. S.) 493; *Doswell v. De Lanza*, 20 How. (U. S.) 29. See *Jackson v. Snodgrass* (Ala. 1904), 37 So. Rep. 246; *Jones v. Herrick* (Wash. 1904), 77 Pac. Rep. 798.

his entry in possession of the land under color of title.¹² This rule has been sustained and applied where the successive holders, although claiming under each other, have not acquired title by any deed or instrument in writing, but merely by parol contract.¹³ But there must be privity of estate between the successive disseisors, in order that their several holdings may be tacked together to produce a continuity of adverse possession.¹⁴ And it has been held that an involuntary sale, as by a sheriff in execution of a judgment, would not create the necessary privity.¹⁵ But in some of the States the entire doctrine is repudiated, and a continuous holding by one person or his heirs for his statutory period is required to raise a bar to the action by the owner for the recovery of his land.¹⁶

§ 505. Against whom the statute runs.—The statute runs against the rightful owner, and all other persons standing in privity with him. But the statute only bars the actions when

¹² *Barks v. Mitchell*, 78 Ala. 161.

¹³ *Smith v. Chapin*, 31 Conn. 530; *Mimms v. Ewing*, 15 Lea 667; *Brown v. Brown*, 106 N. C. 451, 11 S. E. Rep. 647; *Faloon v. Simshauser*, 130 Ill. 649; 22 N. E. Rep. 835; *Kendrick v. Latham* (Fla.), 6 So. Rep. 871. See *Robinson v. Downing Co.* (Ga. 1904), 48 S. E. Rep. 429.

¹⁴ *Austin v. Rutland R. R.*, 45 Vt. 215; *San Francisco v. Fulde*, 37 Cal. 349; *Shuffleton v. Nelson*, 2 Sawyer 540; *Simpson v. Downing*, 23 Wend. 316; *Locke v. Whitney*, 63 N. H. 597; *Louisville & N. R. Co. v. Philyaw*, 88 Ala. 264, 6 So. 37; *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Cahill v. Palmer*, 44 N. Y. 478. And see *Fanning v. Wilcox*, 3 Day 258; *McCoy v. Dickinson College*, 5 Serg. & R. 254; *Clark v. White* (Ga. 1904), 48 S. E. Rep. 357. "A claim of title by adverse possession exercised by another is of no avail where the chain of title does not connect the claimant with the one exercising the possession." 64 N. J. Eq. 147, affirmed. *Murray v. Pannaci* (N. J. 1904) 57 Atl. Rep. 1132.

¹⁵ *Kendrick v. Latham* (Fla.), 6 So. Rep. 871.

¹⁶ 3 Washburn on Real Prop. 147; *King v. Smith*, Rice 10. This theory has lately been confirmed by the Supreme Court of South Carolina. *Ellen v. Ellen*, 16 S. C. 132; *Condon v. Morgan*, 14 S. Car. 587. "To make up the statutory period of adverse possession, the possession of an heir may be tacked to that of his ancestor." *Kilgore v. Kirkland* (S. C. 1904), 48 S. E. Rep. 44.

the statutory period has elapsed after the time when the right of action accrued. The statute, therefore, does not begin to run against a person until he has a right to bring the action.¹⁷ Where the tenant of a particular estate is disseised and is barred by the statute, since the reversioner is not entitled to possession until the termination of the particular estate, the statute will not affect his right of action during the continuance of the particular estate.¹⁸ The disseisor acquires an absolute title only to the tenant's estate; the reversioner is only disseised from the time when the tenant's estate is at an end, and the reversioner has a right to recover the possession.¹⁹ But the heir is disseised immediately, and the statute runs against him at once, where the widow undertakes to convey lands in fee, which had not been assigned to her as dower.²⁰ And so, likewise, at common law, the disseisin of the mortgagor is an immediate disseisin of the mortgagee, and *vice*

¹⁷ See *Radcliffe v. Scruggs*, 96; *Skinner v. Williams*, 85 Mo. 489; *Mason v. Crowder*, 86 Mo. 261; *Wallace v. Presb. Church*, 111 Pa. St. 164; *Wilhoit v. Tubbs*, 83 Cal. 279, 23 Pac. Rep. 386; *Miller v. Texas, etc., Ry. Co.*, 132 U. S. 662; *Smith v. Exchange Bank*, 110 Pa. St. 508, 1 Atl. Rep. 160; *Tennessee, etc., R. R. Co. v. Mabry*, 85 Tenn. 47, 1 S. W. Rep. 511; *Strabala v. Lewis (Iowa)*, 45 N. W. Rep. 881; *Miller v. Foster*, 76 Texas 479, 13 S. W. 529; *Chase v. Cartwright (Ark.)*, 14 S. W. Rep. 90. "Limitation cannot begin to run against an action of ejectment in a federal court prior to the time when the patent for the land under which plaintiff claims was issued by the United States." *Tegarden v. Le Marchel (U. S. C. C., Ark. 1904)*, 129 Fed. Rep. 487.

¹⁸ *Potter v. Kimball (Mass. 1904)*, 71 N. E. Rep. 308. "The possession of a life tenant, however long or continuous, is not adverse to the remainderman." *Morrison v. Fletcher (Ky. 1905)*, 84 S. W. Rep. 548, 27 Ky. Law Rep. 124.

¹⁹ *Devyr v. Schaefer*, 55 N. Y. 451; *Jackson v. Schoonmaker*, 4 Johns. 390; *Miller v. Ewing*, 6 Cush. 34; *Gernet v. Lynn*, 81 Pa. St. 94; *Pinckney v. Burrage*, 30 N. J. L. 21; *Miller v. Foster*, 76 Texas 479, 13 S. W. Rep. 529; *Dupon v. Walden*, 84 Ga. 690, 11 S. E. Rep. 451. "The possession of the grantee of a life tenant does not become adverse to the remainderman until the life tenant's death, no cause of action for possession accruing to the latter till then." *Beatty v. Clymer (Tex. Civ. App. 1903)*, 75 S. W. Rep. 540.

²⁰ *Smith v. Shaw*, 150 Mass. 297, 22 N. E. Rep. 924.

versa,²¹ the reason being that at common law both mortgagor and mortgagee, or either of them, can bring the necessary possessory action for the recovery of the land from the possession of the disseisor. But where the mortgagee's right to the possession before default is taken away, his right of action does not accrue until default in payment, and hence in case of disseisin of the mortgagor before default, the Statute of Limitations would not begin to run against the mortgagee, until there has been a default.²²

In addition to this restriction upon the operation of the statute, the statutes generally contain a saving clause, preventing the statute from running against certain persons who are under disabilities.²³ Although there may be a different rule prevailing in one or two of the States, in order that the disability, such as coverture or infancy, etc., may prevent the operation of the statute, it must have existed at the time that the statute began to run. If it arises subsequently it can have no effect; a succession of disabilities is not permitted to prevent the operation of the statute beyond the time of suspension from the first disability.²⁴ It will not stay the operation of the statute. And this rule governs whether the disability arises subsequently through the acts of the parties, as in the case of a subsequent marriage of a *feme sole*,²⁵ or it occurs through the force of natural causes, such as subsequent insanity, or where the disseisee dies, and his title descends to an infant heir.²⁶ It is usual, however, in the

²¹ *Poignard v. Smith*, 8 Pick. 272; *Dadmun v. Lamson*, 9 Allen 85.

²² See *Schiefferstein v. Allison*, 24 Ill. App. 294; *s. c.* 123 Ill. 623, 15 N. E. Rep. 275; *Houston v. Workman*, 28 Ill. App. 626. See *Tinsley v. Lombard* (Or. 1904), 78 Pac. Rep. 895.

²³ "The statute of limitations does not run against an infant." *Gibson v. Gibson* (Ky. 1904), 77 S. W. Rep. 928.

²⁴ *Mercer's Lessee v. Selden*, 1 How. 37; *Cotterell v. Dutton*, 4 Taunt. 820; *Edso v. Munsell*, 10 Allen 557; *Miller v. Texas, etc., R. R. Co.*, 132 U. S. 662.

²⁵ *Thorpe v. Raymond*, 16 How. 247; *Carrier v. Gale*, 3 Allen 328; *Hall v. Ditto* (Ky.), 12 S. W. Rep. 941.

²⁶ *Allis v. Moore*, 2 Allen 306; *Fleming v. Griswold*, 3 Hill 85;

case of descent to infant heirs, to provide that the time of limitation shall be prolonged, so that the actions will not be barred until the lapse of a stated period after arrival at majority. It is also the general rule, in the absence of an express statutory provision, that the Statute of Limitations will not run against the State or United States. *Nullum tempus occurrit regi.*²⁷

§ 506. **How and when statute operates.**—The statute not only protects the title acquired by adverse possession, when it is assailed by plaintiff in an action of ejectment, but it may also be relied upon to vindicate his right to possession, where he has been ousted and he is forced to his action to recover possession. The statute not only bars the action, but it takes away the disseisee's former right to regain seisin by an entry. Any entry, therefore, which he may make after the lapse of the period of limitation, is a disseisin and does not re-invest him with the lawful seisin. The statute, therefore, may be set up by a plaintiff in ejectment in support of his title, even against one who has a clear paper title.²⁸ And it has also been held, where ejectment is brought by disseisee, and the disseisor with possession for the statutory period suffers judgment by default, he may set up the statute in a subsequent action of ejectment, in which he is plaintiff.²⁹

§ 507. **Effect of the statute.**—All the earlier authorities held that the only effect of the Statute of Limitations was to bar the remedy, and that it did not affect the substantive

Becker v. Van Valkenburg, 29 Barb. 324; Lincoln v. Purcell, 2 Head 143; Burdette v. May, 100 Mo. 13, 12 S. W. Rep. 1056.

²⁷ Lindsey v. Miller, 2 Pet. 660; Burgess v. Gray, 16 How. 48; Oaksmith v. Johnston, 92 U. S. 343; Gardiner v. Miller, 47 Cal. 570. "No title by adverse possession can be acquired against the State or United States, nor is land the subject of adverse possession where the title is in the State." Topping v. Cohn (Neb. 1904), 99 N. W. Rep. 372.

²⁸ Ang. on Lim., Secs. 380, 381; Hughes v. Graves, 39 Vt. 365; Phillips v. Kent, 23 N. J. L. 155; Parker v. Metzger, 12 Oreg. 407.

²⁹ Jackson v. Diffendorff, 3 Johns. 269.

right, whether the action was to recover real property or was only a personal *chose in action*.³⁰ And this would appear to be the reasonable construction of the statutes. They in express terms bar the actions. But of late years some of the courts have gone further and held that the statute affected also the right or title of the disseisee.³¹ Mr. Washburn says that "the operation of the statute takes away the title of the real owner, and transfers it, not in form, indeed, but in legal effect to the adverse occupant."³² The statute may have the effect of destroying the title of the owner altogether and for all purposes, but it cannot be said to transfer it to the disseisor. His title is acquired by adverse possession, and it is only made perfect by rendering the rightful owner powerless to defeat it, either by entry or by ejectment. The only real value of this distinction lies in the settlement of a question arising under the subject of title by abandonment.³³

³⁰ Ang. on Lim., Secs. 1, 7; 3 Washburn on Real Prop. 146; Davenport v. Tyrrel, 1 W. Bl. 975; McElmoyne v. Cohen, 13 Pet. 312; Townsend v. Jemison, 29 How. 497; Bulger v. Roche, 11 Pick. 36.

³¹ School District v. Benson, 31 Me. 384. See Steel v. Johnson, 4 Allen 426; Blair v. Smith, 16 Mo. 273. See 3 Washburn on Real Prop. 163, 164; Bliss on Code Pleading, Sec. 356.

³² 3 Washburn on Real Prop. 164. The rule, as stated by Mr. Washburn, is followed, in a late case, in Missouri. Franklin v. Cunningham (1905), 86 S. W. Rep. 79. See, also, for rule in Oregon, Hamilton v. Flournoy (1903), 74 Pac. Rep. 483.

³³ See *post*, Sec. 517.

SECTION V.

ESTOPPEL.

SECTION 508. Definition.

- 509. Estoppels *in pais*.
- 510. Is fraud necessary to estoppel *in pais*.
- 511. Estoppel in deed.
- 512. Estoppel in deed — Continued.
- 513. Effect of estoppel upon the title.
- 514. Effect of estoppel — Continued.
- 515. Estoppel binding upon whom.

§ 508. Definition.— A title by adverse possession may also be perfected by estoppel. Estoppel is an admission or representation which is held by law to be conclusive upon the party making it, because its disproof would result in injury to him who relied upon its truth. The subject has a general reference to all branches of the law. In its reference to titles to real property they may be divided into estoppels *in pais* and estoppels by deed.²⁴

§ 509. Estoppels *in pais*.— An estoppel *in pais* is a representation, either by act or by word, or even in some cases by silence, made by one party to another for the purpose of influencing the latter in reference to the title or boundary line of the property about to be purchased by the latter.²⁵ One

²⁴ 3 Washburn on Real Prop. 70; 1 Prest. Abst. 421; Welland Canal v. Hathaway, 8 Wend. 480; Hanrahan v. O'Reilly, 102 Mass. 204; Co. Lit. 352 a. Conduct creating an estoppel may be without an intention to deceive or mislead, if such as to induce a reasonable man to act on it. Globe Nav. Co. v. Maryland Casualty Co. (Wash. 1905), 81 Pac. Rep. 826.

²⁵ Ham v. Ham, 14 Me. 351; Attorney-General v. Merrimack Co., 14 Gray 586; McWilliams v. Morgan, 61 Ill. 89; Veal v. Robinson, 76 Ga. 838; Coogler v. Rogers (Fla.), 7 So. Rep. 391; Moose v. Trimmier

is estopped from asserting title to land, which he has permitted to be sold in his presence to a *bona fide* purchaser without disclosing his claim to the land.³⁶ The representation, in order to constitute an estoppel, must refer to facts not equally within the knowledge and reach of both parties. If the purchaser, who relies upon the representation, had other convenient means of ascertaining the truth of the case, there will be no estoppel.³⁷ The party seeking to establish the estoppel must show that he actually relied upon the representation, and was thereby deceived.³⁸ It is further required that the representation must have been made with the intention to influence the conduct of the party misled, or it was so made that the latter might reasonably have been expected to rely upon it.³⁹

(S. C.) 11 S. E. Rep. 548, 552; *Jennings v. Harrison* (S. C.), 11 S. E. Rep. 695; *Gruber v. Baker*, 20 Nev. 453, 23 Pac. Rep. 858; *Geary v. Porter*, 17 Oreg. 465. "Where one by his conduct induces another to act on the supposition that certain conditions exist, he will not be heard to deny their existence, where the other would be prejudiced by such denial." *Anthes v. Schroeder* (Neb. 1905), 103 N. W. Rep. 1072. "The substance of estoppel is the inducement of another to act to his prejudice." *Steffens v. Nelson* (Minn. 1905), 102 N. W. Rep. 871. "The doctrine of estoppel and laches, with reference to an action to recover swamp lands patented by the State to a county, applies to the county to the same extent as to individuals." *Palmer v. Jones* (Mo. 1904), 85 S. W. Rep. 1113.

³⁶ *Gray v. Crockett*, 35 Kan. 686, 12 Pac. 129; *Sumner v. Seaton* (N. J.), 19 Atl. Rep. 884; *Bunting v. Gilmore* (Ind.), 24 N. E. Rep. 583; *Short v. Currier*, 150 Mass. 372, 23 N. E. Rep. 106; *Noble v. Ill. Cent. R. R. Co.*, 111 Ill. 437; *Bobb v. Bobb*, 99 Mo. 578, 12 S. W. Rep. 893. But see, *Tilotsen v. Mitchell*, 111 Ill. 518; *Knutson v. Vidlers* (Iowa 1905), 102 N. W. Rep. 433.

³⁷ *Odlin v. Grove*, 41 N. H. 477; *Mora v. Murphy*, 83 Cal. 12, 83 Pac. 63; *Stuart v. Lowry*, 42 Minn. 473, 44 N. W. Rep. 532; *Western N. Y., etc., R. R. Co. v. Richards* (Pa.), 19 Atl. Rep. 931.

³⁸ *Brown v. Bowen*, 30 N. Y. 541; *Malloney v. Heron*, 49 N. Y. 111; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Jones v. Merchants Nat. Bank*, 55 Hun 290, 8 N. Y. S. 382.

³⁹ *Turner v. Coffin*, 12 Allen 401; *Andrews v. Lyon*, 11 Allen 350; *Howard v. Hudson*, 2 Ell. & B. 1; *Ford v. Fellows*, 34 Mo. App. 630; *Blanchard v. Evans*, 5 N. Y. Super Ct. 543. "It is unnecessary to cre-

§ 510. Is fraud necessary to estoppel in pais? — It has been a disputed question how far the element of fraud is necessary to constitute a false representation a ground for raising an estoppel. A large number of cases hold that, if there are present a false representation, an intention to influence, and a reliance upon that representation, an estoppel arises against the party making the false representation, notwithstanding he did so through an honest mistake as to the facts of the case, provided the circumstances of the case impute to the party making the misrepresentation a knowledge of the truth.⁴⁰ While it is maintained by other courts that the representation must have been made by one who either knew it to be false, or had no reasonable grounds for believing it to be true.⁴¹ This dispute arises only where the representation concerns the title to the land generally. When the representation refers to the boundary line between two estates, the courts seem to have generally agreed upon the following rule: Where a true line was a matter of uncertainty and dispute, and it could not, after a diligent search, be ascertained, if the parties agree upon a line, which shall constitute the boundary line, both will thereafter be estopped from denying that the line agreed upon was the true line, although the dispute arose

ate an estoppel that the conduct of the parties should be characterized by intent to deceive." *Rogers v. Portland & B. St. Ry.* (Me. 1905), 60 Atl. Rep. 713. "The doctrine of equitable estoppel should not be implied, unless in any given case all the elements exist essential to create such estoppel." *Rogers v. Portland & B. St. Ry.* (Me. 1905), 60 Atl. Rep. 713. "One cannot lose a vested title to land by oral admissions that it is the property of another." *Yock v. Mann* (W. Va. 1905), 49 S. E. Rep. 1019.

⁴⁰ *Bigelow v. Foss*, 59 Me. 162; *Maple v. Kussart*, 53 Pa. St. 352; *Morris Canal v. Lewis*, 12 N. J. Eq. 332; *Snodgrass v. Ricketts*, 13 Cal. 362; *Ford v. Fellows*, 34 Mo. App. 630. See *Rogers v. Portland Co.* (Me. 1905), 60 Atl. Rep. 713.

⁴¹ *Davidson v. Young*, 38 Ill. 152; *Boggs v. Merced Co.*, 14 Cal. 367; *Glidden v. Struppeler*, 52 Pa. St. 405; *Copeland v. Copeland*, 28 Me. 539; *Whitaker v. Williams*, 20 Conn. 104; *Hensaw v. Bissell*, 18 Wall. 271. See *Lewis v. Brown* (Tex. 1905), 87 S. W. Rep. 704.

from an honest mistake of one or both of the parties.⁴² But if the representation was made under an honest mistake of the facts in a case, where there was no actual uncertainty as to the true line, the party making the representation would not thereafter be precluded from setting up the true line.⁴³ But if the party making the representation as to boundary knew it to be false and the other relied upon such representation, an estoppel would arise.⁴⁴ These questions, however, involve the discussion of a great many principles of equity, and upon the application of which the courts are not altogether agreed. The foregoing enunciation of the leading principles is as much as can be attempted in an elementary treatise on real property. It is hardly necessary to state that, in order that an estoppel *in pais* may perfect a title by adverse possession, the possession must have been acquired under an honest claim of title. For an honest reliance upon the false representation in respect to the title is necessary to raise the estoppel. In perfecting titles by adverse possession, estoppels are set up by the defendant in defending the title so acquired and perfected. But, if necessary, it may also be set up by the

⁴² *Adams v. Rockwell*, 16 Wend. 285; *Dibble v. Rogers*, 13 Wend. 536; *Jackson v. Ogden*, 7 Johns. 238; *Orr v. Hadley*, 36 N. H. 575; *Knowles v. Toothaker*, 58 Me. 174; *Russell v. Maloney*, 39 Vt. 580; *Sneed v. Osborn*, 25 Cal. 624; *Reed v. Farr*, 35 N. Y. 117. See *Wendall v. Fisher* (Mass. 1904), 72 N. E. Rep. 322; *Le Comte v. Carson* (W. Va. 1904), 49 S. E. Rep. 238. "Where there is doubt as to a boundary, an oral agreement, carried into execution by actual possession, is valid, without other consideration than the settlement of the disputed boundary." *Le Comte v. Carson* (W. Va. 1904), 49 S. E. Rep. 238.

⁴³ *Proprietors, etc., v. Prescott*, 7 Allen 494; *Vosburgh v. Teator*, 32 N. Y. 561; *Russell v. Maloney*, 39 Vt. 580. See *Burdick v. Heinley*, 23 Iowa 515.

⁴⁴ *Davenport v. Tarpin*, 43 Cal. 598; *Lemmon v. Hartrook*, 80 Mo. 13; *Kirchner v. Miller*, 39 N. J. Eq. 355; *Hass v. Plantz*, 56 Wis. 105; *Raynor v. Timerson*, 51 Barb. 517; *Evans v. Miller*, 58 Miss. 120; *Pitcher v. Dove*, 99 Ind. 175. To make valid an oral agreement to fix a line between two contiguous tracts of land, there must be doubt as to the true line, or the agreement is void. *Le Comte v. Carson* (W. Va. 1904), 49 S. E. Rep. 238.

plaintiff in exercising the rights of ownership incident to the title.

§ 511. **Estoppel by deed.**—In its relation to the title of lands an estoppel by deed arises, where there is in the deed an express or implied representation that the grantor at the time of his conveyance was possessed of the title which his deed purports to convey.⁴⁵ If there is such a representation, and it is false, whether he is committing a fraud or is acting under an honest mistake, he is estopped from denying that he has a title; and consequently, if he should afterwards acquire the title, he could not by setting it up defeat his own grant.⁴⁶ And, as in the case of an estoppel *in pais*, the grantor is not estopped, unless the grantee took the deed in reliance upon the truth of the grantor's representations as to his title.⁴⁷ But a grantor may disseise his grantee, and the title by adverse possession, so acquired, may ripen into a good title, which the grantor may assert. So also may he acquire a title subsequently in any other manner, and assert it against his grantee, provided it does not negative the validity of the title which he purported to convey.⁴⁸ The representation need not be express; it may be implied. The common-law conveyance by feoffment was itself an implied representation that the feoffor

⁴⁵ *Dickson v. Sledge* (Miss. 1905), 38 So. Rep. 673; *Coleman v. Coleman*, 216 Ill. 261, 74 N. E. Rep. 701; *New Orleans v. Riddell*, 113 La. 1051, 37 So. Rep. 986.

⁴⁶ *Smith v. Moodus Water Co.*, 35 Conn. 400; *Jackson v. Murray*, 12 Johns. 201; *French v. Spencer*, 21 How. 228; *Washabaugh v. Entricken*, 34 Pa. St. 74; *Ryan v. United States*, 136 U. S. 68; *Stranford v. Broadway Sav. & Loan Co.*, 122 Ind. 422; *Coleman v. Bresnahan*, 54 Hun 619, 8 N. Y. S. 158; *Miller v. Texas, etc., R. R. Co.*, 132 U. S. 68; *Rogers v. Portland Co.* (Me. 1905), 60 Atl. Rep. 713; *Jones v. Jones*, 213 Ill. 228, 72 N. E. Rep. 695.

⁴⁷ *Viele v. Van Steenburg*, 31 Fed. Rep. 249; *Rountree v. Lane* (S. C.), 10 S. E. Rep. 941; *Mann v. City of Elgin*, 24 Ill. App. 419; *McCann v. Oregon Ry. & Nav. Co.*, 13 Or. 455, 11 Pac. Rep. 236.

⁴⁸ *Parker v. Proprietors, etc.*, 3 Metc. 102; *Stearns v. Hendersass*, 9 Cush. 502; *Moore v. Littel*, 41 N. Y. 97; *Garabaldi v. Shattuck*, 70 Cal. 511, 11 Pac. Rep. 778; *Luove v. Wilson* (La. 1905), 38 So. Rep. 522.

had an absolute title to the estate, which was sufficient to bind any subsequently acquired title in his hands.⁴⁹ But in all other deeds, and particularly in deeds which take effect under the Statute of Uses, no estoppel can arise, unless the recitals or the covenants of the deed expressly or impliedly represent that the grantor had a good title to the land which he attempts to convey. No estoppel can arise merely from the execution and delivery of such a deed, and the payment of a valuable consideration.⁵⁰

§ 512. *Estoppel in deeds — Continued.*— It seems, however, in order that a recital may work an estoppel, it must refer specially to some particular fact. General recitals do not conclude the grantor from setting up an after-acquired title.⁵¹ The covenants of warranty are held to raise an estoppel for the purpose of avoiding circuity of action. An entry by the grantor under his after-acquired title would be a breach of the covenants, and instead of putting the grantee to his action on the covenants, the law estops the grantor from asserting the title in derogation of his own grant.⁵² But it is not necessary that the covenant be a general covenant of warranty. A special warranty would ordinarily be sufficient. It will operate as an estoppel to the extent of the liability thereby assumed by the grantor.⁵³ In order that a covenant may work an

⁴⁹ 3 Washburn on Real Prop. 94.

⁵⁰ 3 Washburn on Real Prop. 116; *White v. Patten*, 24 Pick. 324; *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Brinkerhoff*, 3 Johns. 101; *Bruce v. Luke*, 9 Kan. 291, 12 Am. Rep. 491; *Brennan v. Eggeman*, 73 Mich. 658.

⁵¹ *Huntington v. Havens*, 5 Johns. Ch. 23; *Shelley v. Wright*, Willes 9; Co. Lit. 352 b; *Morgan v. Larned*, 10 Metc. 53; *Carver v. Jackson*, 4 Pet. 85; *Hall v. Orvis*, 35 Iowa 366; *Yancey v. Radford* (Va.), 10 S. E. Rep. 972; *Pate v. French*, 122 Ind. 10, 23 N. E. Rep. 673.

⁵² *Somes v. Skinner*, 3 Pick. 52; *Oakes v. Marcey*, 10 Pick. 195; *Jackson v. Waldron*, 13 Wend. 189; *Bogy v. Shoab*, 13 Mo. 378; *Gaffney v. Peeler*, 21 S. C. 55; *Robinson v. Douthit*, 64 Texas 101; *Miller v. Texas, etc., R. R. Co.*, 132 U. S. 662.

⁵³ *Trull v. Eastman*, 3 Metc. 121; *Blake v. Tucker*, 12 Vt. 39; *Kimball v. Blaisdell*, 5 N. H. 535; *Brundred v. Walker*, 12 N. J. Eq. 140;

estoppel it must be contained in a deed which is good and valid in law as well as in equity. A defective deed cannot create an estoppel by covenant.⁵⁴ But a conveyance in consideration of natural love and affection, is sufficient.⁵⁵ So will no estoppel arise from a deed with covenant of warranty, where the deed passes an interest, upon which the warranty can operate, although the interest so passing is not commensurate with the intention of the parties.⁵⁶ And if the deed conveys "all the right, title and interest" of the grantor, instead of an absolute estate, the grantor will not be estopped from setting up an after-acquired title, since he did not undertake to convey any greater interest or better title than he then had.⁵⁷ So, also, a quit-claim deed cannot raise an estoppel as to after-acquired titles.⁵⁸ And where the deed is executed by two or more owners of an estate in common, the estoppel, whether it is based upon a recital or a covenant of warranty, or both, only operates upon the share of each

Coleman v. Coleman, 216 Ill. 261, 74 N. E. Rep. 701; *Cunningham v. Cunningham* (Iowa 1904), 101 N. W. Rep. 470; *New Orleans v. Riddell*, 113 La. 1051, 37 So. Rep. 966. Where one conveys land with general warranty, and his title is defective, and he afterwards acquires a good title, it inures to the benefit of his grantee. *Yock v. Mann* (W. Va. 1905), 49 S. E. Rep. 1019.

⁵⁴ *Blanchard v. Brooks*, 12 Pick. 47; *Patterson v. Pease*, 5 Ohio 190; *Kercheval v. Triplett*, 1 A. K. Marsh. 493; *Dougal v. Fryer*, 3 Mo. 29; *Raymond v. Holden*, 2 Cush. 264. Where proceedings to sell land for taxes were void, and not merely voidable, a landowner was not estopped to object thereto by the fact that he personally appeared and bid on the land at the sale. *Young v. Droz* (Wash. 1905), 80 Pac. Rep. 810.

⁵⁵ *Robinson v. Douthit*, 64 Texas 101.

⁵⁶ *Jackson v. Hoffman*, 9 Cow. 271; *Lewis v. Baird*, 3 McLean 56; 2 Prest. Abst. 216; 4 Kent's Com. 98.

⁵⁷ *Mills v. Ewing*, 6 Cush. 34; *Doane v. Wilcutt*, 5 Gray 328; *Raymond v. Raymond*, 10 Cush. 134; *Harrison v. Gray*, 49 Me. 538; *White v. Brocaw*, 14 Ohio St. 344; *Torrence v. Shredd*, 112 Ill. 466.

⁵⁸ *Fay v. Wood* (Mich.), 32 N. W. Rep. 614; *Frost v. Meth.*, etc., *Missionary Soc.*, 56 Mich. 62; *People v. Miller* (Mich.), 44 N. W. Rep. 172. But see *Clark v. Daniels* (Mich.), 43 N. W. Rep. 854.

grantor, and does not prevent one from setting up a title to the shares of the other, which he acquires subsequently.⁵⁹

§ 513. **Effect of estoppel upon the title.**—Where the estoppel arises *in pais* there seems to be no doubt that it has only the effect of locking up the adverse title in the person against whom the estoppel operates, instead of creating a title in, or transferring the true title to, the person for whose benefit it is brought into operation. It only precludes the party from setting up his true title against him, who has been influenced by false representation. If one who has been deceived has actually received no title in any other way, the doctrine of estoppel will only help him in an action brought to recover the title to which he is entitled. If he has a title by adverse possession under a claim of title, the estoppel will perfect it by preventing his ouster under the paramount title by those who are affected by the estoppel. But a difficult question arises in this connection, where it is an estoppel by deed. Two different theories prevail, and are supported by eminent authority. According to one theory, the estoppel by deed simply precludes the grantor from setting up an after-acquired title in derogation of his own grant. The opposing theory is to the effect that the estoppel actually passes the after-acquired title to the grantee immediately upon its acquisition by the grantor. To use the expression commonly found in these authorities, it “inures” to the grantee. This latter theory is directly opposed to the general doctrine of estoppel, and is believed to be unfounded.

§ 514. **Effect of estoppel — Continued.**—A large array of authorities is cited by Mr. Rawle and Mr. Washburn,⁶⁰ but as

⁵⁹ *Trall v. Eastman*, 3 Metc. 121; *Wright v. Shaw*, 5 Cush. 56. See *Coleman v. Coleman*, 216 Ill. 261, 74 N. E. Rep. 701. But as to estoppel of wife by deed of husband, see, *Cunningham v. Cunningham* (Iowa 1905) 101 N. W. Rep. 470; *Bland v. Windsor et al.* (Mo. 1905), 86 S. W. Rep. 162.

⁶⁰ Rawle, *Cov. of Tit.* (4 ed.) 404; 3 Washburn on Real Prop. 190.

Mr. Bigelow very correctly states, in his article,⁶¹ and again in his work on Estoppel,⁶² these authorities refer to the subject only in general terms, and cannot be treated as final and conclusive. In fact, in some of the cases, the position is assumed by the reporter in the *syllabus*, without having anything in the decision of the court, or the facts of the case, to warrant it.⁶³ According to Mr. Bigelow, the error has occurred through a failure to distinguish between the effect of the common law conveyances of feoffment, fine, recovery and lease, and that of the deeds which take effect under the Statute of Uses. He admits that by these common-law conveyances the after-acquired interest passed by estoppel to the grantee, while he holds that a different conclusion must be reached in respect to deeds of bargain and sale, covenants to stand seised, and lease and release. In the leading case of *Somes v. Skinner*,⁶⁴ all the authorities relied upon, concerned estoppels arising in these common-law conveyances. But it seems to the writer that the entire doctrine is fallacious, whether it refers to common-law conveyances, except a lease for a term of years, or to deeds under the Statute of Uses, and it arises from the false idea of the courts that the doctrine of inurement was necessary, in order to give the grantee sufficient title to defend against trespassers.⁶⁵ At common law no con-

The following are the leading cases cited by Mr. Washburn: *Jackson v. Stevens*, 13 Johns. 316; *Brown v. McCormick*, 6 Watts 60; *Jackson v. Matsdorf*, 11 Johns. 91; *Terrett v. Taylor*, 9 Cranch 43; *Comstock v. Smith*, 13 Pick. 116; *White v. Patten*, 24 Pick. 324; *Van Rensselaer v. Kearney*, 11 How. 322; *Goodson v. Beacham*, 24 Ga. 150; *Kimball v. Schoff*, 40 N. H. 190; *Burton v. Reeds*, 20 Ind. 93; *McCusker v. Mcvey*, 9 R. I. 529; *Plympton v. Converse*, 42 Vt. 712; *Doe v. Dowdall*, 3 Houst. 369; *Parker v. Marks*, 82 Ala. 548; *Kaiser v. Earhart*, 64 Miss. 492; *Jacob v. Yale (La.)*, 1 So. Rep. 822; *Cornish v. Frees*, 74 Wis. 490.

⁶¹ 9 Am. Law Rev. 252.

⁶² Big. on Estop. 285-339.

⁶³ See particularly *Jackson v. Stevens*, 13 Johns. 316; *Jackson v. Matsdorf*, 11 Johns. 91; *Terrett v. Taylor*, 9 Cranch 43.

⁶⁴ 3 Pick. 52.

⁶⁵ *Blanchard v. Ellis*, 1 Gray 195; *Bean v. Welsh*, 17 Ala. 770. A

veyance could be made by one of lands which were in the adverse possession of another.⁶⁶ Where, therefore, there was a conveyance made of the lands—particularly if it was a common-law conveyance—the grantee or feoffee acquired at least a title by adverse possession, if his grantor was not lawfully seised. This title by adverse possession was good against all the world except the true owner.⁶⁷ And if his grantor acquired the paramount title he was estopped from enforcing it against his grantee. The distinction between the two theories only acquired importance when the common-law rule, requiring the grantor to be seised, was abolished and the grantor was permitted to make a legal conveyance while he was dis-seised. The question then for the first time arose, whether the title, subsequently acquired by one who at the time of his grant had neither title nor possession, so far passed by estoppel to the grantee as to permit him to maintain an action of ejectment against one, who holds in adverse possession to both him and his grantee. That a man acquires nothing by a deed from one, who has neither title nor possession, needs no authority.⁶⁸ The after-acquired title must inure or pass to the grantee, instead of being shut up in the hands of the grantor, in order that the grantee may maintain ejectment against a disseisor.⁶⁹ The better opinion is that no title passes by estoppel to the grantee. If he has acquired none

common law lease for a term of years is an executory contract, until the lessee has entered into possession. See *ante*, Sec 131. The lessee may therefore sue for possession at any time during his term, and may take advantage of any after-acquired title of his lessor. But the grant of a freehold operates *eo instanti*, and conveys the title upon the delivery of the deed, or not at all.

⁶⁶ See *post*, Sec. 559.

⁶⁷ See *ante*, Secs. 490, 491.

⁶⁸ Tyl. on Adv. Pos. 542.

⁶⁹ See *Jackson v. Bradford*, 4 Wend. 619; 3 Prest. Abst. 25; *Wyvel's Case*, Hob. 44; *Wright v. Wright*, 1 Ves. Sr. 391; *Somes v. Skinner*, 3 Pick. 52, 80; *Way v. Arnold*, 18 Ga. 350; *Jacocks v. Gilliam*, 3 Murph. 47; *s. c.* 4 Hawks 310, to the effect that such a grantee could not maintain an action of ejectment in his own name against the disseisor.

by force of his grant, *i. e.*, if he has not acquired a title by adverse possession, he does not gain one by estoppel.⁷⁰ In some of the States, to supply the deficiency, statutes have been enacted, which cause after-acquired titles to pass *instantly* from the grantor to the grantee.⁷¹ In the absence of the statute the title remains in the grantor, but he is precluded from setting it up. Neither is the grantee obliged to take advantage of the title subsequently acquired. He may bring his action for the breach of the covenants if he has been evicted.⁷² It would seem that if the title actually inured to the grantee, his dispossession by his grantor, under the claim of a paramount title, could not be treated as a breach of the covenant of warranty. It would be a simple act of trespass. And in cases where by estoppel one acquires a right to the title of lands subsequently acquired, a court of equity will always grant a decree for further assurance, so as to protect the grantee's title against the acquisition of the paramount title by an innocent purchaser without notice of the estoppel.

§ 515. **Estoppel binding upon whom.**—An estoppel will not only bind the party who makes the false representation, but also all those who are in privity with him, whether the privity is of estate, of contract, or by blood. A stranger can neither take advantage of an estoppel, nor be bound by it.⁷³ If, how-

⁷⁰ *Gibson v. Chouteau*, 39 Mo. 566; *Van Rensselaer v. Kearney*, 11 How. 322; *Jackson v. Bradford*, 4 Wend. 619; *Wright v. Wright*, 1 Ves. Sr. 391. See *Reeder v. Craig*, 3 McCord 411. But see *Cooper v. Burns* (Neb. 1904), 133 Fed. Rep. 398; *New Orleans v. Riddell*, 113 La. 1051, 37 So. Rep. 966.

⁷¹ *Bogy v. Shoab*, 13 Mo. 379; *Clark v. Baker*, 14 Cal. 612; *Kline v. Ragland*, 47 Ark. 111.

⁷² *Blanchard v. Ellis*, 1 Gray 195; *Tucker v. Clarke*, 2 Sandf. Ch. 96; *Burton v. Reed*, 20 Ind. 87; *Woods v. North*, 6 Humph. 309; *Noonan v. Isley*, 21 Wis. 139. *Contra*, *King v. Gelson*, 32 Ill. 348; *Reese v. Smith*, 12 Mo. 344.

⁷³ *Wivel's Case*, Hob. 45; *Wright v. Wright*, 1 Ves. Sr. 391; *Somes v. Skinner*, 3 Pick. 52; *Coogler v. Rogers* (Fla.), 7 So. Rep. 391; *Glover v. Thomas*, 75 Texas 506, 12 S. W. Rep. 684; *Gruber v. Baker*, 20 Nev.

ever, the grantor acquires and holds possession adversely to the grantee, the subsequently acquired title will accrue to the grantor and cannot be claimed by the grantee on the theory of estoppel.⁷⁴ Nor can any one enforce an estoppel, except the person to whom the representation was made, or who was intended to be influenced, and those who stand in privity with him, and claim under him. But where the privies of the grantor, who is estopped, are subsequent purchasers for value, they are only estopped where they have a notice of the estoppel, whether that estoppel arises *in pais* or by deed.⁷⁵ If the subsequent purchaser of an after-acquired title has received no notice of the prior deed, the estate in his hands is freed from the estoppel.⁷⁶ But it is a doubtful question whether the registration of the prior deed, before the title had been acquired by the grantor and recorded, would properly be considered constructive notice of the estoppel. It is certainly in violation of the spirit of the registration laws which only require the investigator to search the records for any incumbrance or conveyance which occurs between the time when the grantor acquired the title, and the time when he offers the title for conveyance.⁷⁷ But in order that one may be bound

453, 23 Pac. Rep. 858; *Grand Tower, etc., Co. v. Gill*, 111 Ill. 541; *Consolidated, etc., Min. Co. v. Lebanon Min. Co.*, 9 Colo. 343, 12 Pac. Rep. 212; *Staffordville Gravel Co. v. Newell* (N. J.), 19 Atl. Rep. 209; *Smythe v. Henry*, 41 Fed. Rep. 705; *Cate v. French*, 122 Ind. 10, 23 N. E. Rep. 673; *New Orleans v. Riddell*, 113 La. 1051, 37 So. Rep. 966; *Louve v. Wilson* (La. 1905), 38 So. Rep. 522; *McCormick v. Herron* (Iowa 1905), 103 N. W. Rep. 988; *Boshore v. Parker* (Cal. 1905), 80 Pac. Rep. 707. "One whose only claim to land is as heir of one estopped to claim it has no right to it." *Spears v. Conley* (Ky. 1905), 87 S. W. Rep. 1072, 27 Ky. Law Rep. 1169.

⁷⁴ *Garbaldi v. Shattuck*, 70 Cal. 511, 11 Pac. Rep. 778.

⁷⁵ *Carpenter v. Buller*, 8 Mees. & W. 212; 3 Washburn on Real Prop. 91.

⁷⁶ *Duchess of Kingston's Case*, 2 Smith's Ld. Cas. 720; *Shaw v. Beebe*, 35 Vt. 204; *Thistle v. Buford*, 50 Mo. 278; *Rawle Cov. Tit.* 427.

⁷⁷ *Calder v. Chapman*, 2 P. F. Smith 359; *McCusker v. McEvey*, 10 R. I. 606; dissenting opinion of Judge Potter; *Great Falls Co. v. Worcester*, 15 N. H. 452; *Bright v. Buckman*, 39 Fed. Rep. 243. But

by an estoppel, he must have the capacity to make a valid deed. Infants and married women cannot be bound by estoppel.⁷⁸

see *Wilson v. Smith*, 52 Hun 171; *Pike v. Calvin*, 29 Me. 183; *Wark v. Willard*, 13 N. H. 389; *White v. Patten*, 24 Pick. 324; *Tefft v. Munson*, 57 N. Y. 97; *Doyle v. Peerless Pet. Co.*, 44 Barb. 239; *Farmers L. & T. Co. v. Maltby*, 8 Paige 361. But see *Wilson v. Smith*, 52 Hun 171.

⁷⁸ *Raymond v. Holden*, 2 Cush. 264; *Concord Bk. v. Bellis*, 10 Cush. 276; *Todd v. Kerr*, 42 Barb. 317; *Lackman v. Wood*, 25 Cal. 153; *Williams v. Baker*, 71 Pa. St. 482; *Snoddy v. Leavitt*, 105 Ind. 357; *Hall v. Ditto (Ky.)*, 12 S. W. Rep. 941; *Kirkham v. Wheeler Co. (Wash. 1905)*, 81 Pac. Rep. 869; *McPeck's Heirs v. Graham's Heirs (W. Va. 1904)*, 49 S. E. Rep. 125; *Ft. Wayne Trust Co. v. Sihler*, 72 N. E. Rep. 494. By statute, in Indiana, a married woman is bound by an estoppel *in pais*, like any other person. *Burns, Am. St. 1901*, Sec. 6962.

SECTION VI.

ABANDONMENT.

SECTION 516. Effect of abandonment generally.

517. Abandonment of title by adverse possession.

518. Surrender of deed.

§ 516. **Effect of abandonment generally.**—It has been supposed, that a title to real property may be lost by abandonment by the owner, and such would seem to have been the opinion of the United States Circuit Court of Ohio.⁷⁹ Easements and other incorporeal hereditaments may be lost by abandonment, as has been explained.⁸⁰ So also may all equitable and executory rights to or in the title.⁸¹ But wherever abandonment can take effect, it simply destroys the title, and does not vest it in another. A bargain to give up an equitable claim may work an abandonment, but the bargainees acquires no title by the bargain.⁸² But no legal title of a corporeal hereditament may be lost or destroyed by any act of abandonment, with a possible exception to be mentioned in the next section. A legal title, properly vested, can only be divested by abandonment, when the circumstances of the case are sufficient to raise an estoppel, or where the possession is acquired by one in consequence of the abandonment, and held by him under claim of title for the period of limitation.⁸³

⁷⁹ *Holmes v. Railroad*, 8 Am. Law Reg. 716.

⁸⁰ See *ante*, Sec. 435. See *Trewberger v. Owens*, 80 N. Y. S. 694.

⁸¹ *Picket v. Dowdall*, 2 Wash. 197; *Dikes v. Miller*, 24 Texas 424.

⁸² *Barker v. Salmon*, 12 Metc. 32; *Sumner v. Stevens*, 6 Metc. 337; *Booker v. Stivender*, 13 Rich. Eq. 85; *Kirk v. King*, 3 Pa. St. 441.

⁸³ "The doctrine of abandonment is only applicable where the title affected is inchoate or imperfect. Where a title has passed by patent from the commonwealth, it is never reinvested by abandonment." *Kreamer v. Voneida* (Pa. Super. Ct. 1904), 24 Pa. Super Ct. 347.

The title, although not lost by abandonment, would be barred by estoppel or by the Statute of Limitations.⁸⁴ The voluntary abandonment would not prevent the possession of another from becoming adverse to the real owner, though the abandonment was expressly made for his benefit and to him. But where the abandonment is not accompanied by the circumstances of estoppel or limitation, no matter how formal the abandonment was, if it fall short of a legal deed of conveyance, it has no effect whatsoever upon the legal title. The owner may afterwards re-enter and eject any one who may have entered into possession in reliance upon the abandonment.

§ 517. **Abandonment of title by adverse possession.**— There can be no doubt that, as long as the title by adverse possession is not made absolute by the operation of the Statute of Limitations, it may be lost or destroyed by abandonment. It is an invariable requirement that the possession must be continued and uninterrupted, in order that the title of the real owner may be barred by the statute.⁸⁵ But where the statutory period has elapsed, and the title of the true owner is barred, it becomes a question of considerable doubt, whether a subsequent abandonment would destroy the title by adverse possession which has then become perfected by the operation of the statute. The Supreme Courts of Georgia and Massachusetts have held that such an abandonment would be taken as conclusive proof of the fact that the possession had not been adverse, and would remove the bar of the statute.⁸⁶ A contrary opinion has been reached by the supreme court of Maine.⁸⁷ The solution of the question depends upon the

⁸⁴ *Jackson v. Bowen*, 1 Caines 358; *Adams v. Rockwell*, 16 Wend. 307; *Tolman v. Sparhawk*, 5 Metc. 476; *Barker v. Salmon*, 2 Metc. 32; *Sumner v. Stevens*, 6 Metc. 327; *Gregg v. Blackmore*, 10 Watts 192; *Garabaldi v. Shattuck*, 70 Cal. 511, 11 Pac. Rep. 778.

⁸⁵ See *ante*, Sec. 504. "Where an adverse occupant of land attorns to the true owner, the disseisin of the latter is thereby interrupted." *Illinois Steel Co. v. Budzisz* (Wis. 1902), 90 N. W. Rep. 1019.

⁸⁶ *Vickery v. Benson*, 26 Ga. 589; *Church v. Burghart*, 8 Pick. 327.

⁸⁷ *School District v. Benson*, 31 Me. 381.

proper theory in regard to the effect of the Statute of Limitations. If the statute simply takes away the rightful owner's remedies for the recovery of seisin and possession, and leaves the barren right or title still subsisting in him, then if he recovers the seisin by the consent of the disseisor, having then both the seisin and the lawful title, it would seem that the title by adverse possession and limitation would be destroyed by the abandonment. But if the statute goes farther, and either transfers the lawful title of the real owner or destroys it completely, then the abandonment would have no more effect in this case than it would upon any other title. The possession acquired by the rightful owner in such a case would only give him a title by adverse possession, which can only be made absolute by estoppel or by limitation. But in any case a temporary recovery of possession by the original owner after the running of the Statute of Limitations will not affect the disseisor's title, where there has been no voluntary surrender to the original owner.⁸⁸

§ 518. Surrender of deed.— It has, however, been held in a number of cases that if a deed is delivered up by the grantee, and destroyed, the title reverts in the grantor, if the deed has not been recorded. And the ground upon which the courts rest this decision is that, having voluntarily destroyed this primary evidence of title, the grantee will not be permitted to introduce parol evidence to establish the contents of the deed.⁸⁹ But the mere cancellation and return of the deed will not be sufficient to revert the title in the grantor.⁹⁰ An effective

⁸⁸ *Falson v. Simshauser*, 130 Ill. 649, 22 N. E. Rep. 835.

⁸⁹ *Commonwealth v. Dudley*, 10 Mass. 403; *Holbrook v. Tirrell*, 9 Pick. 105; *Lawrence v. Stratton*, 6 Cush. 163; *Howe v. Wilder*, 11 Gray 267; *Patterson v. Yeaton*, 47 Me. 314; *Parker v. Kane*, 22 How. 1; *Dodge v. Dodge*, 33 N. H. 487; *Sawyer v. Peters*, 50 N. H. 143; *Howard v. Huffman*, 3 Head 564; *Blake v. Fash*, 44 Ill. 305; *Baker v. Kane*, 4 Wis. 12. See *Illinois Steel Co. v. Budzisz*, 90 N. W. Rep. 1019; *Knight v. Denmon*, 90 N. W. Rep. 863; *Anderson v. Carter*, 69 S. W. Rep. 78.

⁹⁰ *Lawrence v. Stratton*, 6 Cush. 163; *Wilson v. Hill*, 13 N. J. Eq. 143; *Holmes v. Trout*, 7 Pet. 171; *Hall v. McDuff*, 24 Me. 312; *Fonda v.*

abandonment would only result therefrom where the circumstances give rise to an estoppel, as where an innocent purchaser is induced to accept a deed from the grantor,⁹¹ or where all the muniments of title have been voluntarily destroyed and the grantee has to resort to parol evidence to prove his title. A recorded deed cannot, therefore, be surrendered in this way. A surrender can only be made to the grantor, and nothing short of cancellation or destruction of the deed would have the effect of passing the title back to him.⁹² It must, however, be understood that the surrender of the deed and its destruction can only have the effect of passing back the title to the grantor, when the grantee is prohibited by the law from proving the contents of the deed by parol evidence. And whenever the law of evidence is changed, so that parol evidence or any other secondary evidence is admissible to prove the contents of a deed which has been voluntarily surrendered by the grantee, it will be found that no such surrender will revest the title in the grantor, and that the grantee may nevertheless assert the title to the land. And it must be remembered in any case that the voluntary surrender will only have the effect of destroying the title, so far as the grantee and his privies are concerned. His wife's dower will not be affected in any manner by her husband's surrender of the deed to himself. For the purpose of asserting her claim of dower on the death of her husband, parol evidence is admissible to prove the contents of the surrendered deed.⁹³ But if the deed was not recorded, the dower right could not be enforced against subsequent purchasers without notice.⁹⁴

Sage, 46 Barb. 122; *Fawcett v. Kinney*, 33 Ala. 264; *Howard v. Huffman*, 3 Head 562; *Kearsing v. Kilian*, 18 Cal. 491.

⁹¹ 1 *Commonwealth v. Dudley*, 10 Mass. 403; *Holbrook v. Tirrell*, 9 Pick. 105; *Trull v. Skinner*, 17 Pick. 213; *Patterson v. Yeaton*, 47 Me. 314.

⁹² *Howe v. Wilder*, 11 Gray 267; *Bank v. Eastman*, 44 N. H. 778; *Blaney v. Hanks*, 14 Iowa 400.

⁹³ *Johnson v. Miller*, 40 Ind. 376, 17 Am. Rep. 699.

⁹⁴ *Wheeler v. Smith*, 62 Mich. 373. For nature and effect of abandonment of mineral, as a part of the *corpus* of the land and other mining rights, see *White*, *Mines & Min. Rem.*, Secs. 419 to 428, and cases cited.

CHAPTER XXII.

TITLE BY GRANT.

- SECTION I. *Title by public grant.*
 II. *Title by involuntary alienation.*
 III. *Title by private grant.*

SECTION I.

TITLE BY PUBLIC GRANT.

- SECTION 519. Public lands.
520. Forms of public grant.
521. The relative value of the patent and certificate of entry.
522. Pre-emption.

§ 519. Public lands.—As has been explained in a preceding section, all lands not held as the private property of individuals are vested in the State or United States. In the original thirteen States all such lands belonged to the State, while in all the others which were subsequently admitted into the Union, except Texas, the public lands, except those given by compromise to certain States, are the property of the United States.¹ These lands of the general government have been by official survey divided into townships and sections, and the latter again sub-divided into fractions of a section, halves, quarters and eighths. And in making a grant or conveyance of these lands, reference is made to the township, section, and fraction of a section, as a sufficient description of the tract

¹ 3 Washburn on Real Prop. 182-184; *Terrett v. Taylor*, 9 Cranch 50; *Worcester v. Georgia*, 6 Pet. 543; *Johnson v. McIntosh*, 8 Wheat. 543. For construction of Texas Con. as to disposal of its public lands, see *Lane v. Hutton* (Tex. 1904), 82 S. W. Rep. 1070.

conveyed.² The conveyance, by which the title to public lands is transferred by the government to private individuals, is called a *public grant*. Although particular reference is made in this connection to the public lands held by the general government, the general principles here explained are equally applicable to lands belonging to the State governments. In respect to the public lands of the United States, it must be understood that although the law of the State in which the land lies governs the rights of property in it, when it is the property of a private individual,³ until a grant of such land has been made by the government, and even in construction of the validity of the grant, the law of the United States is paramount. Until conveyance by the government the lands are not subjected to State control.⁴ Another rule of construction may be mentioned here which has a general application to the subject under consideration. It is, that in questions of property rights arising between the State and individual the construction is always most favorable to the State, whereas a grant from one individual to another is construed most favorably to the grantee.⁵ But it seems that where the grant by

² 3 Washburn on Real Prop. 185; Walk. Am. Laws 42, 43. For construction of grant of section of Government land, see *Story v. Wolverton* (Mont. 1904), 78 Pac. Rep. 589. See, also, *Hill v. McCord*, 117 Wis. 306, 94 N. W. Rep. 65, 195 U. S. 395.

³ *United States v. Crosby*, 7 Cranch 115; *Kerr v. Moon*, 9 Wheat. 565; *Darby v. Mayer*, 10 Wheat. 465; *Cutler v. Davenport*, 1 Pick. 81; *Calloway v. Doe*, 1 Blackf. 372; *Nims v. Palmer*, 6 Cal. 8.

⁴ *Irvine v. Marshall*, 20 How. 558; *Bagnell v. Broderick*, 13 Pet. 436; *Wilcox v. Jackson*, 13 Pet. 516; *Cannon v. White*, 16 La. An. 89. In California it has been held that the United States hold the public lands in that State on the same terms and with the same incidents of ownership as any other private proprietor, except as to taxation; and that they can only exercise their rights in the mines in subordination to the general laws on that subject of California. *Boggs v. Merced Co.*, 14 Cal. 375. See *Lorenz v. Baker* (Ala. 1904), 37 So. Rep. 637.

⁵ *Dubuque R. R. v. Litchfield*, 23 How. 88; *Townsend v. Brown*, 24 N. J. L. 80; *Green's Estate*, 4 Md. Ch. 349; *Hagan v. Campbell*, 8 Port. 2. "A grant of public land must be construed in favor of the grantor." *Story v. Wolverton* (Mont. 1904), 78 Pac. Rep. 589.

the State is for a valuable consideration this rule of construction does not apply, unless the ambiguity arising on the face of the grant is absolutely inexplicable.⁶ Nevertheless, if the State grants an estate upon condition, the breach of the condition will at once divest the title without the necessity of an entry.⁷ The State is not subject to estoppel under a covenant of warranty; it is estopped only by the description contained in a valid grant.⁸

§ 520. **Forms of public grant.**—The grant is not required to assume any particular form. It may be made by special act of Congress, or by deed made in pursuance of some general act. But the public lands of the United States can only be disposed of by authority of Congress, expressed in a special or general act.⁹ Congress has passed general laws providing for the sale of public lands. These laws provide for the establishment of land offices in the Western and other States where the general government still owns large tracts of land, and the would-be purchaser is required to make his negotiations with the registers and receivers of these offices. The purchaser enters upon the records of the office a full and complete description of the land he desires to purchase, and having paid the purchase-money, he receives from the register a certificate of entry, as it is called, which entitles him to a patent, which is the formal deed of conveyance required by the general laws for the transfer of the legal title. The pat-

⁶ *Martin v. Waddell*, 16 Pet. 411; *Charles River Bridge v. Warren Bridge*, 11 Pet. 589; *Commonwealth v. Roxbury*, 9 Gray 492; *Hyman v. Read*, 16 Cal. 444. See *Story v. Woolverton* (Mont. 1904), 78 Pac. Rep. 589.

⁷ *Kennedy v. McCartney*, 4 Port. 141.

⁸ *Mayor, etc., v. Ohio & P. R. R.*, 26 Pa. St. 355; *Elmendorf v. Carmichael*, 3 Litt. 472; *State v. Crutchfield*, 3 Head 113.

⁹ *Lorrimer v. Lewis*, 1 Morris (Iowa) 253; *Pratt v. Brown*, 3 Wis. 603; *Challefoux v. Ducharme*, 8 Wis. 306; *Foley v. Harrison*, 5 La. An. 75; *Freedman v. Goodwin*, 1 McAll. Ch. 142; *Terrett v. Taylor*, 9 Cranch 50; *Chouteau v. Eckhart*, 2 How. 372; *Wilkinson v. Leland*, 2 Pet. 662; *Strother v. Lucas*, 12 Pet. 454.

ent is signed by the President, or by one authorized to affix his signature, and sealed with the seal of the United States.¹⁰

§ 521. *The relative value of the patent and certificate of entry.*—According to some of the cases arising in the State courts, the certificate of entry vests an inchoate or imperfect *legal* title in the vendee, which will enable him to maintain ejectment or trespass against a trespasser, and that the patent is merely the perfection of the imperfect legal title already acquired, by providing the strongest kind of evidence of the previous grant.¹¹ But the United States courts maintain that the purchaser only acquires an equitable title, which is not sufficient to support legal actions in defense of the land, but which is sufficient to vest in him an absolute right to the patent. Once a certificate of entry has been lawfully issued, the same land cannot be subsequently sold.¹² This distinction between a patent and a certificate of entry is so well and generally recognized that where a patent has been issued to one person, and another is entitled to the patent by virtue of the prior entry and certificate, the patentee, nevertheless, holds the ab-

¹⁰ 3 Washburn on Real Prop. 185; *People v. Livingston*, 8 Barb. 253; *Doe v. McIlvaine*, 14 Ga. 252; *Hulick v. Scovil*, 9 Ill. 174. Once the patent has been *legally* executed and delivered it cannot be revoked. *Fletcher v. Peck*, 6 Cranch 87; *Grignon v. Astor*, 2 How. 319; *Doe v. Beardsley*, 2 McLean 412; *Stockton v. Williams*, 1 Dougl. (Mich.) 546. See *Southold v. Parks*, 90 N. Y. S. 1116, 97 App. Div. 636. For procedure to procure patent to mineral upon the public land of the United States, see *White, Mines & Min. Rem.*, Ch. 3, and Government and State statutes and decisions cited.

¹¹ *Sims v. Irvine*, 3 Dall. 456; *Carman v. Johnson*, 29 Mo. 94; *Forbes v. Hall*, 34 Ill. 167; *McDowell v. Morgan*, 28 Ill. 532; *Waterman v. Smith*, 13 Cal. 419. See, also, *Copley v. Riddle*, 2 Wash. C. Ct. 354; *Sweatt v. Corcoran*, 37 Miss. 516; *Dickinson v. Brown*, 9 Smed. & M. 130; *Peterson v. Sloss* (Wash. 1905), 81 Pac. Rep. 744.

¹² *Fenn v. Holme*, 21 How. 481; *Bagnell v. Broderick*, 13 Pet. 436; *Lindsey v. Miller*, 6. Pet. 666; *Fletcher v. Peck*, 6 Cranch 87; *Mayor v. DeArmas*, 9 Pet. 223; *Carman v. Johnson*, 20 Mo. 108; *Nelson v. Sims*, 23 Miss. 383; *Astrom v. Hammond*, 3 McLean 107; *West v. Hughes*, 1 Harr. & J. 6; *Cavender v. Smith*, 5 Iowa 189.

solite legal title until the patent has been avoided by a direct proceeding brought for that purpose by the government, or by the rightful owner in its name. The patent in collateral proceedings is conclusive evidence of title, and cannot then be questioned, unless it be void upon its face.¹³ Nor can the patent be attacked and avoided by one who claims a superior right to the land by a prior entry, after the patentee has sold to a *bona fide* purchaser.¹⁴ But the courts all agree that the certificate of entry vests in the purchaser sufficient title, whether legal or equitable, so that it can be aliened or devised; and upon the death of the purchaser before the issue of the patent it descends to his heirs; and the purchaser's alienee, devisee and heirs, respectively, are entitled to the patent, in the place of the person to whom the certificate has been given.¹⁵ But where the purchaser has died the patent must be made out in the name of the heirs. A patent issued in the name of a purchaser, in pursuance of a certificate of entry, but after the death of the purchaser, is void, and the heirs cannot take advantage of it.¹⁶ And where a purchaser has assigned his

¹³ *Bagnell v. Broderick*, 13 Pet. 436; *Hill v. Miller*, 36 Mo. 182; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Pet. 328; *Curle v. Barrell*, 2 Sneed. 68; *Willot v. Sandford*, 19 How. 79. See *Brush v. Ware*, 15 Pet. 93; *Sweatt v. Corcoran*, 39 Miss. 516; *Harris v. McKissack*, 34 Miss. 464; *Dickinson v. Brown*, 9 Smed. & M. 130; *Maxcy v. O'Connor*, 23 Texas 238; *United States v. Clark*, 138 Fed. Rep. 294; *Schebrede v. State Land Board* (Or. 1905), 81 Pac. Rep. 702.

¹⁴ *Robbins v. Moore*, 129 Ill. 30; *United States v. Clark*, 138 Fed. Rep. 294.

¹⁵ *Galt v. Galloway*, 4 Pet. 332; *Brush v. Ware*, 15 Pet. 93; *Reeder v. Barr*, 4 Ohio 458; *Adams v. Logan*, 6 B. Mon. 175; *Shanks v. Lucas*, 4 Blackf. 476; *Goodlet v. Smithson*, 5 Port. 243; *Wright v. Swan*, 6 Port. 84; *Forsythe v. Ballance*, 6 McLean 562.

¹⁶ *Galloway v. Finley*, 12 Pet. 264; *Blankenpickler v. Anderson's Heirs*, 16 Gratt. 59; *Wood v. Ferguson*, 7 Ohio St. 288; *Phillips v. Sherman*, 36 Ala. 189. *Contra*, *Schedda v. Sawyer*, 4 McLean 181. See *Thomas v. Wyatt*, 25 Mo. 24; *Thomas v. Boerner*, 25 Mo. 27. But by the act of Congress of 1836, if the patent is issued to a deceased person, in ignorance of his death, it will inure to the benefit of his heirs. *Phillips v. Sherman*, 36 Ala. 189; *Stubblefield v. Boggs*, 2 Ohio St. 216.

certificate, and takes out a patent in his own name, he will hold the legal title thus acquired in trust for his assignee, and he can be required to make the proper conveyances.¹⁷ But in such a case, there must be a correspondence of the descriptions of the lands in the patent and in the conveyance.¹⁸ In all cases, in order to entitle one to a patent, the land must be clearly described in the certificate of entry, so as to enable an easy identification of the land. An inaccurate or obscure description would bar the right to a patent.¹⁹

§ 522. Pre-emption.—In order to encourage immigration and the actual settlement upon public lands, the acts of Congress, from an early day, have provided that where one actually settles upon public lands, and makes entry upon the records of the land office of his claim, with accurate description of the land upon which he has settled, he acquires thereby the so-called “pre-emption” right, which entitles him to a patent to the land so occupied at the minimum price fixed by law for the sale of public lands, and gives him a superior claim to a patent over all other persons who may acquire interests in the same land.²⁰ One cannot claim the pre-emption right to more than one quarter section, or one hundred and sixty acres.²¹ But no one can claim pre-emption to lands which have been set apart as a reservation, or to lands which are situated within the limits of a town or

¹⁷ *Trimble v. Boothby*, 14 Ohio 109; *Moore v. Maxwell*, 18 Ark. 469; *Hennen v. Wood*, 16 La. An. 263. “A homestead entryman has, after making final proof, an equitable title to the land entered on, which may be transferred by him.” *Peterson v. Sloss* (Wash. 1905), 81 Pac. Rep. 744.

¹⁸ *Prentice v. Northern Pac. R. R. Co.*, 43 Fed. Rep. 270.

¹⁹ *Lafayette v. Blanc*, 11 How. 104; *Ledoux v. Black*, 18 How. 473.

²⁰ 3 Washburn on Real Prop. 200; U. S. Rev. Stat., Secs. 2256, 2257; *United States v. Fitzgerald*, 15 Pet. 407; *Craig v. Tappin*, 2 Sandf. Ch. 78; *McAfee v. Keirn*, 7 Smed. & M. 780; *Brown v. Throckmorton*, 11 Ill. 529.

²¹ U. S. Rev. Stat., Sec. 2259. See, also, U. S. Comp. St. 1901, pp. 1611, 1388, 1389.

city, or those on which persons have actually settled for the purpose of carrying on any business or trade, other than agriculture, or on which there are known salt or other mines.²² And in order to entitle one to pre-emption, he must make oath that he does not own three hundred and twenty acres of land in any State or Territory, and that he has not abandoned a residence on his own land within the same State or Territory, in order to reside upon the public lands.²³ By the entry in the land office, and actual settlement upon the land, only an inchoate title is acquired. To perfect it, and obtain an absolute legal title, payment of the purchase-money must be made within thirty months after the entry.²⁴ This inchoate title descends to the heirs of the pre-emptor.²⁵ But it cannot be assigned so as to give the assignee a right to the pre-emption, as against the government, or one claiming under a patent.²⁶ But where the pre-emptor has undertaken to convey before he has acquired the legal title, he will take the patent as trustee for the assignee, and the latter will acquire the benefit of it by instituting the proper proceedings.²⁷ In like manner, creditors cannot levy upon the pre-emption right.²⁸ Very often conflicting claims arise under the exercise of the pre-emption right, growing out of deficient locations and entries; and it is provided by the acts of Congress that these disputes shall be settled by the land commissioners and registers. In the settlement of these disputes, the commissioners act in a judicial capacity

²² U. S. Rev. Stat., Sec. 2258; Act Cong. March 3, 1893, c. 208, 27 Stat. 555. See *White, Mines & Min. Rem.*, Ch. 3. See *State v. Tanner* (Neb. 1905), 102 N. W. Rep. 235.

²³ U. S. Rev. Stat., Secs. 2260, 2262.

²⁴ U. S. Rev. Stat., Sec. 2267.

²⁵ *Hunt v. Wickliff*, 2 Pet. 201; *Johnson v. Collins*, 12 Ala. 322

²⁶ U. S. Rev. Stat. Sec. 2263; *Craig v. Tappin*, 2 Sandf. Ch. 78; *Lytle v. Arkansas*, 9 How. 333; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 44; *Myers v. Croft*, 13 Wall. 291; *Frisbie v. Whitney*, 9 Wall. 187; *Hutchins v. Low*, 15 Wall. 77; *Phelps v. Kellogg*, 15 Ill. 131.

²⁷ *Camp v. Smith*, 2 Minn. 155; *Delaunay v. Burnett*, 9 Ill. 454.

²⁸ *Rodgers v. Rawlins*, 8 Port. 326.

and their decisions are subject to appeal to the higher authorities, but otherwise they are final and conclusive, unless tainted with fraud.²⁹

²⁹ See *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Garland v. Wynn*, 20 How. 6; *Tate v. Carney*, 24 How. 357; *State v. Batchelder*, 1 Wall. 109. See *Small v. Rakestrow*, 196 U. S. 403; *Smith v. Finger* (Okl. 1905), 79 Pac. Rep. 759; *Le Fevre v. Amonson* (Idaho 1905), 81 Pac. Rep. 71; *Hartwell v. Harigshorst*, 196 U. S. 635.

SECTION II.

TITLE BY INVOLUNTARY ALIENATION.

SECTION 523. Title by involuntary alienation, what is?

524. Scope of legislative authority.

525. Eminent domain.

526. Persons under disability.

527. Confirming defective titles.

528. Sales by administrators and executors.

529. Sales under execution.

530. Sales by decree of chancery.

531. Tax-titles.

532. Validity of tax-title.

533. Judicial sales for delinquent taxes.

§ 523. Title by involuntary alienation, what is?— Under the head of title by involuntary alienation are included all the modes of transferring one man's title to lands to another, against his will or without his co-operation. Circumstances often arise, when such alienation is necessary to attain the ends of justice. The kinds of involuntary alienation are so numerous, and they are so largely regulated by varying local statutes that in so limited a work as the present it will be impossible to do more than give a general outline and classification of these modes of conveyance, and present the salient features of each.

§ 524. Scope of legislative authority.— Except the power, which the court of chancery possesses in certain cases, and which will be explained in the proper place, the power to effect an involuntary alienation rests upon legislative enactment. As a general proposition, the Legislature cannot divest one of his vested rights against his will. It can enact laws for the control of property and of its disposition, but it cannot take the private property of one man and give it to

another.³⁰ But there are certain well-known exceptions to this general rule, where the interference of the Legislature is necessary to save and protect the substantial interests of individuals on account of their own inability to do so, or to promote the public good. In some of the State Constitutions there is a provision against the enactment of special laws operating upon particular individuals or upon their property. In those States, therefore, involuntary alienation can only be effected by a general law, applicable to all persons under like circumstances. But in the absence of such a constitutional provision, the transfer of lands may be made by special act of the Legislature, as well as under a general law.³¹ But wherever such a transfer by special act of the Legislature would involve the assumption of judicial power,* it would be generally held void, under the common constitutional provision which denies to the Legislature the exercise of such powers.³² The cases in which the Legislature may provide for involuntary alienation may be divided into the following six general classes: 1. In the exercise of the right of eminent domain. 2. In the case of persons under disability to protect their interests by sale and investment. 3. For confirming defective titles. 4. Sales by administrators and executors.

³⁰ *Wilkinson v. Leland*, 2 Pet. 658; *Adams v. Palmer*, 51 Me. 494; *Commonwealth v. Alger*, 7 Cush. 53; *Varick v. Smith*, 5 Paige 159; *John and Cherry Street*, 19 Wend. 676; *Taylor v. Porter*, 4 Hill 147; *Russell v. Rumsey*, 35 Ill. 374; *Good v. Zercher*, 12 Ohio 368; *Deutzal v. Waldie*, 30 Cal. 144.

³¹ *Sohier v. Mass. Gen. Hospital*, 3 Cush. 483; *Kibby v. Chitwood*, 4 B. Mon. 95; *Edwards v. Pope*, 4 Ill. 473. "The disposition of property by will and the right to name executors are not vested rights, but are regulated and controlled by statute." *In re Avery's Estate* (N. Y. Sur. 1904), 92 N. Y. S. 974, 45 Misc. Rep. 529; *In re American Security & Trust Co.*, *Id.*

³² *Rice v. Parkman*, 16 Mass. 326; *Jones v. Perry*, 10 Yerg. 59; *Lane v. Dorman*, 4 Ill. 238; *Edwards v. Pope*, 4 Ill. 473. "The interpretation of a law, the declared purpose of which is to establish the boundaries between two parishes, is a judicial function." *Parish of Caddo v. Parish of Red River* (La. 1905), 38 So. Rep. 274.

5. Sales under execution. 6 Sales to satisfy the claim of the State for taxes.

§ 525. **Eminent domain.**—As already explained in the third chapter, all real property is held subject to the exercise of the right of eminent domain. Whenever it is necessary or beneficial to the public that certain lands shall be appropriated for public use, the State through the Legislature has the right to confiscate such land upon payment of a proper compensation therefor to the owner of the land.³³ The State may exercise the right, or it may authorize a corporation of a public character, such as railroads, turnpike companies, etc., to exercise it.³⁴ But the corporation must be one in whose maintenance the public is interested, and from whose existence the public is to derive a benefit. The State cannot authorize a private individual or a strictly private corporation to take the lands of another with or without compensation.³⁵

³³ *Haskell v. New Bedford*, 108 Mass. 214; *Commonwealth v. Alger*, 7 Cush. 92; *Clarke v. Rochester*, 24 Barb. 481; *Carson v. Coleman*, 11 N. J. Eq. 108; *Moose v. Carson*, 104 N. C. 431, 10 S. E. Rep. 689.

³⁴ *Cushman v. Smith*, 34 Me. 247; *Bloodgood v. Mohawk & H. R. R.*, 18 Wend. 9; *Matter of Townsend*, 39 N. Y. 171; *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *Orr v. Quimby*, 54 N. H. 590; *Gilmer v. Lime Point*, 18 Cal. 229.

³⁵ *Wilkinson v. Leland*, 2 Pet. 658; *Adams v. Palmer*, 51 Me. 494; *Commonwealth v. Alger*, 7 Cush. 53; *Flagg v. Flagg*, 16 Gray 180; *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 404; *Gillan v. Hutchinson*, 16 Cal. 156. Since it is not imposed upon the State as a public duty to erect and maintain light-houses it cannot appropriate lands for such a purpose; but the United States may do so, and the only power the State has is to cede jurisdiction to the United States over the land thus taken. *Burt v. Merchants' Ins. Co.*, 106 Mass. 360; *People v. Humphrey*, 23 Mich. 471. In like manner the State may grant to the United States the authority to appropriate lands for the erection of post-offices and other public buildings. *Burt v. Merchants' Ins. Co.*, 106 Mass. 356; *Orr v. Quimby*, 54 N. H. 590; *Gilmer v. Lime Point*, 18 Cal. 229. The statutes of Utah, giving a private individual the right to condemn his neighbor's land for irrigation purposes, is upheld by the Supreme Court, on account of the local conditions in Utah and the interests of the public in the development of the arid lands of the State.

§ 526. **Persons under disability.**—Where persons are under a legal disability which prevents them from making a *valid* sale of their property, and such sale and reinvestment of the proceeds of sale are necessary for the conservation of their interests, the State, in the capacity of *parens patriæ*, has the power to authorize a sale by the guardians of such persons. This may be done by special act or by a general law.³⁶ The property of persons who are not under a disability cannot be sold by authority of the courts, on the ground that such a sale would be beneficial.³⁷ In most of the States there are general laws authorizing the courts to empower the guardians of minors, lunatics, and other persons under disability, to make sale of the real property of such persons. Generally the sales are made under special orders of the court, and in making the conveyance the deed should contain recitals of all the preliminary proceedings, which are necessary to the effectual transfer of the title; but these recitals are not absolutely necessary, provided the deed shows on its face in what capacity the grantor executes the deed.³⁸

§ 527. **Confirming defective titles.**—Generally, when a title is defective through some informality in the execution of the conveyance, upon a proper case being made out, the court of equity will afford an ample remedy by decreeing a reformation of the instrument.³⁹ But cases do arise where, through

Nash v. Clark, 27 Utah 158, 101 Amer. St. Rep. 953, 75 Pac. Rep. 371, 198 U. S. 361, 49 L. Ed. 1058.

³⁶ *Sohier v. Mass. Gen. Hospital*, 16 Mass. 326; *s. c.*, 3 Cush. 483; *Davidson v. Johannot*, 7 Metc. 395; *Cochran v. Van Surlay*, 20 Wend. 365; *Estep v. Hutchman*, 14 Serg. & R. 435; *Doe v. Douglass*, 8 Blackf. 10; *Jones v. Perry*, 10 Yerg. 59.

³⁷ *Wilkinson v. Leland*, 2 Pet. 658; *Adams v. Palmer*, 51 Me. 494; *Irvine's Appeal*, 16 Pa. St. 256; *Palairit's Appeal*, 67 Pa. St. 479. *In re Bryden's Est.* (Pa. 1905), 61 Atl. Rep. 250.

³⁸ 3 Washburn on Real Prop. 210, 211. *In re Kimble* (Iowa 1905), 103 N. W. Rep. 1009.

³⁹ *Adams v. Stevens*, 49 Me. 362; *Brown v. Lamphear*, 35 Vt. 260; *Metcalf v. Putnam*, 9 Allen 97; *Conedy v. Marcy*, 13 Gray 373; *Keene's*

the absence or death of the parties, or through a want of knowledge as to who they are, it is impossible to obtain a reformation in chancery, and even in cases where the equitable remedy is only troublesome and inconvenient, and the defect is only an informality, which does not go to the essence of the conveyance, and which does not create any doubt as to the intention to make a valid conveyance, the power of the Legislature to interfere and cure the defect by special act has generally been sustained by the courts of those States, where special acts are not inhibited by the Constitution. Thus the defective certificate of a wife's acknowledgment has been perfected by special act.⁴⁰

§ 528. **Sales by administrators and executors.**—Where one dies without having made provisions for such contingencies, it is often necessary that some one should be authorized to make a sale of the lands, for the purpose of making an effective administration, and to protect and satisfy the claims of those who are interested in the property. If the deceased leaves a will he very often, perhaps generally, empowers the executor to make sale of the land. Where the executor has this testamentary power, his sales are presumed to be under this power, and there is no need of a resort to the statutory power.⁴¹ But these express testamentary powers are supplemented by statutes, which authorize courts of probate to order a sale of the decedent's lands by the administrator or

Appeal, 64 Pa. St. 274; *Mills v. Lockwood*, 42 Ill. 111; *Gray v. Hornbeck*, 31 Mo. 400. "A lease executed under a mutual mistake may be reformed." *Ranz'li v. Zeppetelli* (N. Y. Sup. 1905), 94 N. Y. S. 561. "Errors of description in deeds to real estate may be corrected as between the parties." *Penn v. Rodriguez* (La. 1905), 38 So. Rep. 955.

⁴⁰ *Wilkinson v. Leland*, 2 Pet. 627; *s. c.*, 10 Pet. 294; *Watson v. Mercer*, 8 Pet. 88; *Kearney v. Taylor*, 15 How. 494; *Adams v. Palmer*, 51 Me. 494. See *Florentine v. Barton*, 2 Wall 210; *Jones v. Perry*, 10 Yerg. 59. But a defective tax-title cannot be made good by legislative enactment. *Conway v. Cable*, 37 Ill. 82.

⁴¹ *Payne v. Payne*, 18 Cal. 291; *White v. Moses*, 21 Cal. 44. See *Burnes v. Burnes* (Mo. 1905), 137 Fed. Rep. 781.

executor, whenever necessary to the full performance of his duties. Thus, if the personal property is not sufficient to satisfy all the debts, the administrator or executor may, under order of the court, make a valid sale of the lands, and the proceeds of the sale will constitute in his hands a trust fund, out of which the claims of the creditors must be satisfied.⁴² A sale may be authorized by special act of the Legislature, as well as by order of the court under a general law.⁴³ In all these cases the deed of conveyance should contain recitals of the compliance with all the requirements of the statute as to the preliminary proceedings, although perhaps such recitals are not absolutely necessary to the validity of the conveyance, if the authority of the grantor to make the conveyance appears otherwise on the face of the deed.⁴⁴

§ 529. *Sales under execution.*—By the early common law lands were inalienable for any purpose, and they could not in consequence be sold to pay the debts of the owner. But as trade and commerce increased, it became necessary that the creditors should be provided with means for satisfying their claims by compulsory process against the debtor's property. In compliance with the popular demand, the statutes merchant and statutes staple were passed, which created in the creditors an estate in the debtor's lands whereby he was entitled to enter into possession and satisfy himself out of the rents and profits.⁴⁵ These statutes have been abolished in England, where they have been superseded by the *writ of elegit*,

⁴² 3 Washburn on Real Prop. 209.

⁴³ *Wilkinson v. Leland*, 2 Pet. 627; *Watkins v. Holman*, 16 Pet. 59; *Sohier v. Trinity Church*, 109 Mass. 1; *Langdon v. Strong*, 2 Vt. 234; *Kibby v. Chitwood*, 4 B. Mon. 95; *Shehan v. Barnett*, 6 B. Mon. 594.

⁴⁴ *Campbell v. Knights*, 26 Me. 224; *Doolittle v. Holton*, 28 Vt. 819; *Planters' Bk. v. Johnson*, 7 Smed. & M. 449; *Jones v. Taylor*, 7 Texas 240; *White v. Moses*, 21 Cal. 44. "A sale of real estate by an administrator under an order and decree of court is a judicial sale." *Pierce v. Vansell* (Ind. App. 1905), 74 N. E. Rep. 554; *Padesta v. Bims* (N. J. Ch. 1905), 60 Atl. Rep. 815.

⁴⁵ 2 Bla. Com. 161, 162.

which bears such a close resemblance to the American statutes of execution that a separate discussion of its principles will not be necessary. In all the American States there are statutes which provide that when a creditor obtains judgment against his debtor, he may cause a writ of execution to be issued against the property of the debtor, under which the sheriff is authorized to make sale of the real property, and to execute the proper deeds of conveyance. The interest which the creditor acquires in his debtor's lands under the execution is so far a vested interest, that he has been held entitled to the crops growing on the land, and to the fixtures attached thereto, and he may restrain the removal of either.⁴⁶ And Mr. Washburn calls such interests *estates by execution*.⁴⁷ But they are of so ephemeral a character that it was not considered necessary to discuss them in an independent chapter. If these interests can be called estates, they are a species of estate upon condition, which is defeated by the satisfaction of the judgment and made absolute by sheriff's sale. Where the property has been sold under execution to a stranger he acquires an absolutely indefeasible title, if all the requirements of the statute have been complied with. And where the judgment, on which the execution was issued, has been reversed on appeal, his title remains unaffected by such reversal.⁴⁸ Where the purchaser is a party to the judg-

⁴⁶ Coolidge v. Melvin, 42 N. H. 537; Evans v. Roberts, 5 B. & C. 829; Penhallow v. Dwight, 7 Mass. 34; Heard v. Fairbanks, 5 Metc. 111; Whipple v. Foot, 2 Johns. 423; Pattison's Appeal, 61 Pa. St. 297; Farrar v. Chauffetete, 5 Denio 527. See Jones v. Rogers (Miss. 1905), 38 So. Rep. 742; Ullman v. Cameron, 93 N. Y. S. 976; Poole v. French (Kan. 1905), 80 Pac. Rep. 997.

⁴⁷ 2 Washburn on Real Prop. 29.

⁴⁸ Feger v. Keefer, 6 Watts 297; Taylor v. Boyd, 3 Ohio 337; Gray v. Brignordello, 1 Wall. 627; Parker v. Anderson, 5 B. Mon. 445. *Contra*, Delano v. Wilde, 11 Gray 17. "A return on an execution does not transfer title, but only gives a right to demand a deed conveying title." Jones v. Rogers (Miss. 1905), 38 So. Rep. 742. The purchaser is not charged with a knowledge that the land sold was a homestead, in Iowa. Rosenberger v. Hawkins, 103 N. W. Rep. 781. But the pur-

ment and the suit under it, a subsequent reversal would defeat his title, since he cannot be called a subsequent purchaser without notice. And in all cases of reversal of the judgment, where the purchaser acquires an indefeasible title, the debtor may have his action for damages against the judgment creditor for the injury sustained by the sale of the premises.⁴⁹ In order to further protect the creditor, it is provided by most of the State statutes that the judgment, when properly docketed, creates a lien upon all the debtor's real property, which attaches to, and binds, the land into whosoever hands it may come. The judgment lien enables the creditor to sell the land under execution, although it has been conveyed away by the debtor to a purchaser for value. But to make a valid conveyance in the case of a sale under execution, the requirements of the statute must all have been complied with, and usually, as in the case of sales by administrators and guardians, the deed should contain recitals of the proceedings taken.⁵⁰

§ 530. Sales by decree of chancery.—The cases are numerous in which the court of chancery has the power to decree

chaser is charged with notice of facts shown by the record. *International Co. v. Cichowicz*, 114 Ill. App. 121.

⁴⁹ 2 Washburn on Real Prop. 29; *Stinson v. Ross*, 51 Me. 557.

⁵⁰ *Jackson v. Roberts*, 11 Wend. 425; *Weyand v. Tipton*, 5 Serg. & R. 332; *Doe v. Bedford*, 10 Ired. 198; *Den v. Wheeler*, 11 Ired. 288; *Ware v. Bradford*, 2 Ala. 676; *Minor v. President of Natchez*, 4 Smed. & M. 602; *Dunn v. Meriwether*, 1 A. K. Marsh. 158. The return of the sheriff of his proceedings in making the levy is conclusive evidence of the facts there stated in respect to the levy between the debtor and creditor and all other persons claiming under them. *Bott v. Burnell*, 11 Mass. 163; *Whitaker v. Sumner*, 7 Pick. 551. And the recitals of the deed cannot be contradicted as to the power or order of sale, under which the sale was made, by showing that it was made under some other power or order. *Jackson v. Croy*, 12 Johns. 427; *Jackson v. Vanderheyden*, 17 Johns. 167; *Jackson v. Roberts*, 11 Wend. 425; *Snyder v. Snyder*, 6 Binn. 489. See *Pullen v. Simpson* (Ark. 1905), 86 S. W. Rep. 801; *London v. Morris* (Ark. 1905), 86 S. W. Rep. 672; *Armstead v. Jones* (Kan. 1905), 80 Pac. Rep. 56.

a sale and conveyance, most of which have been already incidentally mentioned, such as the decree of sale in the foreclosure of a mortgage, in the enforcement of an equitable lien, or in making an involuntary partition of joint estates, and the like. Chancery has also the power to subject equitable estates to the claims of creditors by the institution of a suit called the creditors' bill. But all these subjects belong more properly to a treatise on equity jurisprudence than to one on real property, and it is intended to make here only casual mention of them. In all these cases, originally, the court in its decree ordered the holder of the legal title or owner of the land to make the proper deeds of conveyance, upon pain of being punished for contempt of court. If the individual was obstinate, or beyond the jurisdiction of the court, the court was powerless to effect a conveyance. A decree ordering a conveyance did not and could not pass the title.⁵¹ But now courts of equity generally possess the power to authorize some officer of the court, usually the master, to execute the necessary deeds of conveyance, and such deeds will be as effectual in passing an indefeasible title as the sheriff's deed under execution.⁵² Like the sheriff's deed, if an appeal has been taken from the decree, and during the pendency of the appeal the property has been sold and conveyed to a stranger, the title which he thereby acquires will not be affected by the subsequent reversal of the decree. But if the purchaser is a party to the suit, his title will fail, because he is not a purchaser without notice.⁵³ Like other modes of involuntary alienation, the master's deed under an equitable decree of sale must show the proceedings taken and the authority for making the sale, although recitals of these

⁵¹ *Ryder v. Innerarity*, 4 Stew. & P. 14; *Mummy v. Johnston*, 3 A. K. Marsh. 220; *Sheppard v. Comm'rs of Ross Co.*, 7 Ohio 271.

⁵² 3 Washburn on Real Prop. 219; *Vollenwender v. Vollenwender*, 216 Ill. 197, 74 N. E. Rep. 795.

⁵³ *Galpin v. Page*, 18 Wall. 350; *Jackson v. Cadwell*, 1 Cow. 641; *Gott v. Powell*, 41 Mo. 416; *Reynolds v. Harris*, 14 Cal. 667.

matters do not seem to be absolutely necessary to the validity of the conveyance.⁵⁴

§ 531. *Tax-titles.*—The power of taxation is an essential incident to government; without it the maintenance of government is impossible. Although the power of taxation generally cannot properly be considered of feudal origin, yet in its application to real property it assumes a decidedly feudal character. If the power to tax real property rested solely upon the obligations of citizenship, as most of the authorities seem to hold,⁵⁵ then it could only be levied upon those proprietors of lands who were citizens. As a matter of fact, all lands situated within the jurisdiction of the government which levies the tax are taxed for their proportionate share. The levying of a tax upon land, and the enforcement of the levy, are proceedings *in rem* against the land, and not *in personam* against the proprietors.⁵⁶ But whatever may be the proper theory in respect to the character and the authority of taxation, the government has not only the right to levy the taxes necessary for the support of the government, but also to provide means for enforcing the levy. In respect to the collection of taxes assessed against real property, with which alone we are here concerned, all the States have statu-

⁵⁴ *Atkins v. Kinnan*, 20 Wend. 241; *Wood v. Mann*, 3 Sumn. 318; *Hamilton v. Crosby*, 32 Conn. 347; *Tooley v. Kane*, 1 Smed. & M. Ch. 518. As to notice of facts shown by the record, see *International Co. v. Cichowicz*, 114 Ill. App. 121.

⁵⁵ *Providence Bk. v. Billings*, 4 Pet. 561; *McCulloch v. Maryland*, 4 Wheat. 428; *Opinions of Judges*, 58 Me. 591; *Clarke v. Rochester*, 24 Barb. 482; *Phila. Ass'n, etc., v. Wood*, 39 Pa. St. 73; *Davison v. Ramsay Co.*, 18 Minn. 482.

⁵⁶ *Cooley on Tax*. 360. In some of the States, however, a distinction is made by statute between resident and non-resident lands, as they are called, imposing a personal liability upon the owners of the resident lands. *Cooley on Tax*. 278, 279. "In general, the location of land, and not the residence of the owner thereof, determines where it is taxable, and, except so far as otherwise provided by statute, land is taxable in the district where situated, whether a school or a tax district." *People v. Howell* (N. Y. Sup. 1905), 94 N. Y. S. 488.

tory provisions, authorizing certain officers of the government, after the lapse of the proper time, and by instituting the prescribed preliminary proceedings, such as listing and advertising the lands, to sell the lands, upon which the taxes have not been paid, to the highest bidder, usually at public sale, and to appropriate the proceeds of sale, or so much thereof as may be necessary to the payment of the taxes due and the expenses incurred in the sale. The requirements of the statutes, in order to make a valid sale of lands for unpaid taxes, are in some States very minute, and they vary in detail in every State. It will be impossible here to refer to the details of the statutes, or of the decisions upon them. A discussion of them would in itself constitute a volume of respectable size. The reader is therefore referred to the statutes of his own State and the decisions upon them for a careful study of the law upon tax-titles. So difficult is it to fulfil all the requirements of the law in respect to the tax-titles, that the investigator of titles always looks with suspicion upon a title which depends upon a tax-deed. And the Superior Court of New Hampshire is said to have declared "that a tax-collector's deed was, *prima facie*, void."⁵⁷

§ 532. **Validity of a tax-title.**— But notwithstanding the dubious estimation in which a tax-deed is held, if all the requirements of the law as to the preliminary proceedings have been complied with, the tax-deed conveys an absolute title, and the purchaser cannot be divested of it, although he may have paid for it a sum altogether disproportionate to the real value of the land.⁵⁸ How far it is necessary to observe all the minute requirements of the statute, in order

⁵⁷ 3 Washburn on Real Prop. 225. See *Blair v. Johnson*, 215 Ill. 552, 74 N. E. Rep. 747; *Graton v. Land & Lumber Co.* (Mo. 1905), 87 S. W. Rep. 37.

⁵⁸ *Harding v. Tibbils*, 15 Wis. 232; *Wofford v. McKinna*, 23 Texas 43. "The title of the purchaser at a tax sale is not the same as that of the owner in whose name the land was sold, but they are separate and hostile claims." *State v. Harman* (W. Va.), 50 S. E. Rep. 828.

to make a valid sale of delinquent lands, is not clearly settled by the courts. Although some of the decisions seem to go to the length of requiring a *strict* and *literal* compliance with *all* the provisions of the statute, yet the better opinion, which seems to be more in consonance with the general drift of authority, is that a *substantial* though *strict* compliance with those provisions of the statute which are intended for the protection of the delinquent proprietor, is all that is necessary; and that a failure to follow the statutory provisions, which are intended for the benefit of the State, and which does not affect the interests of the proprietor, will not vitiate the purchaser's title, as against the former owner.⁵⁹ In all proceedings at common law, based upon the forfeiture for the failure to perform some public duty in which the title to property is made to pass from the delinquent, the burden of proving that all the provisions of the law of forfeiture had been strictly complied with rests upon the purchaser. This rule has generally been applied to tax-sales, and the decisions cited below⁶⁰ bear out Mr. Blackwell in his description of a tax-title, viz.: "The operative character of the deed depends upon the regularity of the anterior proceedings. The deed is not the title itself, nor even evidence of it. Its recitals bind no one. It creates no estoppel upon the former owner. No presumption arises from the mere production of the deed, that the facts upon which it is based had any existence. When it is shown, however, that the ministerial officers of the law have performed every duty which the law imposed

⁵⁹ *Brown v. Veazie*, 25 Me. 359; *Stevens v. McNamara*, 36 Me. 176; *Langdon v. Poor*, 20 Vt. 15; *Wilson v. Bell*, 7 Leigh 22; *Rubey v. Huntsman*, 32 Mo. 501; *Ferris v. Coover*, 10 Cal. 589. See, also, *Ingram v. Sherwood's Heirs* (Ark. 1905), 87 S. W. Rep. 435.

⁶⁰ *Stead's Ex'rs v. Course*, 4 Cranch 402; *Williams v. Peyton's Lessee*, 4 Wheat. 77; *Games v. Stiles*, 14 Pet. 332; *Parker v. Overman*, 18 How. 142; *Little v. Herndon*, 10 Wall. 26; *Jackson v. Shepard*, 7 Cow. 88; *Annan v. Baker*, 49 N. H. 161; *French v. Patterson*, 61 Me. 203; *Charles v. Waugh*, 35 Ill. 315; *Elliott v. Eddins*, 24 Ala. 508; *Doe v. Ins. Co.*, 8 Smed. & M. 197; *Hamilton v. Burum*, 3 Yerg. 355; *Fitch v. Casey*, 2 Greene (Iowa) 300; *Bucknall v. Story*, 36 Cal. 67.

upon them, and every condition essential to its character, then the deed becomes conclusive evidence of title in the grantee according to its extent and purport."⁶¹ But it is so difficult for a purchaser to prove in detail the performance of the preliminary proceedings required by the statutes, and it being the policy of the State to provide an effective mode of selling lands for delinquent taxes, statutes have now been passed in some of the States which change the common-law rule of evidence just stated and throw the burden of proof upon the former owner, thereby making the tax-deed *prima facie* evidence of title and of a compliance with the requirements of the law. The power of the Legislature to shift the burden of proof in tax-titles has been often questioned, but it is now an unquestionable rule of law that the Legislature may make the tax deed *prima facie* evidence of title, but cannot give to it and its recitals the force of a conclusive presumption, that all the preliminary proceedings had been faithfully carried out.⁶²

§ 533. **Judicial sales for delinquent taxes.**—The cause of the uncertainty, as to the validity of a tax-title, lies in the fact that the proceeding, which culminates in the sale of the land, is generally *ex parte*, no opportunity being given for determining judicially whether the taxes are due, or for properly protecting the interests of the delinquent. In order to avoid this objectionable feature of tax-sales, in some of the States, notably Illinois, it is provided by statute that the tax-collector must institute suit against the delinquent in

⁶¹ Blackwell Tax Titles 430. A statute curing tax deeds will not effect a deed made before the passage of the statute. *State v. Harman* (W. Va.), 50 S. E. Rep. 828.

⁶² *Pillow v. Roberts*, 13 How. 472; *Orons v. Veazie*, 57 Me. 517; *Johnson v. Elwood*, 53 N. Y. 435; *Hoffman v. Bell*, 61 Pa. St. 444; *Whitney v. Marshall*, 17 Wis. 174; *Abbott v. Lindenbower*, 42 Mo. 162; *s. o.*, 46 Mo. 291; *Genther v. Fuller*, 36 Iowa 604; *Ray v. Murdock*, 36 Miss. 692; *Bidleman v. Brooks*, 28 Cal. 72; *State v. Harman*, 50 S. E. Rep. 828; *Keho v. Aud. Gen.* (Mich. 1904), 101 N. W. Rep. 809.

some court of record, usually the County Court, and he is only authorized to make a sale of the land under the decree or judgment of the court.⁶³ The proceeding, although differing somewhat from the ordinary action at law, contains its essential features, and has the same general effect as to the conclusiveness of the judgment. If property is sold under such a judgment, the purchaser's title cannot be affected by any irregularity not taken advantage of in the judicial proceeding, unless the irregularity is so gross and so essential as to deprive the court of its jurisdiction over the subject-matter.⁶⁴ Where the statute requires certain preliminary proceedings to be observed, in order that the court may obtain jurisdiction, a failure to institute them will vitiate the purchaser's title, notwithstanding the sale rests upon a judgment of the court.⁶⁵ This is certainly the fairest, as well as the most effective, mode of enforcing the payment of taxes, and it is surprising that it has not been adopted by all the States.

⁶³ *Hills v. Chicago*, 60 Ill. 86; *Webster v. Chicago*, 62 Ill. 302. To set a tax deed aside, in Illinois, the plaintiff cannot allege the mere invalidity of the deed, but must allege and prove specific reason for the invalidity of the deed. *Langlais v. People*, 212 Ill. 75, 72 N. E. Rep. 28.

⁶⁴ *Cadmus v. Jackson*, 52 Pa. St. 295; *Dentler v. State*, 4 Blackf. 258; *Wall v. Trumbull*, 16 Mich. 228; *Bailey v. Doolittle*, 24 Ill. 577; *Wallace v. Brown*, 22 Ark. 118; *Eitel v. Foote*, 39 Cal. 439; *Mayo v. Foley*, 40 Cal. 281; *Langlais v. People*, 212 Ill. 75; 72 N. E. Rep. 28.

⁶⁵ *Thatcher v. Powell*, 6 Wheat. 119; *Woods v. Freeman*, 1 Wall. 398; *Fox v. Turtle*, 55 Ill. 377; *Fortman v. Ruggles*, 58 Ill. 207; *Mayo v. Ah Loy*, 32 Cal. 477. In some States, the defense of payment of the tax, if not interposed, will not effect the validity of the tax sale. *Blackwell, Tax Titles* 94. But in Missouri, in a recent well considered opinion, by Judge Marshall, the State's right to sell is held to exist only by reason of its lien for the unpaid taxes,—no lien exists where the taxes were not delinquent; a judgment for taxes that have been paid is held to be a nullity, although payment was not pleaded as a defense, and the owner is held entitled to have the execution sale recalled and the judgment set aside, on motion filed in the original proceeding before the return term of the execution, after sale. *State, ex rel, Williams v. Linzee*, 146 Mo. 532.

SECTION III.

TITLE BY PRIVATE GRANT.

SECTION 534. Title by private grant, what is?

(a.) Common-law conveyances.

- 535. Principal features and classes of common-law conveyances
- 536. Feoffment.
- 537. Grant.
- 538. Lease.
- 539. Release, confirmation and surrender.

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- 540. Retrospection.
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- 543. Future estates of freehold in bargain and sale.
- 544. Lease and release.

(c.) Modern conveyances.

- 545. What conveyances judicially recognized.
- 546. Statutory forms of conveyance.
- 547. Quit-claim deeds.
- 548. Dual character of common conveyances.
- 549. Is a deed necessary to convey freeholds?

§ 534. Title by private grant, what is?—The term “grant,” as here used, is generic in signification, and is made to include all modes of private alienation, all conveyances *inter vivos*, as distinguishable from title by devise.** The term at common law had a more specific meaning, but this restricted use of it has lost its practical value, and will be mentioned in a subsequent paragraph only for the pur-

** Mr. Washburn (3 Washburn on Real Prop. 353) cites Mr. Wood to the effect that “the word *grant*, taken largely, is where anything is granted, or passed from one to another; and in this sense it comprehends feoffments, bargains and sales, gifts, leases in writing or by deed, and sometimes by word without writing.” 3 Wood Conv. 7. See 4 Kent’s Com. 491.

pose of explaining the source of modern rules of conveying. Conveyances may be divided into three principal classes viz.: (a.) common-law conveyances; (b.) conveyances under the Statute of Uses; (c.) modern conveyances. In this order they will be presented.

(a.) COMMON-LAW CONVEYANCES.

§ 535. **Principal features and classes of common-law conveyances.**—A common-law conveyance, using the term in its broadest sense, is one which directly, and by the force of the conveyance itself, transfers the legal title to the grantee. And when so considered, it includes the modern statutory conveyances as well as those which were known at common law. In a more restricted sense, it includes only the latter class. Common-law conveyances may be sub-divided into two classes, viz.: *primary* and *secondary* conveyances. A *primary* conveyance is one which transfers the seisin or estate to one, who has no other interest or estate in the property, while the conveyance is called *secondary*, when the estate previously created is enlarged, restrained, transferred, or extinguished.⁶⁷ The following are enumerated by Blackstone as the principal kinds of primary and secondary conveyances: *Primary*, (1) feoffment; (2) gift; (3) grant; (4) lease; (5) exchange; (6) partition. *Secondary*, (1) release; (2) confirmation; (3) surrender; (4) assignment; (5) defeasance.^{67a} A gift, *donatio*, was the name applied to the grant of an estate tail, and differed from a feoffment only in the character of the estate created or granted.^{67b} An *exchange* was an ancient conveyance, now obsolete, whereby a mutual grant of equal interests is effected, the one in consideration of the other, the peculiar value of which was its capacity to take effect without livery of seisin, and merely by entry into possession. But the interests or estates had to

⁶⁷ 2 Bla. Com. 309.

^{67a} 2 Bla. Com. 310.

^{67b} 2 Bla. Com. 316, 317.

be equal in quantity; an estate in fee could not be *exchanged* for one for life or for years, although they may be of equal pecuniary value.⁶⁸ *Partition*, if voluntary, differs now very little, if any, from the more common modes of conveyance. *Partition* is made by ordinary deeds of indenture, conveying to each of the partitioners his share in severalty.⁶⁹ Involuntary partition is, as the term applies, a species of involuntary grant effected through the decree of the court.⁷⁰ *De-feasance* deeds have been already fully discussed in the chapter on mortgages, and will require no further elucidation.⁷¹ Assignment is more properly a transfer of an interest already created than a peculiar mode of acquiring title. When applied to the subject of conveyancing generally, it may be treated as synonymous with the generic term *conveyance*. Its peculiar signification in its application to estates for years has been already explained.⁷² The remaining common-law conveyances will now be explained somewhat in detail.

§ 536. *Feoffment*.—This was the chief common-law conveyance for the transfer of freehold estates in corporeal hereditaments, and arose out of the peculiarities of the feudal relation between the lord and his tenants. The word *feoffment* is derived from the verb *feoffare*, or *infeudare*, to give one a feud. It is, therefore, in its original sense, the grant of a feud, *donatio feudi*.⁷³ This is the only primary common-law conveyance now known to us which is capable of transferring a freehold. It is said to operate by transmutation of possession. It has no effect if there be no delivery of the possession. In fact, the feoffment is itself nothing more than the delivery of the possession with the intention to grant an estate of freehold. The grantor was called the *feoffor* and the grantee the

⁶⁸ 2 Bla. Com. 323.

⁶⁹ See *ante*, Sec. 193.

⁷⁰ See *ante*, Sec. 194.

⁷¹ See *ante*, Secs. 228, 234.

⁷² See *ante*, Sec. 139.

⁷³ 2 Bla. Com. 310; Co. Lit. 9.

feoffee. The feoffor, in order to make the conveyance, went upon the land with the feoffee, and in the presence of witnesses delivered to the latter a clod of earth, or a twig, or some other thing taken from the land, which was treated as a symbolical delivery of the land itself. The feoffee, who during this time was standing presumably near the border, but on the outside of the land, then entered upon it, and the conveyance was complete. This ceremony was called livery of seisin.⁷⁴ No writing was necessary. Indeed, at first a deed of feoffment was unusual. But later on, when the exigencies of advancing civilization called forth the grant of lands to different persons with different estates, or interests therein, upon various conditions, and under multitudinous limitations, it was found necessary to accompany the livery of seisin with a deed, explaining and setting forth the terms and conditions of the conveyance, in order to avoid the mistakes of witnesses, which would naturally occur if they had to rely upon their memory. But not until the enactment of the Statute of Frauds in the reign of Charles II was it necessary for a feoffment to be evidenced by a writing.⁷⁵ The conveyance by feoffment passed the actual seisin in fee or for life according to the terms of the gift, whether the feoffer had an estate in the land or not. "If it is proposed to convey a fee simple, it created an actual fee simple in the feoffee, by right or by

⁷⁴ This symbolical delivery of possession is very ancient, and has been employed by almost all of the historical nations. Thus we read in the Old Testament of the Bible, Ruth, iv: 7: "Now this was the manner in former time, in Israel, concerning redeeming and concerning changing, for to conform all things: a man plucked off his shoe and gave it to his neighbor; and this was a testimony in Israel." Blackstone also tells us that contracts for the sale of lands were made among the Goths and Swedes in the presence of witnesses, who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; while a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses. 2 Bla. Com. 313.

⁷⁵ 2 Bla. Com. 310-317; Williams on Real Prop. 147; 3 Washburn on Real Prop. 233, 351.

wrong, according as the feoffor was or was not seised in fee."⁷⁶ In consequence of this doctrine, a tortious feoffment disseised the rightful owner, and until entry by him he was absolutely divested of his seisin as if he had made the feoffment himself. And where one attempted to make a feoffment of a greater estate than he possessed, his feoffee would acquire a tortious estate, and the smaller estate which the feoffor actually possessed would be lost or merged in the tortious estate so granted. His feoffee, therefore, acquired no indefeasible estate, and could be ousted at once by the rightful owner of the reversion. This explains the tortious operation of feoffments by the tenants of particular estates upon contingent remainders, which has already been fully set forth.⁷⁷ In England, and in most of the States of this country at the present day, feoffments have been either abolished altogether, or they have by statute been prevented from having any tortious operation upon future expectant estates.⁷⁸ The doctrine of seisin has been so fully explained in preceding chapters that nothing further need here be said of it.

§ 537. *Grant.*—Conveyance by grant, at common law, was the method of transferring or creating estates in incorporeal hereditaments. These rights being intangible or incorporeal, they could not be transferred by livery of seisin. "For which reason all corporeal hereditaments, such as lands and houses,

⁷⁶ 3 Washburn on Real Prop. 351.

⁷⁷ See *ante*, Sec. 317.

⁷⁸ 4 Kent's Com. 481; 3 Washburn on Real Prop. 351; Williams on Real Prop. 146. In Alabama, Maine, New York, Wisconsin, Massachusetts, Minnesota and Michigan. 1 Washburn on Real Prop. 120. See Grout v. Townshend, 2 Hill 554; McCorry v. King's Heirs, 3 Humph. 267; Dennett v. Dennett, 40 N. H. 505. In South Carolina the tortious operation of feoffment was for a long time recognized as an active element of the law, and it until lately afforded to heirs, who were dissatisfied with the tenancy for life given to them by will, ready means for defeating the contingent remainders over and acquiring the fee simple. See Faber v. Police, 10 S. C. 376. But by a very late statute the tortious effect of the feoffment has been abolished.

are said to lie *in livery*; and the others, advowsons, commons, rents, reversions, etc., to lie in grant."⁷⁹ Conveyance by grant could only be made by deed. In this respect the law is still unchanged. But the deed of grant differs in form but little from the deed of feoffment, the same operative words being used in both, *dedi et concessi*, "have given and granted." But the deed of feoffment is inoperative as a conveyance, it simply acts as an attestation of the conveyance made by the livery of seisin. At common law corporeal hereditaments could not be transferred by grant.⁸⁰ Another important distinction between feoffment and grant was that a deed of grant could not be made to create a tortious estate. A grant only conveys what the grantor had a right to convey. It cannot work a disseisin of the reversioner.⁸¹

§ 538. *Lease*.—This is properly a conveyance of a particular estate in lands, whether for life, or for years, or at will, where a reversion is left in the grantor.⁸² But at present the term is used to indicate the conveyance of an estate less than a freehold. Used in that sense, it is a contract between lessor and lessee, vesting in the latter a right to the possession of the land for a term of years. Until possession is taken it is merely a *chose in action*, an executory contract, which is called an *interesse termini*. It becomes an estate when it takes effect in possession. No livery of seisin is required, and the lessee merely enters upon the land.⁸³ It is for this reason that an estate for years could be made to commence *in futuro*, while it was impossible to do so with a freehold.⁸⁴

⁷⁹ 1 Bla. Com. 317.

⁸⁰ 2 Bla. Com. 317; 3 Washburn on Real Prop. 352; *Huff v. McCauley*, 53 Pa. St. 206; *Drake v. Wells*, 11 Allen 143; 2 Shars. Bla. Com. 206, note.

⁸¹ Co. Lit. 271 b, Butler's note; 4 Kent's Com. 353; 3 Washburn on Real Prop. 352.

⁸² 2 Bla. Com. 317.

⁸³ 2 Bla. Com. 318. See *ante*, Secs. 131, 135.

⁸⁴ See *ante*, Sec. 132.

§ 539. Release, confirmation and surrender.—These three secondary conveyances are so nearly allied to each other that they will be explained and distinguished in a single paragraph. A release, as defined by Blackstone, “is a discharge or a conveyance of a man’s right in lands or tenements to another that held some former estate in possession. The words generally used there are *demised, released* and *forever quit-claimed*.”⁸⁵ A virtual possession, i. e., a constructive possession, which may be converted into an actual possession, is sufficient. And the possession of the lessee of a tenant for life is so far the possession of the tenant for life that the reversioner may make a release to him (the life tenant) of the reversion.⁸⁶ The deed of release may be used in the following cases: *First*, to enlarge a particular estate in possession; as where the reversioner releases the inheritance to the tenant for life. But the reversion must be immediate to the particular estate. An outstanding intermediate estate would prevent a release of the reversion to the tenant in possession.⁸⁷ *Secondly*, to pass the interest of one coparcener or joint-tenant to another. *Thirdly*, to transfer to a disseisor the disseisee’s right of entry, and thus make the disseisor’s title absolute.⁸⁸ A confirmation is, according to Lord Coke, “a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased.”⁸⁹ The operative words in a confirmation are “have given, granted, ratified, approved, and confirmed.”⁹⁰ A surrender operates to transfer a particular estate to the immediate reversioner, and is effected by the words, “hath surrendered, granted, and yielded up.” But it can only take effect where the surrenderor has an estate in possession, and the surrenderee has a higher estate in im-

⁸⁵ 2 Bla. Com. 324.

⁸⁶ Co. Lit. 270 a; Hargrave’s note 3.

⁸⁷ Co. Lit. 273 b.

⁸⁸ 2 Bla. Com. 324, 325.

⁸⁹ 2 Bla. Com. 325; 1 Inst. 295.

⁹⁰ 2 Bla. Com. 325.

mediate reversion.⁹¹ In all these cases the transfer is made by force of the deed of release, confirmation or surrender, and does not require livery of seisin in the first two cases, viz.: release and confirmation, because the transferee has the seisin already, and in the case of surrender because the seisin of the surrenderor, having been acquired originally from the surrenderee, is subordinate to the seisin in law of the surrenderee, his reversioner, the estates of the two together constituting one and the same seisin.⁹² At the present day the ordinary quit-claim deed, so-called, has all the qualities of the release or confirmation, and is effective in any of these cases to convey the interest of the grantor.⁹³

(b.) CONVEYANCES UNDER THE STATUTE OF USES.

§ 540. *Retrospection.*—It will be remembered, in discussing the subject of uses and trusts, it was stated that a use could be created originally by a simple oral declaration of the legal owner of the land, that he held it to the use of another, provided the declaration was made for a good or valuable consideration.⁹⁴ The Statute of Frauds subsequently required all creations or grants of uses and trusts to be manifested by some instrument in writing signed by the party to be charged.⁹⁵ And although it has become customary to create uses by instruments having all the formalities of a deed, it is not necessary. These uses, when based upon a consideration, were enforced in equity as readily as if there had been a feoffment to uses.⁹⁶ It has also been shown that when the Statute of Uses was enacted, all uses *in esse*, and vested, became at once executed into legal estates, the seisin being transferred to the *cestui que use* by force of the statute, and the future contingent uses were executed whenever they be-

⁹¹ 2 Bla. Com. 326.

⁹² 2 Bla. Com. 324-327.

⁹³ See *post*, Sec. 547.

⁹⁴ See *ante*, Sec. 330.

⁹⁵ See *ante*, Secs. 328, 330, 374.

⁹⁶ See *ante*, Sec. 330.

came vested.⁹⁷ After the passage of the Statute of Uses, therefore, it was possible to convey the legal estate without making use of any of the primary common-law conveyances which operated by transmutation of possession, and required a livery of seisin. The grantor had only to make a declaration of uses upon sufficient consideration. His declaration vested the use or equitable estate in the grantee, and the statute immediately executed it into a legal estate and transferred the seisin to him. Thus was avoided the necessity of a resort to the cumbersome and ceremonial feoffment and livery of seisin. With this explanation, and a knowledge of the doctrine of uses and trusts, it is not difficult to understand the operation of the deeds of *covenants to stand seised, bargain and sale, and lease and release*. The deeds themselves vest in the grantee only the use or equitable estate. The legal use and seisin are transferred by the Statute of Uses. And where any one of these deeds creates a future and contingent use which cannot be executed by the statute, the operation of the statute upon the deed will be suspended in respect to such interest, until it has become vested and in a position to be executed.

§ 541. *Covenant to stand seised.*—This is a covenant, between near relatives by blood or marriage, founded upon the *good* consideration of natural love and affection, that the covenantor, the legal proprietor of the land, shall stand seised to the use of the covenantee. But the conveyance can only operate as a covenant to stand seised when it is made upon the consideration of blood or marriage.⁹⁸

⁹⁷ See *ante*, Secs. 338, 339, 349.

⁹⁸ 2 Bla. Com. 338; 2 Saunders on Uses 82; 2 Rolle Abr. 784, pl. 244; Emery v. Chase, 5 Me. 232. Although it is usual for the covenant to be made with the person who is to receive the benefit of the use, it is not necessary. A. may covenant with B. to stand seised to the use of C., A.'s wife or child. Co. Lit. 112 a; Bedell's Case, 7 Rep. 40; Brewer v. Hardy, 22 Pick. 376; Leavett v. Leavett, 47 N. H. 329; Barrett v. French, 1 Conn. 354; Hayes v. Kershaw, 1 Sandf. Ch. 258.

§ 542. **Bargain and sale.**— This deed is in the nature of a contract, in which the bargainor for a valuable consideration bargains and sells the land to the bargainee,⁹⁹ and, under the doctrine of equitable conversion, becomes the trustee for the bargainee, holding the legal title and seisin in this fiduciary capacity. As it appears from this definition, the bargain and sale must be founded upon a valuable consideration, i. e., money, or money's equivalent. But the consideration need not be an adequate compensation for the land. The covenant to stand seised, and the bargain and sale are to be distinguished by the relations of the parties, and the consideration upon which the conveyance rests, and not by the operative words. "Covenant to stand seised" is the operative clause in the conveyance of that name, but neither it nor "bargain and sell" has any technical, precise legal import; and a covenant to stand seised, if founded upon a valuable consideration will operate as a bargain and sale between strangers; while, on the other hand, a bargain and sale deed without valuable consideration will operate as a covenant to stand seised between near relations.¹ In England, by statute, no bargain and sale can have the effect, under the Statute of Uses, of vesting the legal title in the bargainee, unless it is made by deed, and enrolled within six months in one of the courts of Westminster Hall, or with the *custos rotulorum* of the country.² This statute has never been in force in the United States.³

§ 543. **Future estates of freehold in bargain and sale.**— It has been held in unqualified terms by the courts of Massachusetts and Maine, that a freehold estate to commence *in futuro*

⁹⁹ Read *Hanks v. Folsom*, 11 Lea 555, distinguishing bargain and sale deeds and executory contracts for sale of lands. See *ante*, Sec. 365.

¹ Co. Lit. 40 b; 2 Inst. 672; 1 Prest. Conv. 38; *Davies v. Speed*, 12 Mod. 39; *Trafton v. Hawes*, 102 Mass. 533; *Jackson v. Cadwell*, 1 Cow. 639; *Eckman v. Eckman*, 68 Pa. St. 460. See *post*, Sec. 548.

² 2 Bla. Com. 338; 3 Washburn on Real Prop. 313.

³ *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Jackson v. Wood*, 12 Johns. 74; *Given v. Doe*, 7 Blackf. 210; Report of Judges, 3 Binn. 156.

cannot be created by bargain and sale deed.⁴ But it has been held very generally elsewhere, that such a deed is capable of creating a future estate of freehold, and even the courts of the States above named have finally come to the same conclusion, overruling the prior decisions to the contrary.⁵ It is difficult to see how this error could have gained such recognition. Bargain and sale, and covenant to stand seised, rest upon the same foundation, that they both create uses in the grantee, and operate under the Statute of Uses. And there is no better established rule in respect to the subject of uses and trusts than that a use is free from the restrictions controlling the limitation of common-law legal estates, which arise from the doctrine of seisin, and the necessity of livery of seisin, in order to convey a title.

§ 544. *Lease and release.*—This conveyance is stated to have been invented by Sergeant Moore soon after the passage of the Statute of Enrollment, and consists of two separate instruments, a lease and a release, and was introduced to avoid the necessity of enrolling the bargain and sale. The lease is for one year, in the form of a bargain and sale, which need not have been enrolled, since the statute referred only to freeholds. This *bargain and sale* lease vested a use for one year in the lessee, and the statute transferred to him the possession and the legal title. Being then in possession as tenant, he was in a position to receive the grant of the reversion or freehold by way of a release.⁶ This is, perhaps,

⁴ *Marden v. Chase*, 32 Me. 329; *Pray v. Pierce*, 7 Mass. 331; *Gale v. Coburn*, 18 Pick. 397; *Brewer v. Hardy*, 22 Pick. 376.

⁵ *Shapleigh v. Pilsbury*, 1 Me. 271; *Wyman v. Brown*, 50 Me. 150; *Jordan v. Stevens*, 51 Me. 79; *Drown v. Smith*, 52 Me. 141; *Jackson v. Swart*, 20 Johns. 87; *Jackson v. McKenny*, 3 Wend. 235; *Hayes v. Kershaw*, 1 Sandf. Ch. 267; *Bank v. Housman*, 6 Paige 526; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Trafton v. Hawes*, 102 Mass. 533. See also *Mellichamp v. Mellichamp*, 28 S. C. 125; *Watson v. Cressy* (Me.), 10 Atl. Rep. 59; *Seals v. Pierce*, 83 Ga. 587.

⁶ 2 Bla. Com. 337.

the most effective of the conveyances under the Statute of Uses, and in England it superseded to a large extent both the covenant to stand seised and bargain and sale deeds.

The possession, acquired by the *bargain and sale* lease, is only such a constructive possession which is sufficient to support the release, and does not give to the lessee the right to maintain actions in respect to the possession until he has gained actual possession by entry.⁷ Both the lease and the release are common-law conveyances, but the lease, operating as a common-law conveyance, vests in the lessee before entry only an *interesse termini*, and not an estate. It must operate as the limitation of a use under the Statute of Uses, in order to give the lessee an estate with constructive possession. The release itself is a common-law conveyance, and operates as such in this connection. In England it had to operate as a common-law conveyance to do without enrollment. But in this country it may operate just as well as the limitation of a future use as a release of a future legal estate.⁸

(c.) MODERN CONVEYANCES.

§ 545. What conveyances judicially recognized.— Although there is an almost infinite variance to be found in the rules of conveyancing in the different States of the Country, it is believed that all the modes of conveyancing, which were recognized by the English common law, heretofore discussed, and those which operated under the Statute of Uses are recognized as valid and effective to pass the legal title. In New York deeds of feoffment with livery of seisin are expressly abolished by statute,⁹ while in other States they remain as a valid, though somewhat obsolete, conveyance. In most of these States, in order that a deed of feoffment may take effect as such, it must still be accompanied by the ceremonial livery of seisin. But in several of the States, notably Massa-

⁷ 3 Washburn on Real Prop. 356.

⁸ 3 Washburn on Real Prop. 355.

⁹ 1 Rev. Stat. N. Y. 738.

achusetts, Maine, Mississippi, Pennsylvania, Missouri, Connecticut and Rhode Island, the recording and delivery of a deed of feoffment is equivalent to the actual livery of seisin, and dispenses with it.¹⁰ The conveyances under the Statute of Uses are also recognized, and in Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Pennsylvania, Vermont and Virginia, the deed in general use is substantially a *bargain and sale*.¹¹ In no State is it thought impossible to make a valid conveyance by deed operating under the Statute of Uses.¹²

§ 546. *Statutory forms of conveyance.*— But in addition to the forms of conveyance already discussed, there are found in some of the States others which are prescribed by statute and made effectual to pass the legal title. Such forms are to be found in New Hampshire, South Carolina, Pennsylvania, New York, Iowa, Maryland and Tennessee. The use of these forms, however, is not made obligatory. The statute is construed to be directory, and does not invalidate the other modes of conveyance which were previously in use. A bargain and sale or a feoffment would be just as effectual now as formerly.¹³ In New York, as previously stated, feoffments have been abolished, and all conveyances, whether they are in form a feoffment or a deed under the Statute of Uses, are by statute made to operate as, and are called, grants.¹⁴ And in Georgia a statute provides that any deed which clearly shows the

¹⁰ *Pray v. Pierce*, 7 Mass. 381; *Russell v. Coffin*, 8 Pick. 143; *Barrett v. French*, 1 Conn. 354; *Caldwell v. Fulton*, 31 Pa. St. 483; *Wyman v. Brown*, 50 Me. 160; *Williamson v. Carleton*, 51 Me. 462; *Poe v. Domec*, 48 Mo. 481.

¹¹ 2 Washburn on Real Prop. 452.

¹² *Givan v. Doe*, 7 Blackf. 212; *Funk v. Creswell*, 5 Iowa 68; *Brewer v. Hardy*, 22 Pick. 376; *Duval v. Bibb*, 3 Call. 362; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611.

¹³ 3 Washburn on Real Prop. 360; *Redfern v. Middleton*, Rice 464; 2 Washburn on Real Prop. 447; *Miller v. Miller*, Meigs. 484.

¹⁴ 1 Rev. Stat. N. Y. 738.

intention of the party to convey the title to lands, shall be effectual for that purpose. No form is prescribed, and no want of form will invalidate the transaction.¹⁵

§ 547. *Quit-claim deed.*—Although a deed of release is a secondary conveyance and is only effectual in conveying a reversionary or equitable interest to one already possessed of an estate in possession, a form of deed similar to the release, and known as a quit-claim deed, has met with general recognition in this country, and has, in some of the States, been expressly recognized by statute.¹⁶ In Kentucky release is, by statute, made a primary conveyance.¹⁷ But a quit-claim deed only passes that interest which the grantor has at the time of conveyance, and the grantee under it has not the equities of a *bona-fide* purchaser. If the title should fail there is no remedy against the grantor, for a quit-claim deed contains no covenants of title.¹⁸ It is, however, possible for a deed in the form of a quit-claim deed, to contain covenants of title. But such deeds are not technical quit-claim deeds.¹⁹ And should the grantor subsequently acquire the title, no estoppel arises against him in favor of the grantee, to prevent his enforcement of the title.²⁰ Quit-claim deeds contain, usually, as their operative words, “remise, release, and forever quit-claim,” but the form may be varied. And where there are

¹⁵ 3 Washburn on Real Prop. 361. See also *Kennedy v. Moness* (N. C. 1905), 50 S. E. Rep. 450.

¹⁶ It is so recognized in Minnesota, Maine, Mississippi, Massachusetts, and Illinois; 3 Washburn on Real Prop. 359, notes. See also, *Brown v. Jackson*, 3 Wheat. 452; *Jackson v. Bradford*, 4 Wend. 619; *Jackson v. Hubble*, 1 Cow. 613; *Dart v. Dart*, 7 Conn. 255; *Hall v. Ashby*, 9 Ohio 96; *Hamilton v. Doolittle*, 37 Ill. 482; *Kerr v. Freeman*, 33 Miss. 292; *Carpentier v. Williamson*, 25 Cal. 168.

¹⁷ 3 Washburn on Real Prop. 360.

¹⁸ *May v. LeClair*, 11 Wall. 232; *Kyle v. Kavanagh*, 103 Mass. 356; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Sherwood v. Barlow*, 19 Conn. 471.

¹⁹ See *Whaley v. Cavanaugh*, 88 Cal. 132.

²⁰ *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491; *Price v. King*, 44 Kans. 639.

no technical words of sale and conveyance, the quit-claim deed has been held effectual to pass the title, provided words of transfer, or words evidencing the intention to transfer, are present.²¹ Quit-claim deeds are practically nothing more than deeds without covenants of title, and they will operate as primary or secondary conveyances, according to the circumstances of the parties in respect to the land, at least in those States where the quit-claim deed is recognized as a primary conveyance. Deeds in the form of a quit-claim deed, may contain covenants of title, and in such cases there is very little doubt that the parties intended them to operate as primary conveyances.²²

§ 548. Dual character of common conveyances.—The character of the conveyance is in the first instance determined by the operative words of conveyance appearing in the deed. The forms of expression, characteristic of the various modes of conveyance, have been given in connection with the description of them. The ordinary deed, usually found in general use in the United States, contains the operative words, "give, grant, bargain and sell." "Give and grant," *do et concedo*, were used in the deed of feoffment and grant, and are common-law words of conveyance. "Bargain and sell," as has already been explained, are the operative words of bargain and sale deeds. By a course of judicial legislation, going far back into the common law of Lord Coke's day, in order to effectuate the intention of the parties, when clearly manifested, a deed has been held to operate as that mode of conveyance which best carries out the intention of the parties, provided there are sufficient operative words to bring the deed within that class of conveyances. Where, therefore, a deed contains the words "give, grant, bargain and sell," it may operate either as a bargain and sale under the Statute of Uses, or as

²¹ *Fash v. Blake*, 38 Ill. 367; *Johnson v. Boutock*, 38 Ill. 114; *Wilson v. Albert*, 89 Mo. 537, 1 S. W. Rep. 209.

²² See *Whaley v. Cavanaugh*, 88 Cal. 132. See *Denver v. Denver* (N. C. 1904), 49 S. E. Rep. 113.

a feoffment at common law, if there is livery of seisin, or if livery is dispensed with by statute or by judicial legislation;²³ or further, it may operate as the modern statutory conveyance, provided the operative words are the same as prescribed by the statute.²⁴ In most of the cases arising under this rule of construction the deed is inoperative as one mode of conveyance, on account of some defect in the execution, or in the nature of the grant, and complies with the requirements of some other mode of conveyance. Thus a deed of release will take effect as a covenant to stand seised, if there is a limitation of a future freehold estate which cannot be created by a common-law conveyance.²⁵ So also will release be treated as a bargain and sale, where it would be invalid as a release, because it is made to a party not in possession of the land. The words of release raise a use in favor of the releasee.²⁶ A use may be raised by any words showing the intention to convey a title. In a case in Virginia the words of conveyance were "give, grant, and deliver," and the court held it to be a good bargain and sale.²⁷ It is also a well established rule that deeds operating under the Statute of Uses will be treated as bargains and sales, or as covenants to stand seised whatever may be the words of conveyance, according to the consideration present to support the conveyance. If it is a good consideration it will be a covenant to stand seised, and a bargain and sale if the consideration is valuable.²⁸ So also, if the operative words are "give, grant, bargain, and sell," and the like, will the deed

²³ See *ante*, Sec. 545.

²⁴ 3 Washburn on Real Prop. 357; Sheppard Com. Assur. 82, 83.

²⁵ *Roe v. Tranmarr*, 7 Willis 682; *s. c.* 2 Smith's Ld. Cas. 288; *Smith v. Frederick*, 1 Russ. 210; *Haggerston v. Hanbury*, 5 B. & C. 101; *Gibson v. Minet*, 1 H. Bl. 569; *s. c.* 3 T. R. 481.

²⁶ *Pray v. Pierce*, 7 Mass. 381; *Marshall v. Fisk*, 6 Mass. 24; *Russell v. Coffin*, 8 Pick. 143; *Jackson v. Beach*, 1 Johns. Cas. 401; *Havens v. Seashore Land Co. (Ind.)*, 20 Atl. Rep. 497. See *Cassady v. Stoble*, 90 N. Y. S. 533.

²⁷ *Rowletts v. Daniel*, 4 Munf. 473; *Tabb v. Baird*, 3 Call. 475.

²⁸ *Cox v. Edwards*, 14 Mass. 492; *Brewer v. Hardy*, 22 Pick. 376;

be treated as a common-law conveyance if it cannot operate as a bargain and sale, or a covenant to stand seised, for the want of a good or a valuable consideration.²⁹ And where there is a grant in such a deed to A. to the use of B., since the policy of the courts of this country is to execute all uses, and vest the legal title in the *cestui que use* whenever it is possible, the deed will be treated as a common-law conveyance, since such a limitation in a bargain and sale would create a use upon a use, which cannot be executed.³⁰ That a bargain and sale to A. to the use of B. raises a use upon a use, and gives the legal title to A. under the Statute of Uses, is the settled rule of the courts of those States where the doctrine of ulterior uses, or use upon a use, has not been abolished by statute.³¹ A deed may also as to one limitation operate as a common-law conveyance, while it may be treated as a conveyance under the Statute of Uses in respect to another limitation, if such a construction is necessary to carry out the intention of the parties.³² But when it is desired that a deed should operate as a particular mode of conveyance it must possess all the requisites of that conveyance. And although by this liberal and accommodating rule of construction it is not likely for a common and ordinary grant to be made, which will not possess the requisite of some form of conveyance, and which cannot take effect in consequence, yet it is possible, and where the grant is so singularly defective it will of course, be void and inoperative.³³

Trafton v. Hawes, 102 Mass. 533; *Okison v. Patterson*, 1 Watts & S. 395.

²⁹ *Emery v. Chase*, 5 Me. 232; *Adams v. Guerard*, 29 Ga. 676; *Cheney v. Watkins*, 1 Harr. & J. 527; *Rowland v. Rowland*, 93 N. C. 214.

³⁰ *Thatcher v. Omans*, 3 Pick. 522; *Bacon v. Taylor*, Kirby 368; *Hunt v. Hunt*, 14 Pick. 374; *Jackson v. Sebring*, 16 Johns. 515; *Sprague v. Woods*, 4 Watts & S. 194. See *Lynville v. Golding*, 11 Ind. 374.

³¹ See *ante*, Sec. 342. See R. P. Law N. Y. (1896), p. 570, construed, *In re DeRycks Will*, 91 N. Y. S. 159.

³² *Emery v. Chase*, 5 Me. 232; *Bryan v. Bradley*, 16 Conn. 474.

³³ *Emery v. Chase*, 5 Me. 232; *Jackson v. Sebring*, 16 Johns. 515; *Jackson v. Cadwell*, 1 Cow. 622; *Marshall v. Fisk*, 6 Mass. 24; *Carrol*

§ 549. Is a deed necessary to convey freeholds?—By the term “deed” is meant an instrument under seal.³⁴ The question, therefore, which is mooted here is, whether a *sealed* instrument is necessary to convey the legal title to a freehold estate. It has been so long and so generally considered indispensable, unless abolished by statute, that although irresistibly driven to the conclusion, it was with some hesitation that the contrary position, with qualifications, has been here assumed. The position is, that for the conveyance of a *legal* freehold estate in a corporeal hereditament, a sealed instrument is not necessary, unless a statute expressly requires it. There were two principal classes of conveyances in England, viz.: common-law conveyances, operating by transmutation of possession, and conveyances under the Statute of Uses. The principal common-law conveyances, and those which concern us in the present discussion, were “feoffment” and “grant.” *Grant* was used to convey incorporeal hereditaments and reversionary interests in corporeal hereditaments, and *required* a sealed instrument.³⁵ *Feoffment* was used to convey corporeal freeholds in possession, and consisted of the ceremonial livery of seisin. *No deed, or any other writing was required*, although it was customary to employ a deed, where the limitations were numerous and intricate.³⁶ In respect to the conveyances under the Statute of Uses, it is a well-known fact that uses before the Statute of Frauds could be created in corporeal hereditaments by an oral declaration which would be executed by the Statute of Uses into a legal

v. Norwood, 5 Harr. & J. 155; *Den v. Hanks*, 5 Ired. 30; *Foster v. Dennison*, 9 Ohio 121. In *Den v. Hanks*, *supra*, the deed could not operate as a bargain and sale, because no consideration was expressed or proved. It could not take effect as a covenant to stand seised, for there was no blood relationship between the parties to import a good consideration, and it could not operate as a feoffment, because there had been no livery of seisin. The deed was therefore declared void.

³⁴ See *post*, Secs. 551, 572.

³⁵ See *ante*, Sec. 537.

³⁶ See *ante*, Sec. 536; Williams on Real Prop. 147, 152.

estate, if it was supported by a sufficient consideration,³⁷ except in one case, viz. : in the case of a bargain and sale. By statute, 27 Hen. VIII, ch. 16, commonly called and known as the Statute of Enrollment, it was enacted that no bargain and sale shall have the effect of conveying the legal title to a freehold estate, unless it is in writing, *indented* and *sealed*, and enrolled in one of the King's courts at Westminster.³⁸ From this synoptical statement it is evident, therefore, that, using the language of Mr. Washburn, "prior to the Statute of Frauds in the time of Charles II, it did not require a written instrument to convey corporeal hereditaments, except as provided in the matter of deeds of bargain and sale."³⁹ But it was at an early day held impossible to create a use in any incorporeal hereditament, such as rents which required a deed at common law, unless it was declared by deed.⁴⁰ Now the Statute of Frauds only required an instrument in writing, signed by the grantor, and *did not* require it to be sealed. After the passage of the Statute of Frauds, therefore, except as to bargains and sales and grants,⁴¹ a deed was not required to make an effectual conveyance. *Feoffments* could be made by a simple instrument in writing, and it would seem that a *covenant to stand seised* did not actually require a seal, although a covenant is a sealed instrument; for it is stated unqualifiedly by the old authorities that, for the

³⁷ See *ante*, Secs. 330, 540. The Statute of Uses expressly states this to be the case. The statute enacts that "where any person stood or were seised . . . in any honours, castles, lands, etc., to use, etc., of any other person, etc., by reason of any bargain, sale, feoffment, . . . covenant, contract, agreement, will, or otherwise," etc. See *ante*, Sec. 338, note.

³⁸ 3 Washburn on Real Prop. 421.

³⁹ 3 Washburn on Real Prop. 421, 422.

⁴⁰ 2 Washburn on Real Prop. 392; 2 Bla. Com. 331; 1 Spence Eq. Jur. 449.

⁴¹ It must not be understood that any reference is made here to the common-law *secondary* conveyances, such as a *release*, exchange or surrender. These conveyances were all in the nature of a "grant," and required a deed. See *ante*, Secs. 535, 539.

creation of a use, an oral declaration was sufficient, but it required a *valuable* consideration to create a use in a stranger, and a *good* consideration to vest it in a blood relation.⁴² But although a deed was not required before, or after, the Statute of Frauds except in the case of *grants* and *bargains and sales*, it was always customary to use them. In the early days of the feudal system, the great lords and barons were ignorant of the art of writing, and could not sign their names; but they all possessed seals, and when any important writing was required to be executed, they sealed it with their own seals instead of signing.⁴³ From the solemnity of the act of sealing, a seal was, at an early day, held to import a consideration. If, therefore, a sealed instrument was used in the declaration of a use, no actual consideration was necessary to support the use, if some sufficient consideration was acknowledged in the deed.⁴⁴ But if it was an oral declaration, a consideration had to be proved in order to raise a use. To avoid, therefore, the necessity of a consideration, it was the common custom to use a sealed instrument. This was the state of the law in England at the time of the American revolution. The next question is, what is the condition of the law in America? It follows, as a necessary consequence, that in those States which have expressly or impliedly adopted the common law of England, except so far as it is modified by statute, or repugnant to the political institutions of this country, the law in respect to the requirement of a sealed instrument to convey lands must be the same, unless it has been changed by a local statute. The only doubtful question involved in this conclusion is the effect of the English Statute of Enrollment, upon the American law. It has been very generally held that this statute has

⁴² See 2 Washburn on Real Prop. 392, 394; 1 Spence Eq. Jur. 449, 450. The word "covenant" is also often used as synonymous with contract or agreement. Thus we speak of covenants in leases, when usually leases are not sealed.

⁴³ Williams on Real Prop. 147; 2 Bla. Com. 305, 306; Hallam's Middle Ages 329.

⁴⁴ See *ante*, Sec. 329, and *post*, Sec. 564.

never been recognized by the American courts as a part of the common law.⁴⁵ But the cases cited in the note only involved the question as to the necessity of an enrollment, and did not involve a discussion as to the applicability of the statute, so far as it requires a deed to create a use by bargain and sale. The natural presumption would be, that a statute could not be recognized in part, and denied to be in force as to its other requirements, particularly where the provision, supposed to be recognized, is only auxiliary to the main object and purpose of the statute. The conclusion, therefore, is, that *unless the Statute of Enrollment is in force in this country, or unless there is a State statute, requiring a use or trust to be created by deed in order that it may be executed by the Statute of Uses into a legal estate*, the ordinary deed in common use will be effectual to pass the legal title to any freehold in a corporeal hereditament, *without being sealed*, if an actual consideration is proved to have passed from the grantee to the grantor.⁴⁶ And, furthermore, if in any State the ordinary conveyance can operate as a feoffment, and the State statutes do not expressly require a sealed instrument, the conveyance will be a good feoffment without being sealed, and without the acknowledgment or proof of a consideration, if the conveyance expressly declares to whose use the lands shall be held.⁴⁷

⁴⁵ *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Jackson v. Wood*, 12 Johns. 74; *Jackson v. Dunsbath*, 1 Johns. 97; *Givan v. Doe*, 7 Blackf. 210; *Report of Judges*, 3 Binn. 156.

⁴⁶ The author has had neither time nor space to ascertain and state the exact law on this subject in any particular State. He has contented himself with the general statement of a somewhat abstract rule, and leaves the continuation of the investigation to the reader. One other observation may perhaps be necessary; and that is, that where a statute prescribes a form of conveyance, and requires a seal in executing it, it does not invalidate the other modes of conveyance, which were previously in use, unless they are expressly repealed (see *ante*, Sec. 546); and the requirement of a seal in the statutory conveyance will not by implication make a seal necessary in the other forms of conveyance.

⁴⁷ See Secs. 329, 565. The omission of a seal has been held not to

effect the validity of the instrument, in the following cases, *Laughlin v. Kieper* (Wis. 1905), 103 N. W. Rep. 264; *Burkamp v. Healey* (Ky. 1903), 72 S. W. Rep. 759. "A seal is unnecessary to a lease, and if placed thereon does not raise the same above the dignity of any non-specialty written contract." *Woolsey v. Henke* (Wis. 1905), 103 N. W. Rep. 267.

CHAPTER XXIII.

DEEDS — THEIR REQUIREMENTS AND COMPONENT PARTS.

- SECTION I. *The requisites of a deed.*
 II. *The component parts of a deed.*
 III. *Covenants in deeds.*

SECTION I.

THE REQUISITES OF A DEED.

- SECTION 550. Definition of a deed.
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§ 550. **Definition of a deed.**— A deed, as defined by Lord Coke, is a writing *sealed and delivered* by the party thereto, and contains a contract, executory or executed. According to the common-law, before the passage of the Statute of Frauds, signing was unnecessary. It is now, however, an important act, and in most, if not all, of the United States, it is absolutely necessary to the validity of the deed.¹ In discussing what constitutes a deed, its requirements will be considered first, and then the component parts, in an orderly arrangement.

§ 551. **Requisites, what they are.**— The following may be stated as including all the essentials of a deed, viz.: (1) a sufficient writing; (2) proper parties, grantor and grantee; (3) a thing to be granted; (4) a consideration; (5) execution, i. e., signing, sealing, attestation, and acknowledgment; (6) delivery and acceptance; (7) registration. These will be considered in their regular order.

§ 552. **A sufficient writing, what constitutes.**— Without meeting with any positive adjudication, it seems to be the accepted opinion of all the courts and treatise-writers that to make a valid deed it must be written on parchment or paper, it being supposed that these two materials are more durable,

¹ 3 Washburn on Real Prop. 239; Co. Lit. 171 b; Van Santwood v. Sandford, 12 Johns. 198; Hutchins v. Byrnes, 9 Gray 367; Taylor v. Morton, 5 Dana 365; Hammond v. Alexander, 1 Bibb 333.

and less capable of erasure or alteration.² This objection goes more to the inadvisability of using other materials, from the individual standpoint of the parties, rather than to establish a ground for holding the deed to be otherwise invalid. There can be no objection in principle to a deed written on cloth or on unprepared skins of animals, as long as the writing remains unobliterated. And the reason fails altogether if the writing is carved on stone or engraved on metal. The writing must clearly manifest the intention of the parties, and contain the entire agreement. If any uncertainty, either as to the parties or the subject-matter, appears on the face of the deed, and cannot be explained away by a reference to other parts of the same deed, or by some other deed expressly referred to, parol evidence will not be admitted for that purpose, and the deed will be void for the want of certainty.³ But it is not necessary to the validity of the deed that there should be a strict observance of the rules of grammar or rhetoric; as long as the intention and meaning of the parties can be gathered from the instrument, the law does not require accuracy or precision of language.⁴

§ 553. A sufficient writing, what constitutes — Continued.—

But in order that a deed may be valid as a conveyance, the writing must be completed in all its essential parts before it is delivered. Any alteration or filling up of blanks after delivery will not give life to the deed.⁵ But though there is

² 3 Washburn on Real Prop. 240; Co. Lit. 35 b; 2 Bla. Com. 297; *Warren v. Lynch*, 5 Johns. 240.

³ 3 Washburn on Real Prop. 266; *Boardman v. Reed*, 6 Pet. 345; *Deery v. Cray*, 10 Wall. 270; *Peck v. Mallams*, 10 N. Y. 630; *Andrews v. Todd*, 50 N. H. 565; *Hill v. Mowry*, 6 Gray 551; *Fenwick v. Floyd*, 1 Har. & G. 172; *Thomas v. Turney*, *Id.* 437.

⁴ 3 Washburn on Real Prop. 240; *Shrewsbury's Case*, 9 Rep. 48; *Walters v. Bredin*, 70 Pa. St. 237; *Moorehead v. Scovill* (Pa. 1904), 60 Atl. Rep. 13.

⁵ 3 Washburn on Real Prop. 240; *Burns v. Lynde*, 6 Allen 305; *Duncan v. Hodges*, 4 McCord 239; *Perminter v. McDaniel*, 1 Hill (S. C.) 267.

no variance among the decisions in respect to the correctness of this position, that the deed must be completed before it is delivered to the grantee in order to be valid, it is impossible to reconcile the authorities upon the question, whether the delivery after its completion may not be made by an agent under a parol authority. In the early case of *Texira v. Evans*,⁶ it was held that a bond which was signed by the obligor, but in which the sum was left blank, and was afterwards filled in by an agent and by him delivered to the obligee according to the parol authority of his principal, was good and binding upon the parties. This case has been often commented upon, and in the cases, cited in the note below, repudiated, and the contrary doctrine established that the deed must be completed before it leaves the hands of the grantor, or there must be a second delivery by him. An agent cannot deliver it, unless he obtains his authority from a power of attorney under seal.⁷ On the other hand, the principle has been sustained by the courts of some of the States.⁸ The weight of authority in this country is certainly in favor of the position that a second delivery is necessary, although the better opinion would seem to be that the completion and delivery of the deed may be done by an agent as effectively as by the principal. This rule would give ample security to the grantor against any fraudulent transactions, while it would make the title of the grantee more secure.

⁶ 1 Anstr. 228.

⁷ *Hibblewhite v. McMorine*, 6 Mees. & W. 200; *Davidson v. Cooper*, 11 M. & W. 794; *Drury v. Foster*, 2 Wall. 24; *Basford v. Pearson*, 9 Allen 388; *Vose v. Dolan*, 108 Mass. 159; *Viser v. Rice*, 33 Texas 130; *Cummings v. Cassily*, 5 B. Mon. 74; *Conover v. Porter*, 14 Ohio 450; *Simms v. Harvey*, 19 Iowa 290; *People v. Organ*, 27 Ill. 29; *Upton v. Archer*, 41 Cal. 85; *Hammerslough v. Cheatham*, 84 Mo. 13; *De Arguello v. Bours*, 67 Cal. 447; *Vaca Val., etc., R. R. Co. v. Mansfield*, 84 Cal. 560, 24 Pac. Rep. 145. See also, *Bullin v. Hancock* (N. C. 1905), 50 S. E. Rep. 621.

⁸ *Inhabitants, etc., v. Huntress*, 53 Me. 90; *McDonald v. Eggleston*, 26 Vt. 161; *Van Etta v. Evanson*, 28 Wis. 33; *Devin v. Himer*, 29 Iowa 301; *Phelps v. Sullivan*, 140 Mass. 36, 54 Am. Rep. 442; *State v.*

§ 554. **Alterations and interlineations.**—It is also an important question how far alterations and interlineations may be made in a deed without affecting its validity. Lord Coke states that in ancient times an erasure or interlineation would invalidate the deed at whatever time it was made.⁹ But now, as it was even in the days of Coke, erasures and interlineations do not invalidate the deed. But in order that the deed may take effect as modified by the interlineation or erasure, the alteration must have been made before the delivery of the deed.¹⁰ It has been held that it may be made after acknowledgment; but if the alteration enlarges the scope of the conveyance there must be a new acknowledgment.¹¹ It is, however, doubtful upon whom the burden lies, to prove that the alteration was made before delivery. Where the alteration is in an unimportant part of the deed the question does not become important. But if the change is made in an essential part, some of the authorities treat the erasure or interlineation as extremely suspicious, and throw the burden of proof upon the grantee. The presumption of law, according to these authorities, is that it was made after delivery.¹² The courts of Massachusetts and other States deny that there is any presumption of law in respect to the matter, but hold that the burden of proof is thrown upon the party relying upon the deed.¹³ The following quotation from the court of Missouri may, perhaps, furnish the correct rule: "As a general rule, if any presumption at all is indulged, the law will

Matthews, 44 Kan. 596. See, as to delivery through third party, Blackford v. Almstead (Mich. 1905), 104 N. W. Rep. 47.

⁹ Co. Lit. 225 b.

¹⁰ 3 Washburn on Real Prop. 244; Jordan v. Stevens, 51 Me. 78; Bassett v. Bassett, 55 Me. 126; Gordon v. Sizer, 39 Miss. 818.

¹¹ Webb v. Mullins, 78 Ala. 111.

¹² United States v. Linn, 1 How. 104; Clifford v. Parker, 2 Mann. & G. 909; Morris v. Venderen, 1 Dall. 67; 1 Greenl. on Ev., Sec. 564; Galland v. Jackman, 26 Cal. 85.

¹³ Ely v. Ely, 6 Gray 439; Wilde v. Armsby, 6 Cush. 314; Knight v. Clements, 8 A. & E. 215; Jackson v. Osborn, 2 Wend. 555; Herrick v. Malin, 22 Wend. 388; Comstock v. Smith, 26 Mich. 306. See, also,

presume that the alteration was made before, or at least contemporaneous with, the signing of the writing, unless peculiar circumstances are patent upon its face; and even then the whole question is one for the jury to settle upon the facts, when and where, and with what intent, the alteration was made."¹⁴ The safer plan, and the one adopted by all careful conveyancers, when alteration in the body of the deed are necessary is to note the erasure or interlineation upon the instrument, and generally above the attestation clause, to show that it was made before the delivery. But no subsequent alteration of the deed, not even its destruction, can have any effect upon the title which has been passed by the deed,¹⁵ although it would be fatal to any action upon the covenants in the deed if the deed is fraudulently destroyed or a material alteration is made in the covenant.¹⁶ But if a deed is destroyed without the fault of the grantee, he may resort to equity to compel the grantor to give him a new deed,¹⁷ or the contents may be proved by parol evidence, after the loss of the deed has been established.¹⁸

§ 555. Proper parties — The grantor.— It needs only to be stated, to receive immediate recognition, that to make a valid

Messi v. Frechede (La. 1904), 37 So. Rep. 600; *Gaskins v. Allen* (N. C. 1905), 49 S. E. Rep. 919.

¹⁴ *McCormick v. Fitzmorris*, 39 Mo. 34; *Matthews v. Coalter*, 9 Mo. 705. See, also, *Gunkle v. Seiberth* (Ky. 1905), 85 S. W. Rep. 733.

¹⁵ *Davis v. Cooper*, 11 Mees. & W. 800; *Bolton v. Carlisle*, 2 H. Bl. 263; *Roe v. York*, 6 East 86; *Chessman v. Whittemore*, 23 Pick. 231; *Lewis v. Payne*, 8 Cow. 71; *Jackson v. Chase*, 2 Johns. 84; *Raynor v. Wilson*, 6 Hill 469; *Rifener v. Bowman*, 53 Pa. St. 318; *Wood v. Hilderbrand*, 46 Mo. 284.

¹⁶ *Davidson v. Cooper*, 11 Mees. & W. 800; *Deem v. Phillips*, 5 W. Va. 168; *Woods v. Hilderbrand*, 46 Mo. 284. As where the word "Trustee," after the grantee's name, is erased. *Flitcraft v. Title & Tr. Co.* (Pa. 1905), 211 Pa. 114, 60 Atl. Rep. 557.

¹⁷ *King v. Gilson*, 32 Ill. 354.

¹⁸ *Wallace v. Harmstad*, 44 Pa. St. 492; *Shaumberg v. Wright*, 39 Mo. 125.

deed there must be a competent grantor. He must own the property, and have the capacity to convey. The number of persons who are in this respect under disability is very small, and may all be included in the classes known as infants, *non compotes mentis*, and married women. The disabilities resting upon these persons are not uniform in their extent, and vary in reference to each class. In respect to some the deeds are absolutely void, while as to others they are only voidable. They will be discussed separately.

§ 556. *Infants and insane persons.*—As a general proposition, it may be stated that the deeds of infants¹⁹ and lunatics²⁰ are placed in respect to their validity on the same basis, and are held to be voidable and not void. But if the insane person is under guardianship, the deed will be absolutely void;²¹ while in New York and Pennsylvania

¹⁹ *Tucker v. Moreland*, 10 Peters 58; *Phillips v. Green*, 3 Marsh. A. K. 7, 13 A. M. Dec. 124; *Roof v. Stafford*, 7 Cowen 180; *Moore v. Abernathy*, 7 Blackf. 442; *Kendall v. Lawrence*, 22 Pick. 540, 543; *Jenkins v. Jenkins*, 12 Iowa 195, 198; *Breckenridge v. Ormby*, 1 Marsh. J. J. 245, 19 Am. Dec. 71; *Cook v. Toumbs*, 36 Miss. 685; *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463; *Zouch v. Parsons*, 3 Burr 1794, 1805; *Boston Bank v. Chamberlin*, 15 Mass. 211.

²⁰ *Riggan v. Green*, 80 N. C. 236; *Breckenridge v. Ormsby*, 1 Marsh. J. J. 236, 19 Am. Dec. 71; *Freed v. Brown*, 55 Ind. 310; *Jackson v. Gumaer*, 2 Cowan 552; *Desilver's Est.*, 5 Rawle 111, 28 Am. Dec. 645; *Bensell v. Chancellor*, 5 Whart. 376, 34 Am. Dec. 561; *Seaver v. Phelps*, 11 Pick. 304, 22 Am. Dec. 372; *Thomas v. Hatch*, 3 Sum. 170; *Eaton v. Eaton*, 8 Vroom. 103; *Summers v. Pumphrey*, 24 Ind. 231; *Tucker v. Moreland*, 10 Peters 58. But see *Van Dusen v. Sweet*, 51 N. Y. 378, 383.

²¹ *Wait v. Maxwell*, 5 Pick. 217; *Griswold v. Butler*, 3 Conn. 231; *Pearl v. McDowell*, 3 J. J. Marsh. 658; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Fitzhugh v. Wilcox*, 12 Barb. 235; *Mohr v. Tulip*, 40 Wis. 66; *Hovey v. Hobson*, 53 Me. 451; *Elston v. Jasper*, 45 Texas 409; *Van Dusen v. Sweet*, 51 N. Y. 378; *Nichol v. Thomas*, 53 Ind. 42; *Leonard v. Leonard*, 14 Pick. 280; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470. But see *Hunt v. Hunt*, 2 Beas. 161. See *Keely v. Moore*, 196 U. S. 38, 49 L. Ed. 232. "A deed executed by a person of unsound mind is voidable only." *Logan v. Vanarsdall* (Ky. 1905),

the deed of an insane person seems under all circumstances to be void.²² But it is often difficult to determine what degree of sanity is sufficient to enable a person to make a good and valid deed. The question is no doubt one of fact, whether the person has sufficient strength of mind to understand the nature and consequences of the act of conveyance. The fact that his mental powers have been impaired will not invalidate the deed, provided they have not been so far affected as to make him incapable to transact business, and to protect his interests to a reasonable degree.²³ But deeds of both infants and lunatics may be made valid by a subsequent ratification; in the case of infants after coming of age, and with lunatics after the mental disturbance has passed away. The deed may be avoided only by the infant or lunatic, or by his guardian, personal representative or heirs.²⁴ In order to

86 S. W. Rep. 981. See also, *McPeck's Heirs v. Graham's Heirs* (W. Va. 1904), 49 S. E. Rep. 125.

²² *Van Deusen v. Sweet*, 51 N. Y. 384; *Matter of Desilver*, 5 Rawle 111. But see *Roof v. Stafford*, 7 Cow. 180; *Bool v. Mix*, 17 Wend. 119; *Ingraham v. Baldwin*, 9 N. Y. 45.

²³ *Dennett v. Dennett*, 44 N. H. 538; *Doe v. Prettyman*, 1 Houst. 339; *In re Barker*, 2 Johns. Ch. 232; *Dennett v. Dennett*, 44 N. H. 531. See *Northwestern Mut. Fire Ins. Co. v. Blankenship*, 94 Ind. 535, 48 Am. Rep. 185. See *Hovey v. Hobson*, 55 Me. 256; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Carpenter v. Carpenter*, 8 Bush 283; *Shelford on Lun.* 37; *Titcomb v. Vantyle*, 84 Ill. 371; *Odell v. Buck*, 21 Wend. 142; *Jackson v. King*, 4 Cowen 207, 15 Am. Dec. 354; *Sprague v. Duel*, 1 Clarke 90, 11 Paige 480; *Kennedy v. Marrast*, 46 Ala. 161; *Jackson v. King*, 4 Cowen 216, 15 Am. Dec. 354; *Allore v. Jewell*, 94 U. S. (4 Otto) 506, 510; *Harding v. Hardy*, 11 Wheat. 125; *Kemson v. Ashbee*, 10 Ch. Cas. 15; *Keeley v. Moore*, 196 U. S. 38.

²⁴ *Arnold v. Townsend*, 14 Phila. 216; *Campbell v. Kuhn*, 45 Mich. 513; *Cates v. Woodson*, 2 Dana 452; *Brown v. Freed*, 43 Ind. 253; *Judge of Probate v. Stone*, 44 N. H. 593; *Brown v. Caldwell*, 10 Serg. & R. 114, 13 Am. Dec. 660; *Hartness v. Thompson*, 5 Johns. 160; *Nightingale v. Withington*, 15 Mass. 272, 7 Am. Dec. 101; *Person v. Chase*, 37 Vt. 647; *Bozeman v. Browning*, 31 Ark. 364; *Veal v. Forbson*, 57 Texas 482; *Jones v. Butler*, 30 Barb. 641; *Tillinghast v. Holbrook*, 7 R. I. 230; *Vaughan v. Parr*, 20 Ark. 600; *Gaskins v. Allen* (N. C. 1905), 49 S. E. Rep. 919.

avoid a deed made by an infant or insane person it has been held not to be necessary to restore the consideration.²⁵ But if the infant or lunatic has bought property, and still has it when the minority or lunacy terminates, the property must be restored before he can disaffirm.²⁶ An infant cannot avoid his deed while he is an infant, and a second deed during infancy is no disaffirmance of the first.²⁷

§ 557. **Ratification and disaffirmance.**—What constitutes a ratification or a disaffirmance is, perhaps, not easy of solution. It is not necessary that the act of ratification should be as formal as the ordinary release of an outstanding claim of

²⁵ Kent's Com. 236; *Hovey v. Hobson*, 53 Me. 453; *Gibson v. Soper*, 6 Gray 279; *Cresinger v. Welch*, 15 Ohio 156; *Kilbee v. Myrick*, 12 Fla. 419. But see *Thomas v. Hatch*, 3 Sum. 170; *Edgerton v. Wolf*, 6 Gray, 456; *Mustard v. Wohlford*, 15 Gratt 329, 343; *Bedinger v. Wharton*, 27 Gratt 857; *Chandler v. Simmons*, 97 Mass. 508; *Price v. Furman*, 27 Vt. 208, 65 Am. Dec. 104; *Dill v. Bowen*, 54 Ind. 204; *Manning v. Johnson*, 26 Ala. 446; *Walsh v. Young*, 110 Mass. 396, 399; *Stout v. Merrill*, 35 Iowa 47; *Kerr v. Bell*, 44 Mo. 120; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Rusk v. Fenton*, 14 Bush 490; *Addison v. Dawson*, 2 Vern. 678. And see *Davis Sewing Machine Co. v. Barnard*, 43 Mich. 379; *Fitzgerald v. Reed*, 9 Smedes & M. 94; *Scanlan v. Cobb*, 85 Ill. 296; *Niell v. Morley*, 9 Ves. 478; *Riggan v. Green*, 80 N. C. 236; *Price v. Berrington*, 3 Macn. & G. 486; *Carr v. Holliday*, 1 Dev. & B. Eq. 344; *Eaton v. Eaton*, 8 Vroom 108; *Millsap v. Estes* (N. C. 1905), 50 S. E. Rep. 227.

²⁶ *Womack v. Womack*, 8 Texas 397, 58 Am. Dec. 119; *Brantley v. Wolf*, 60 Miss. 420; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 805; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Smith v. Evans*, 5 Humph. 70; *Kitchen v. Lee*, 11 Paige 107, 42 Am. Dec. 101; *Roof v. Stafford*, 7 Cowen 179; *Locke v. Smith*, 41 N. H. 346; 2 Kent. Com. 240; *Gordon v. Miller* (Mo. App. 1905), 85 S. W. Rep. 943.

²⁷ 3 Washburn on Real Prop. 250; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *McCormic v. Leggett*, 8 Jones (N. C.) 425. In California this is changed by the Code. Civ. Code, Sec. 335; *Dunton v. Brown*, 31 Mich. 182; *Williams, C. J.*, in *Shipman v. Horton*, 17 Conn. 482. See *Pitcher v. Laycock*, 7 Ind. 398; *Slator v. Trimble*, 14 I. R. C. L. 342; *McGan v. Marshall*, 7 Humph. 121; *Jackson v. Carpenter*, 11 Johns. 131; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 566. See *Gaskins v. Allen* (N. C. 1905), 49 S. E. Rep. 919.

title; but, on the other hand, the act or acts, from which the ratification may be inferred, must be a sufficiently strong admission of the title of the grantee to give rise to the presumption, that the *quondam* infant or lunatic intends to ratify his deed.²⁸ The acceptance of a lease, an oral acknowledgment of the validity of the conveyance, the subsequent acceptance of the consideration, provided these acts are done intelligently, will be a sufficient ratification.²⁹ So, on the other hand, an entry, the institution of a suit, a subsequent conveyance, are sufficient acts of disaffirmance to avoid the deed, and no subsequent ratification of the first deed can invalidate the title of the grantee in the second conveyance, if the second deed is recorded.³⁰ So far the courts are agreed. But whether a mere silent acquiescence will operate as a ratification is a disputed point. A number of the courts hold that, in order to avoid a deed made under disability, it must be disaffirmed within a reasonable time after the removal of the disability, and that if the grantee is suffered to remain in possession for a long time, particularly if he makes valuable improvements upon the premises, the deed will be ratified, and the grantee's title made good.³¹ But the position is not

²⁸ *Howe v. Howe*, 99 Mass. 98. "A deed executed by a married woman while a minor was not ratified by lapse of time with no disaffirmance for more than 20 years." *Gaskins v. Allen* (N. C. 1905), 49 S. E. Rep. 919.

²⁹ *Irvine v. Irvine*, 9 Wall. 618; *Bond v. Bond*, 7 Allen 1; *Tucker v. Moreland*, 10 Peters 64; *Eaton v. Eaton*, 8 Vroom. 108; *Arnold v. Richmond Iron Works*, 1 Gray 434; *Robbins v. Eaton*, 10 N. H. 561; *Boody v. McKenney*, 23 Me. 517; *Tyler on Infancy and Coverture*, Sec. 43; 2 Vent. 203; *Houser v. Reynolds*, 1 Hayw. (N. C.) 143, 1 Am. Dec. 551; *Riggs v. Fisk*, 8 Cent. L. J. 325; *Hughes v. Watson*, 10 Ohio 127; *Blankenship v. Stout*, 25 Ill. 132; *Howe v. Howe*, 99 Mass. 98; *Cole v. Pennoyer*, 14 Ill. 158. See *Burton v. Anthony*, 79 Pac. Rep. 185; *Southern Cotton Oil Co. v. Dukes* (Ga. 1905), 49 S. E. Rep. 788.

³⁰ *Tucker v. Moreland*, 10 Pet. 75; *Bond v. Bond*, 7 Allen 1; *Jackson v. Carpenter*, 11 Johns. 541; *Jackson v. Burchin*, 14 Johns. 124; *Williams, C. J.*, in *Shipman v. Horton*, 17 Conn. 482; *Dunton v. Brown*, 31 Mich. 182.

³¹ *Robins v. Eaton*, 10 N. H. 561; *Emmons v. Murray*, 16 N. H. 385;

sustained by the other courts, which maintain that mere acquiescence will not operate as a ratification, unless it has been so long continued as to bar the right of action under the Statute of Limitations.³²

§ 558. **Deeds of married women.**—It may be stated as a general proposition that the deeds of married women, unless they are also executed by their husbands, or unless it is otherwise provided by statute, are absolutely void; and if, after becoming *discovert*, a second conveyance, or a second delivery of the same deed, is made, the deed takes effect as a primary conveyance from the time of the second delivery, and not as a secondary conveyance confirmatory of the prior conveyance during coverture.³³ Reference is not made here to her sole and separate property. This species of property is an equitable estate governed by the rules of the law of uses and trusts; this branch of the subject has been already discussed, and the powers of married women in relation thereto explained.³⁴ But in a number of the United States statutes have been en-

Jackson v. Carpenter, 11 Johns. 539; *Hartley v. Wharton*, 11 Ad. & E. 934; *Wallace v. Lewis*, 4 Har. (Del.) 75; *Jones v. Butler*, 30 Barb. 641; *Flinn v. Powers*, 36 How. Pr. 289; *Jamison v. Smith*, 35 La. An. 609; *Green v. Wilding*, 59 Iowa 679, 44 Am. Rep. 696.

³² *Irvine v. Irvine*, 9 Wall. 618; *Hovey v. Hobson*, 53 Me. 453; *Prout v. Wiley*, 26 Mich. 164; *Thomas v. Pullis*, 56 Mo. 211; *Wallace v. Latham*, 52 Miss. 291; *Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100; *Tucker v. Moreland*, 10 Peters 59; *Huth v. Carondelet*, 56 Mo. 202, 210, per Napton, J. See *Urban v. Grimes*, 2 Grant Cas. 96; *Gillespie v. Bailey*, 12 W. Va. 70; *Sims v. Everhardt*, 22 Alb. L. J. 445; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Sims v. Smith*, 86 Ind. 577; *Shepley, J.*, in *Boody v. McKenney*, 23 Me. 517, 523; *Jackson v. Carpenter*, 11 Johns. 539; *Curtin v. Patten*, 11 Serg. & R. 311. See *Gaskins v. Allen*, 40 S. E. Rep. 919; *Vincent v. Blanton* (Ky. 1905), 85 S. W. Rep. 703.

³³ *Zouch v. Parsons*, 3 Burr. 1805; *Allen v. Hooper*, 50 Me. 374; *Hatch v. Bates*, 54 Me. 139; *Concord Bank v. Bellis*, 10 Cush. 277; *Davis v. Andrews*, 30 Vt. 681; *Perrine v. Perrine*, 11 N. J. Eq. 144; *Lefevre v. Murdock*, Wright 205; *Bressler v. Kent*, 61 Ill. 426; *Cope v. Meeks*, 3 Head 388; *Goodright v. Straphan*, Cowp. 201.

³⁴ See *ante*, Sec. 348.

acted abolishing the entire common law in relation to the property rights of married women, and giving them the rights and capacity of single women.³⁵ In Massachusetts the separate deed of a married woman will be good for every other purpose except to convey the husband's right of curtesy therein.³⁶ And perhaps it may be doubtful in some of the other States, where statutes of this character have been passed, whether it is not still necessary for the husband to join in the execution of the deed, in order to bar his right of curtesy. In New York the husband's curtesy is barred by the separate conveyance of the wife.³⁷ At common law the only mode of conveying the wife's property was by levying a fine.³⁸ Subsequently, by statute, 3 & 4 Wm. IV, ch. 74, a joint conveyance of husband and wife, when properly acknowledged, was made sufficient to convey her estate, thus doing away with the necessity of the fine.³⁹ And still later, in 1874, by statute 37 & 38 Vict., ch. 78, when any estate shall be vested in a married woman as a bare trustee, she may convey it as freely as if she were a *feme sole*.⁴⁰ But in this country fines and recoveries were never recognized as modes of conveying the interests of married women, and instead thereof it has from the early colonial days become customary in the United States for married women to convey their real estate by deed, in which their husbands joined. This custom has been generally recognized wherever the common-law disability

³⁵ See *ante*, Sec. 74.

³⁶ *Beal v. Warren*, 2 Gray 458; *Willard v. Eastham*, 15 Gray 334; *Campbell v. Bemis*, 16 Gray 487. In Alabama, Connecticut, Idaho, Kentucky, North Carolina and Pennsylvania, the husband must join in the deed of his wife. *Winestein v. Marks Co.*, 59 Atl. Rep. 496; *Karlson v. Sawmill Co.*, 78 Pac. Rep. 1080; *Smith v. Burton*, 49 S. E. Rep. 64; *Linton v. Moorhead*, 209 Pa. 646, 59 Atl. Rep. 264; *Collier v. Doe, ex rel. Alexander*, 38 So. Rep. 244; *Furnish Admr. v. Lilly*, 84 S. W. Rep. 734.

³⁷ *Yale v. Dederer*, 22 N. Y. 460; *Hatfield v. Sneden*, 54 N. Y. 287.

³⁸ 3 Washburn on Real Prop. 252; Williams on Real Prop. 229, 230.

³⁹ Williams on Real Prop. 230.

⁴⁰ Williams on Real Prop. 232.

still prevails, and has been adopted as law and incorporated into the statutes of the different States.⁴¹ In some of the States certain forms of conveyance and modes of execution are prescribed by statute, and in those States a strict compliance with the requirements of the statute is necessary; if it is not executed according to the statute the conveyance will be void.⁴² In some of the States it is required that she be examined privately by an officer authorized to take oaths, and the deed acknowledged by her as her free act and deed, and she is generally required to state further, that her husband has not by any means of intimidation prevailed upon her to execute it against her will.⁴³ In the New England States, and in some others, a privy examination is not required, a simple acknowledgment being sufficient, and in some of the States the joint conveyance may be made by separate deeds.⁴⁴ It is

⁴¹ *Fowler v. Shearer*, 7 Mass. 14; *Jackson v. Gilchrist*, 15 Johns. 110; *Lloyd's Lessees v. Taylor*, 1 Dall. 17; 3 Washburn on Real Prop. 252; *Williams on Real Prop.* 231, Rawle's note; 4 Kent's Com. 152, 154; *Blythe v. Dargin*, 68 Ala. 370; *Holt v. Agnew*, 67 Ala. 360; *Call v. Perkins*, 65 Me. 439; *Buchanan v. Hazzard*, 95 Pa. St. 240; *Concord Bank v. Bellis*, 10 Cush. 276; *Powell v. The Monson & B. Manuf. Co.*, 3 Mason 347; *Manchester v. Hough*, 5 Mason 67. The deed of a married woman to her land, in which her husband fails to join, is valid in New York. *Hardwick v. Selzi*, 93 N. Y. S. 265. Also in Colorado. *Patrick v. Morrow*, 81 Pac. Rep. 242. See *Peter v. Byrne* (Mo. 1903), 75 S. W. Rep. 433.

⁴² *Hepburn v. Dubois*, 12 Pet. 375; *Elwood v. Blackf.* 13 Barb. 50; *Askew v. Daniel*, 5 Ired. Eq. 321; *Rumfelt v. Clements*, 46 Pa. 455; *Thorndell v. Morrison*, 25 Pa. 326; *Millenberger v. Croyle*, 27 Pa. 170; *Richards v. McClelland*, 29 Pa. St. 385; *Roseburg's Exrs. v. Sterling's Heirs*, 27 Pa. 292.

⁴³ *Albany Fire Ins. Co. v. Pay*, 4 N. Y. 9; *Dundas v. Hitchcock*, 12 How. 256; *Elliott v. Pearce*, 20 Ark. 508; *Askew v. Daniel*, 5 Ired. Eq. 321; *Scott v. Purcell*, 7 Blackf. 66; *Holt v. Agnew*, 67 Ala. 360; *Call v. Perkins*, 65 Me. 439; *Buchanan v. Hazzard*, 95 Pa. St. 240; *Sumner v. Conant*, 10 Vt. 20; *Blythe v. Dargin*, 68 Ala. 370; *Evans v. Summerlin*, 19 Fla. 858. This is still the law in Arkansas. *Wade v. Brown*, 87 S. W. Rep. 839.

⁴⁴ 4 Greenl. Cruise, 19, note; 3 Washburn on Real Prop. 254, 255; 2 Kent's Com. 150-154; *Strickland v. Bartlett*, 51 Me. 355; *Bean v. Boothby*, 57 Me. 295; *Woodward v. Seaver*, 38 N. H. 29; *Frary v.*

also generally necessary that the deed, in order to pass the wife's property, must contain words of grant which expressly or impliedly refer to her, and proceed from her. Merely signing a deed, in which the husband is represented as conveying his right or interest in the property, will not make it her deed. She must be joined with him in the operative words of the deed.⁴⁵ But generally there will be a sufficient joining of the husband in the deed if he signs it. It is not necessary for him to be mentioned in the deed as one of the grantors.⁴⁶ And where both are mentioned as grantors the deed may be made to convey not only her property, but also his independent interests in the same.⁴⁷ In several of the States it is provided by statute that a married woman will have the powers and capacity of single women, if her husband has deserted her, or has been consigned to prison, or has become incapable of executing deeds from any other cause.⁴⁸ It is impossible to present within any narrow compass the details of the law in respect to property rights of married women, as it prevails in the different States. Reference must be had to the statutes and decisions of the State in which the question arises.

Booth, 37 Vt. 78. The joint acknowledgment of husband and wife is all the Missouri law requires. *Peter v. Byrne*, 75 S. W. Rep. 433.

⁴⁵ *Agricultural Bank v. Rice*, 4 How. 225; *Dundas v. Hitchcock*, 12 How. 256; *Melvin v. Props. of Locks and Canals*, 16 Pick. 137; *Learned v. Cutler*, 18 Pick. 9; *Purcell v. Goshorn*, 17 Ohio 105; *Cox v. Wells*, 7 Blackf. 410; *Stearns v. Swift*, 8 Pick. 532.

⁴⁶ *Hills v. Bearse*, 9 Allen 406; *Elliott v. Sleeper*, 2 N. H. 525; *Woodward v. Seaver*, 38 N. H. 29; *Stone v. Montgomery*, 35 Miss. 83; *Ingholdsby v. Juan*, 12 Cal. 564. See *Collier v. Doe*, *ex rel. Alexander* (Ala. 1905), 38 So. Rep. 244.

⁴⁷ *Needham v. Judson*, 101 Mass. 161.

⁴⁸ *Greenl. Cruise*, 19, 20; *Gregory v. Pierce*, 4 Metc. 478; *Abbott v. Bayley*, 6 Pick. 89; *Boyce v. Owens*, 1 Hill (S. C.) 8. See *Dum v. Stawers* (Va. 1905), 51 S. E. Rep. 366; *Furnish Admr. r. Lilly* (Ky. 1905), 84 S. W. Rep. 734; *McDaniels v. Sommons* (Ark. 1905), 86 S. W. Rep. 997; *Stephens r. Stephens*, 85 S. W. Rep. 1093. The husband's deed alone is color of title as against the wife. *Rose v. Ware* (Ky. 1903), 74 S. W. Rep. 188. But see, *contra*, *McNeely v. Oil Co.* (W. Va. 1903), 44 S. E. Rep. 508.

§ 559. A disseisee cannot convey.— Another requisite under the head of competent grantors is, that the grantor is seised at the time of the conveyance. If the land is in the adverse possession of another, disseisin leaving nothing in him but a *chose in action*, the grantor is prohibited at common law from conveying this interest. This prohibition has been retained in a number of the States, to which reference is made in the cases cited below.⁴⁹ It has also been held that the disseisin of a mortgagor will invalidate the mortgage and the assignment of it by the mortgagee.⁵⁰ But the deed is only void against the parties in adverse possession at the time of the conveyance. As against the rest of the world and between the parties to the deed, it is good.⁵¹ And although the legal title, as against the disseisor, remains in the grantor unaffected by the grant, the grantee acquires such an interest in the land as will enable him to claim the land against the grantor, and maintain

⁴⁹ *Hathorne v. Haines*, 1 Me. 238; *Foxcroft v. Barnes*, 29 Mich. 128; *Sohier v. Coffin*, 101 Mass. 179; *Park v. Pratt*, 38 Vt. 563; *Betsey v. Torrance*, 34 Miss. 132; *Ewing v. Savary*, 4 Bibb 424; *Jackson v. Ketchum*, 8 Johns. 479; *Jackson v. Andrews*, 7 Wend. 152; *Roberts v. Cooper*, 29 How. 467; *Thurman v. Cameron*, 24 Wend. 87; *Burdick*, 14 R. I. 574; *Bernstein v. Humes*, 75 Ala. 241; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Wade v. Lindsey*, 6 Met. 407, 414; *Harral v. Levarty*, 50 Conn. 46, 47 Am. Rep. 608; *Burgett v. Taliaferro*, 118 Ill. 503; *Johnson v. Prairie*, 94 N. C. 773.

⁵⁰ *Williams v. Baker*, 49 Me. 428. See *Deans v. Gay* (N. C. 1903), 43 S. E. Rep. 643.

⁵¹ *Wade v. Lindsey*, 6 Metc. 407; *Farmer v. Peterson*, 111 Mass. 151; *White v. Fuller*, 38 Vt. 204; *Park v. Pratt*, 38 Vt. 553; *Livingston v. Peru Iron Co.*, 9 Wend. 511; *Betsey v. Torrance*, 34 Miss. 138; *Brinley v. Whiting*, 5 Pick. 348, 355; *Loud v. Darling*, 7 Allen 206; *Sohier v. Coffin*, 101 Mass. 179; *McMahan v. Bowe*, 114 Mass. 140; *Snow v. Orleans*, 126 Mass. 453; *Alexander v. Carew*, 13 Allen 72; *White v. Fuller*, 38 Vt. 204; *Betsey v. Torrance*, 34 Miss. 138; *Park v. Pratt*, 38 Vt. 553. But see *Steeple v. Downing*, 60 Ind. 484; *Brinley v. Whiting*, 5 Pick. 348; *Tabb v. Baird*, 3 Call. 475; *Gibson v. Shearer*, 1 Murph. 114. But the deed of a disseisee, who has not held possession for the statutory period will not pass title as against the holder thereof. *United W. J. Canal Co. v. Con. Fruit Jar Co.*, 55 Atl. Rep. 46; *Zwerble v. Myers*, 95 N. W. Rep. 597.

his action of ejectment against the disseisor in the name of the grantor.⁵² But it is always competent for the grantor to make a good conveyance of lands in the adverse possession of another by entering upon the land and delivering the deed there. His entry restores the seisin to him for the time being, and interrupts the continuity of the adverse possession.⁵³ This doctrine does not apply to incorporeal hereditaments, nor to such adverse possession of strips of land arising from a mistake as to the boundaries.⁵⁴ And since a State cannot be disseised, no adverse possession will invalidate its deed of conveyance.⁵⁵ These principles prevail generally in this country, but in some of the States the entire doctrine has been repudiated, and it is there held that disseisin does not in any way affect the capacity of the grantor to convey.⁵⁶

§ 560. *Fraud and duress.*—Not only must there be a grantor capable of making a conveyance, but the deed must be a free and voluntary act. If, therefore, he is induced by fraud, or forced by threats of personal injury, to make a conveyance which he would not otherwise have made, the deed is voidable. By restoring the consideration, he may, within a reasonable time after the discovery of the fraud, or after

⁵² *Brinley v. Whiting*, 5 Pick. 348; *Sohier v. Coffin*, 101 Mass. 179; *Wade v. Lindsey*, 6 Metc. 413; *Jackson v. Leggett*, 7 Wend. 380; *Livingston v. Peru Iron Co.*, 9 Wend. 523; *Betsey v. Torrance*, 34 Miss. 138; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Shartall v. Hinckley*, 31 Ill. 219.

⁵³ *Farwell v. Rogers*, 99 Mass. 36; *Warner v. Bull*, 13 Metc. 4.

⁵⁴ *Corning v. Troy Iron Factory*, 40 N. Y. 191; *Cleveland v. Flagg*, 4 Cush. 76; *Sparhawk v. Bogg*, 16 Gray 585. See *Handouf v. Haes* (Iowa 1903), 95 N. W. Rep. 226.

⁵⁵ *Ward v. Bartholomew*, 6 Pick. 409; *People v. Mayor, etc.*, 28 Barb. 240. See *Doe v. Pugh* (Ala. 1903), 34 So. Rep. 377. See also, *El Paso v. Bank*, 74 S. W. Rep. 21.

⁵⁶ *Cresson v. Miller*, 2 Watts 272; *Poyas v. Wilkins*, 12 Rich. 420; *Bennett v. Williams*, 5 Ohio 461; *Shortall v. Hinckley*, 31 Ill. 219; *Fetrow v. Merriweather*, 53 Ill. 279; *Stewart v. McSweeney*, 14 Wis. 471; *Crane v. Reeder*, 21 Mich. 82; *Crigler v. Mexico*, 74 S. W. Rep. 384.

he is removed from the threatened danger, disaffirm the deed, and recover the land.⁵⁷ What will constitute such a duress as to avoid a deed made while under its influence, is a question which is determined by the facts of each case. It must be such a duress as will seriously interfere with, or take away, the will power of the grantor. According to the United States Court, "unlawful duress is a good defense if it includes such a degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness."⁵⁸ In New Hampshire it was held necessary that the duress must raise the apprehension of loss of life, limb or personal property;⁵⁹ while it has been held sufficient duress that a wife signed under threats of abandonment by the husband, and in another case under a threat of criminal prosecution against her husband.⁶⁰ Perhaps no better rule can be laid down than that which is taken from the United States Supreme Court, regard being had, in its application to particular cases, to the age, condition and sex of the parties.

§ 561. Proper parties — Grantees.— All persons, as a general rule, are able to take property as grantees, infants, per-

⁵⁷ 2 Bla. Com. 291; 3 Washburn on Real Prop. 260; *Worcester v. Eaton*, 13 Mass. 371; *Bassett v. Brown*, 105 Mass. 551; *Fisk v. Stubbs*, 30 Ala. 335; *Davis v. Fox*, 59 Mo. 125; *Cook v. Moore*, 39 Texas 255; *Bacon's Abridgement*, Tit. Duress, D.; *Worcester v. Eaton*, 13 Mass. 377, 7 Am. Dec. 155.

⁵⁸ *United States v. Huckabee*, 16 Wall. 423; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *State v. Sluder*, 70 N. C. 55; *Bosley v. Schanner*, 26 Ark. 280; *Beckwith v. Frisbie*, 32 Vt. 559; *Maxwell v. Griswold*, 10 How. 242.

⁵⁹ *Evans v. Gale*, 18 N. H. 401. A deed by parents, to prevent the prosecution of their son by the grantee, will be set aside, in Texas. *Medaris v. Granberry*, 84 S. W. Rep. 1070. See also, *McClelland v. Bullis* (Colo. 1905), 81 Pac. Rep. 771.

⁶⁰ *Eddie v. Slimmons*, 26 N. Y. 12; *Topley v. Topley*, 10 Minn. 460. See *Medaris v. Granberry* (Texas 1905), 84 S. W. Rep. 1070.

sons *non compotes mentis*, married women, corporations, etc.⁶¹ But from the necessity of the case, if these conveyances are coupled with a condition imposing duties upon the grantee, or contain covenants of the grantee, the grantee under disability cannot be compelled to perform them. And if in consequence of his failure to perform, the conveyance may be avoided, the grantor's only remedy is to recover the land. But in respect to married women, it seems that the assent of the husband is necessary at common law to make the conveyance to the wife valid. The deed is otherwise void. And if he assents to the conveyance neither she nor her heirs can disaffirm the deed after his death.⁶² Lord Coke maintains that the assent of the husband does not prevent a disclaimer by the wife after his death.⁶³ The statutes of *mortmain* in England prohibit corporations from taking lands by purchase, unless specially authorized. But these statutes have never prevailed in this country, except in Pennsylvania, and, therefore, corporations are free to purchase lands to any amount, unless specially restrained by their charters,⁶⁴ or by the general laws under which the incorporation was obtained. It is customary, however, to limit the amount of real property which a corporation may hold, and the State may confiscate whatever lands it acquires above the limit. But if the land exceeds the limit in consequence of the rise in value, it will not be subject to forfeiture.⁶⁵ For the grant of an immedi-

⁶¹ 3 Washburn on Real Prop. 267; *Melvin v. Proprs., etc.*, 16 Pick. 167; *Concord Bank v. Bellis*, 10 Cush. 278; *Spencer v. Carr*, 45 N. Y. 410; *Mitchell v. Ryan*, 3 Ohio St. 387; *Rivard v. Walker*, 39 Ill. 413; *Cecil v. Beaver*, 28 Iowa 241.

⁶² Co. Lit. 3 a; *Butler v. Baker*, 3 Rep. 26; *Whelpdale's Case*, 5 Rep. 119; *Melvin v. Proprs., etc.*, 16 Pick. 167; *Foley v. Howard*, 8 Clark 36.

⁶³ Co. Lit. 3 a.

⁶⁴ The acquisition of land by a corporation not specially authorized by its charter to hold land, is not for that reason unlawful. *Schneider v. Sellers* (Texas 1905), 84 S. W. Rep. 417.

⁶⁵ 3 Washburn on Real Prop. 267; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633. In this case the property, when acquired by the corporation, yielded an income of £30, and by the remarkable rise in the

ate estate in possession, it is necessary that the grantee be *in esse*, and if it be shown that the grantee came into being after the conveyance, it will avoid the deed.⁶⁶ But this is not necessary in the grant of remainders and future contingent estates.⁶⁷

§ 562. Proper parties named in the deed.—Not only must there be proper parties, grantor and grantee, but they must be named in the deed. Names are necessary to distinguish the parties, and render certain who are the grantor and grantee. The object, therefore, is attained if any name is used, not necessarily the true name, provided means are provided in the deed for ascertaining the true parties. A man may be described by his office or by his relation to a certain person.⁶⁸ And a mistake in the Christian name or in the value of real estate in the city of New York the income was increased to \$300,000.

⁶⁶ *Miller v. Chittenden*, 2 Iowa 368; *Barr v. Schroeder*, 32 Cal. 610; 1 Wood on Conveyancing, 170, 172; *Perkins*, 53; 3 Washburn on Real Prop. (4 ed.) 266. But see, *Hall v. Wright* (Ky. 1905), 87 S. W. Rep. 1129.

⁶⁷ *Hall v. Leonard*, 1 Pick. 27; *Morris v. Stephens*, 46 Pa. St. 200; *Huss v. Stephens*, 51 Pa. St. 282; 3 Washburn on Real Prop. 266, 267; *Mellichamp v. Mellichamp*, 28 S. C. 125.

⁶⁸ A grant to the heirs of A., A. being dead, is good, for it is possible to ascertain who are the heirs of A. *Hogan v. Page*, 2 Wall. 607; *Ready v. Kearsley*, 14 Mich. 225; *Cook v. Sinnamon*, 47 Ill. 214; *Boone v. Moore*, 14 Mo. 420. A limitation by devise to the heirs of a living person has been held to be a grant to the person and his heirs. *White v. Rukes*, 37 Fed. Rep. 754. In Georgia a grant to heirs of a living person was held to be a grant to his children born and living at the time of the conveyance, and excluding children born subsequently. *Tharp v. Yarborough*, 79 Ga. 382. See, also, *Pivard v. Gisenhof*, 35 Hun 247; *Heath v. Hewitt* (N. Y.), 27 N. E. Rep. 959; *Crisswell v. Grumb-ling*, 107 Pa. St. 408. A grant to A. and his partners has also been held good. *Hoffman v. Porter*, 2 Brock. 156; *Morse v. Carpenter*, 19 Vt. 613. *Contra*, *Arthur v. Weston*, 22 Mo. 378. So likewise to a partnership in the firm name. *New Vienna Bank v. Johnson* (Ohio), 24 N. E. Rep. 503; *Menage v. Burke*, 43 Minn. 211. But see, *contra*, *Ketchum v. Barber* (Cal.), 12 Pac. Rep. 251, where it is held that a conveyance to a firm, in the firm name, for example to Henry Stull & Co., passes

name of a corporation, or the use of different names in different parts of the deed is not fatal, provided the uncertainty arising therefrom is not incurable. If the true party can be ascertained, the deed will be good.⁶⁹ A deed to one under an assumed name would be good, if the real grantee can be ascertained.⁷⁰ But a deed to a fictitious person, or to one by his surname only, without further means of identifying the person intended, would be void for uncertainty.⁷¹ It has, however, been held that where the Christian name is left blank, the grantee, being in possession of the deed, may show by parol evidence that he was the person intended.⁷² The law knows only one Christian name. The omission of the middle name is, therefore, not material; neither is a mistake in calling the party *senior*, when he is the *junior* of the name.⁷³ In the same manner a mistake in the Christian name

title only to the persons whose names appear in the firm name. See, also, generally, *Dr. Ayray's Case*, 11 Rep. 20; *Sir Moyle Finch's Case*, 6 Rep. 65; *Shaw v. Loud*, 12 Mass. 447. A grant to the survivor of two persons named contains a proper designation of the grantee. *McKee v. Marshall* (Ky.), 5 S. W. Rep. 415. "A deed 'to the estate of E., his heirs or assigns,' is not void for want of a grantee, but conveys title to them entitled to take the estate of E." *McKee v. Ellis* (Tex. Civ. App. 1904), 83 S. W. Rep. 880.

⁶⁹ *Boothroyd v. Engles*, 23 Mich. 21; *Middleton v. Findla*, 25 Cal. 80; *Ashville Division v. Aston*, 92 N. C. 578; *Grand Tower, etc., Co. v. Gill*, 111 Ill. 541; *Spinker v. Haagsman*, 99 Mo. 208, 12 S. W. Rep. 659; *McDuffie v. Clark*, 9 N. Y. S. 826; *Galveston, etc., R. R. Co., v. Stealy*, 66 Texas 468, 1 S. W. Rep. 186; *Gould v. Barnes*, 3 Taunt. 505; *Lind v. Hook*, Mod. Cas. cited Cro. Elix. 807 n. a; *James v. Whitbread*, 11 Com. B. 406; *Reeves v. Slater*, 7 Barn. & C. 489; *Williams v. Bryant*, 5 Mees. & W. 454. See *Elliott v. Davis*, 2 Bos. & P. 339.

⁷⁰ *Wilson v. White*, 84 Cal. 239, 24 Pac. Rep. 114.

⁷¹ *Fanshaw's Case*, F. Moore, 229; *Jackson v. Corey*, 8 Johns. 388; *Hornbeck v. Westbrook*, 9 Johns. 74; *Muskingum Turnpike v. Ward*, 13 Ohio 120.

⁷² *Fletcher v. Mansur*, 5 Ind. 269. See *Morse v. Carpenter*, 19 Vt. 615.

⁷³ *Games v. Stiles*, 14 Pet. 322; *Dunn v. Games*, 1 McLean 321; *Franklin v. Tallmadge*, 5 Johns. 84; *Jackson v. Hart*, 12 Johns. 77; *Jackson v. Miner*, 15 Johns. 226; *Jackson v. Cody*, 9 Cowen 140;

may be explained by a reference to the other parts of the deed.⁷⁴ There is the same necessity of naming in the deed the person who is to take the equitable interest under it as to name the grantee of the legal estate.⁷⁵ And if a grant is made to trustees of an unincorporated corporation, the persons named as trustees take individually and not as trustees.⁷⁶ And where there is a person named in the deed as the grantee of the immediate estate, the remainder-man under the deed need not be made a party to the deed, although he must be named or sufficiently described.⁷⁷ Finally, in order that a deed may be valid, there must be a definite deed, an ascertained grantor and grantee, and if there is an incurable uncertainty as to either, arising from the terms of the deed, it will be void.⁷⁸ But if the intent of the grantor can be ascertained, it will be given effect, although it renders nugatory some clause of the deed. It has thus been held that the grantee takes a life estate and her husband the remainder, although in another part of the deed the estate was limited to the wife and her heirs.⁷⁹

§ 563. A thing to be granted.—In order that there may be a conveyance, there must be a thing to be conveyed, and this must be sufficiently described in the deed, so as to be capable
Roosevelt v. Gardiner, 2 Cowen 643; *Cobb v. Lucas*, 15 Pick. 7; *Commonw. v. Perkins*, 1 Pick. 388; *Banks v. Lee*, 73 Ga. 25.

⁷⁴ 3 Washburn on Real Prop. 265.

⁷⁵ *German Assn. v. Scholler*, 10 Minn. 331. See *ante*, Sec. 331, and *post*, Secs. 640, 641.

⁷⁶ *Austin v. Shaw*, 10 Allen 552; *Brown v. Combs*, 29 N. J. L. 36; *Tower v. Hale*, 46 Barb. 361; *Den v. Hay*, 21 N. J. L. 174. See *post*, Secs. 640, 641, in reference to the devises to unincorporated bodies.

⁷⁷ *Hornbeck v. Westbrook*, 9 Johns. 73; *Hunter v. Watson*, 12 Cal. 363.

⁷⁸ *Jackson v. Corey*, 8 Johns. 388; *Hornbeck v. Westbrook*, 9 Johns. 74; *Hardin v. Hardin* (S. C.), 11 S. E. Rep. 102.

⁷⁹ *Bean v. Kenmuir*, 86 Mo. 666; *Bodine's Admr. v. Arthur* (Ky.), 14 S. W. Rep. 904. See, for rule in Missouri, in grant to woman and her heirs, *Miller v. Dum*, 83 S. W. Rep. 436. See also, *Schrecongost v. West* (Pa. 1904), 59 Atl. Rep. 269, 210 Pa. 7.

of easy identification.⁸⁰ It may now be stated as a general rule, subject to a few exceptions to be mentioned hereafter, that every freehold interest in, or issuing out of, lands must and can only be conveyed by deed.⁸¹ And whatever is created by deed, can only be transferred by deed.⁸² Not only must estates in the land itself be conveyed by deed, but incorporeal hereditaments of a freehold character, easements, *profits à prendre*, the mines and other deposits upon the land apart from the soil, all require a deed to be granted.⁸³ It has been a much debated question whether, to pass the title to growing or standing trees, it is necessary that the sale should be made by writing. Some authorities hold, notably the English courts, that if the sale contemplates the immediate removal of the trees, it is not necessary that it should be done by deed or other instrument in writing, since it can and ought to be considered a sale of chattels rather than an interest in the freehold.⁸⁴ On the other hand, the courts of this country

⁸⁰ See *post*, Secs. 590, 605, for a discussion of the usual elements of a description of the land, and for what is a sufficient description.

⁸¹ 3 Washburn on Real Prop. 341. Mr. Washburn, on the page referred to, says that "since the Statute of Frauds (29 Charles II, Ch. 3), a deed has been required, in order to convey a freehold, in, to, or out of any messuages, manors, lands, tenements, or hereditaments." The Statute of Frauds only requires such conveyances to be put in writing, and does not require a deed. When this section (563) was written, the author had entertained the generally prevailing idea that a deed, i. e., an instrument in writing under seal, was necessary to convey all freehold interests in lands, and had not yet written Section 549, in which the contrary position, with qualifications, has been assumed. Inasmuch as a deed is necessary in the conveyance of very many freehold interests—for example, incorporeal hereditaments—the present section has not been altered; but the statements made there and elsewhere must be read in the light of Section 549.

⁸² 3 Washburn on Real Prop. 341.

⁸³ 3 Washburn on Real Prop. 341. See *ante*, Sec. 549. For requisites in grants of mineral, both with and apart from the surface of land, see, White, Mines & Min. Rem., Chap. IV, *et sub*.

⁸⁴ *Smith v. Surman*, 9 B. & C. 561; *Evans v. Roberts*, 5 B. & C. 829; *Marshall v. Green*, 33 L. T. Rep. (N. S.) 404; *Bostwick v. Leach*, 3 Day 476. But in *Rodwell v. Phillips*, 9 Mees. & W. 505, *contra*, the

generally hold that standing trees are "a part of the inheritance, and can only become personalty by actual severance, or by severance in contemplation of law as the effect of a proper instrument in writing."⁸⁵ A sale of standing trees is a twofold contract. It includes a sale of trees when severed from the land, which must necessarily be executory in its character, and a license to go upon the land and remove them. Until a severance has been made, the only vested interest which the vendee has is the license, and it being an interest in land, it is revocable unless granted by a proper instrument of conveyance. Where the license is of a definite duration, it being then a leasehold interest in the land, a deed strictly so-called will not be necessary. But if it is indefinite, it becomes a freehold interest in lands, and requires a deed to grant it.⁸⁶ Standing trees and other things growing upon the land certainly pass with the conveyance of the freehold, unless expressly excepted.⁸⁷ If, therefore, a sale is made of standing trees with a parol license to enter and cut them, it does not prevent the title to the trees from passing to a subsequent court say: "It must be admitted, taking the cases altogether, that no general rule is laid down in any one of them that is not contradicted by some other." See *Ross v. Cook* (Kan. 1905), 80 Pac. Rep. 38.

⁸⁵ *Slocum v. Seymour*, 36 N. J. 139; *Trull v. Fuller*, 28 Me. 548; *Green v. Armstrong*, 1 Denio 550; *Giles v. Simonds*, 15 Gray 441; *Delaney v. Root*, 99 Mass. 548; *Poor v. Oakman*, 104 Mass. 316; *White v. Foster*, 102 Mass. 378; *Buck v. Pickwell*, 27 Vt. 184.

⁸⁶ *Clap v. Draper*, 4 Mass. 266; *Green v. Armstrong*, 1 Denio 554; *Kingsley v. Holbrook*, 45 N. H. 313; *Howe v. Batchelder*, 49 N. H. 208; *Sterling v. Baldwin*, 42 Vt. 308; *Huff v. McCauley*, 58 Pa. St. 210; *Pattison's Appeal*, 61 Pa. St. 297. "While an oral contract to sell standing timber is invalid as a contract, yet it is good as a license, and timber cut before the revocation thereof becomes the property of the licensee." *Antrim Iron Co. v. Anderson* (Mich. 1905), 104 N. W. Rep. 319, 12 Detroit Leg. N. 314.

⁸⁷ *Bracket v. Goddard*, 54 Me. 313; *Noble v. Bosworth*, 19 Pick. 314; *Cook v. Whiting*, 16 Ill. 481. But Chancellor Kent maintains that growing crops do not pass with the grant of the land. 4 Kent's Com. 468; *Smith v. Johnston*, 1 Pa. St. 471. See *Foot v. Colvin*, 3 Johns. 216; *Turner v. Reynolds*, 23 Pa. St. 199; *McIlvaine v. Harris*, 20 Mo. 467. See also, *Brinson & Co. v. Kirkland* (Ga. 1905), 50 S. E. Rep. 369.

grantee; the license by such subsequent conveyance is revoked, and the licensee is left to his remedy against his licensor for the breach of his executory contract.⁸⁸ Some of the courts are also inclined to treat the sale of annual crops as the sale of chattels instead of an interest in lands. This is undoubtedly the correct theory, qualified, however, by the statement that the sale must be evidenced by some writing, in order to give to the vendee any vested interest during the growth of the crop. But since the license is only for a year, or less than a year, any writing will suffice.⁸⁹

§ 564. A thing to be granted — Continued — A mere possibility.— A further qualification of the above stated general rule is, that there cannot be a grant of a mere possibility, unless coupled with a vested interest. It must be a vested present future estate.⁹⁰ But this rule is not now enforced so rigidly as formerly. Thus, the deed of an heir apparent conveying his ancestor's estates has been held to attach in equity to the estate upon the death of the ancestor.⁹¹ Also a grant by a soldier of bounty lands to be thereafterwards given to him by the government.⁹² So, also, can there be a grant of a right of redemption from a mortgage or deed of trust.⁹³ And a further modification is attained by the application of the

⁸⁸ *Whitmarsh v. Walker*, 1 Metc. 313; *Giles v. Simonds*, 15 Gray 441.

⁸⁹ *Crosby v. Wadsworth*, 6 East 602; *Waddington v. Bristow*, 2 B. & P. 452; *Warwick v. Bruce*, 2 M. & S. 205; *Evans v. Roberts*, 5 B. & C. 836; *Stewart v. Doughty*, 9 Johns. 108; *Austin v. Sawyer*, 9 Cow. 40; *Powell v. Rich*, 31 Ill. 469; *Graff v. Fitch*, 58 Ill. 377. See *Ross v. Cook*, 80 Pac. Rep. 38.

⁹⁰ *Fulwood's Case*, 4 Rep. 66; *Dart v. Dart*, 7 Conn. 255; *Baylor v. Commonwealth*, 40 Pa. St. 37; 3 Washburn on Real Prop. 348.

⁹¹ *Stover v. Eycleshimer*, 46 Barb. 84; *Trull v. Eastman*, 3 Metc. 121. But this is true only where the conveyance is a deed with covenant of warranty. *Gardner v. Pace* (Ky.), 11 S. W. Rep. 779. See, also, *ante*, Secs. 511, 512. And see as to a deed not to be delivered until the grantor's death. *Thompson v. Calhoun*, 216 Ill. 161, 74 N. E. Rep. 775.

⁹² *Jackson v. Wright*, 14 Johns. 193.

⁹³ *Lindley v. Crombie*, 31 Minn. 232.

doctrine of estoppel arising on a covenant of title in the deed.⁹⁴

§ 565. *The consideration.*— It is sometimes stated as a general proposition that a consideration, good or valuable, is necessary to be acknowledged or proved, in order to pass the title to real estate. Without qualification and explanation, this is incorrect and misleading. All common-law conveyances, properly so-called, which operate by transmutation of possession, or as grants, such as feoffments, releases, etc., and modern statutory conveyances, where the statute does not provide otherwise, will be effectual to pass the legal estate of any interest in lands, and, except in the case of the grant of a fee by a common-law conveyance, the equitable estate also, without resting upon any consideration whatever.⁹⁵ And where a deed can operate both as a common-law conveyance and as a conveyance under the Statute of Uses, the want of a consideration will not prevent it from passing the legal title as a common-law conveyance.⁹⁶ A common-law conveyance passes the legal title without a consideration, but if the estate granted is a fee simple, since it is presumed under the doctrine of resulting uses, that a man will not part with the beneficial interest in real property without receiving some consideration therefor, the use or equitable interest therein results to the grantor, and the Statute of Uses draws the legal seisin out of the grantee and reverts it in the grantor.⁹⁷ But this is merely a legal presumption, and may be rebutted by other evidence appearing in the deed and showing a contrary intention on the part of the grantor.⁹⁸ For this reason it is

⁹⁴ See *ante*, Secs. 511, 512.

⁹⁵ *Green v. Thomas*, 11 Me. 318; *Laberee v. Carlton*, 53 Me. 212; *Boynton v. Rees*, 8 Pick. 332; *Winans v. Peebles*, 31 Barb. 380; *Taylor v. King*, 6 Munf. 358; *Doe v. Hurd*, 7 Blackf. 510; *Pierson v. Armstrong*, 1 Clark (Iowa) 282; *Jackson v. Dillon*, 2 Overt. 261.

⁹⁶ *Cheney v. Watkins*, 1 Har. & J. 527; *Den v. Hanks*, 5 Ired. 30; *Poe v. Domec*, 48 Mo. 481. See *ante*, Secs. 544, 548.

⁹⁷ See *ante*, Sec. 329.

⁹⁸ See *ante*, Sec. 329.

customary in Massachusetts, and, perhaps, in other States, in the ordinary deed, to grant the premises to the grantee and his heirs, *to his and their use*. The employment of the italicised clause excludes the idea of a resulting use.² Mr. Williams says: "All that was ultimately effected by the Statute of Uses was to import into the rules of law some of the then existing doctrines of the courts of equity, and to add three words, *to the use*, to every conveyance."¹ It is, however, different with conveyances which operate under the Statute of Uses, such as bargain and sale, covenant to stand seised, lease and release. For reasons already explained,² in all three of these conveyances a consideration is necessary, in order to raise in the grantee the use which the statute is to execute. In a bargain and sale, or lease and release, a valuable consideration was necessary, while a good consideration was sufficient to support a covenant to stand seised.³ But the valuable consideration need not be substantial or adequate, in order to pass title as between the parties.⁴ In Missouri it seems doubtful that a valuable consideration must be acknowledged or proved in a bargain and sale.⁵ And in Tennessee it has been held unnecessary under their statute to acknowledge a consideration in any deed.⁶ But if there be a *good* consideration between the parties, although the deed be

²² 2 Washburn on Real Prop. 440; Williams on Real Prop. 188; 2 Sand. on Uses, 64-69.

¹ Williams on Real Prop. 159, 160.

² See *ante*, Secs. 330, 539, 542.

³ *Goodspeed v. Fuller*, 46 Me. 141; *Jackson v. Florence*, 16 Johns. 47; *Okison v. Patterson*, 1 Watts & S. 395; *Boardman v. Dean*, 34 Pa. St. 252; *Cheney v. Watkins*, 1 Harr. & J. 527; *Kinnebrew v. Kinnebrew*, 35 Ala. 636.

⁴ *Diefendorf v. Diefendorf*, 8 N. Y. S. 617. "A conveyance of land in consideration of love and affection is valid between the parties." *McKee v. West* (Ala. 1904), 37 So. Rep. 740.

⁵ *Perry v. Price*, 1 Mo. 553. That is because the same deed may operate as a feoffment, since the delivery and registration of the deed are equivalent to livery of seisin. See also *Poe v. Domec*, 48 Mo. 441.

⁶ *Jackson v. Dillon*, 2 Overt. 281. See also *Fetrow v. Merriweather*, 53 Ill. 278.

in form a bargain and sale, it will be treated as a covenant to stand seised.⁷ And although a consideration is generally necessary to the validity of deeds under the Statute of Uses, it is not necessary that the consideration should actually be passed to the grantor if the receipt of a proper consideration is acknowledged by him in the deed. But it must be acknowledged in the deed, or proved *aliunde* to have actually passed.⁸ The acknowledgment of the consideration is only *prima facie* evidence of the character and amount of the consideration. And if one is expressed, another consideration may be proved, if it be not inconsistent with or contradictory of the one expressed.⁹ But no parol evidence will be admitted to prove that the consideration acknowledged in the deed was never paid, in order to invalidate the deed between the grantor and grantee.¹⁰ The amount acknowledged is presumed to be the true consideration agreed upon; but this is not conclusive. In an action to enforce the payment of the

⁷ See *ante*, Secs. 540, 542, 548.

⁸ *Jackson v. Alexander*, 3 Johns. 434; *Jackson v. Pike*, 9 Cow. 69; *Jackson v. Leek*, 19 Wend. 339; *Den v. Hanks*, 5 Ired. 30; *Toulmin v. Austin*, 5 Stew. & P. 470; *Young v. Ringo*, 1 B. Mon. 30. But see *Boardman v. Dean*, 34 Pa. St. 252. The acknowledgment of a consideration will be sufficient to raise a use only when it is under seal. In order, therefore, that a bargain and sale may create a use and pass the legal title by instrument in writing not under seal, in conformity with the doctrine laid down in Sec. 549, a consideration must actually pass from the grantee to the grantor.

⁹ *Pierce v. Brew*, 43 Vt. 295; *Drury v. Tremont, etc., Co.*, 13 Allen 171; *Miller v. Goodwin*, 8 Gray 542; *Morris Canal v. Ryerson*, 27 N. J. L. 467; *Parker v. Foy*, 43 Miss. 260; *Rabsuhl v. Lack*, 35 Mo. 316; *Harper v. Perry*, 28 Iowa 63. Time of payment of consideration is not usually of such importance as to avoid a deed, in equity. *Cosby v. Honaker* (W. Va. 1905), 50 S. E. Rep. 610. But see, where vendor covenanted to convey land he did not own, *Webb v. Honchon*, 102 N. W. Rep. 1127.

¹⁰ *Trafton v. Hawes*, 102 Mass. 541; *Wilkinson v. Scott*, 17 Mass. 257; *Bassett v. Bassett*, 55 Me. 127; *Rockwell v. Brown*, 54 N. Y. 213; *Murdock v. Gilchrist*, 52 N. Y. 246; *Mendenhall v. Parish*, 8 Jones L. 108; *Lowe v. Weatherley*, 4 Dev. & B. 212; *Lake v. Gray*, 35 Iowa 462; *Coles v. Soulsby*, 21 Cal. 47; *Rhim v. Ellen*, 36 Cal. 362.

consideration a different amount may be established by parol evidence, and the acknowledgment of the receipt of the consideration is no bar to its recovery. The recital of the consideration in a deed is only conclusive as to the fact that there was a consideration to the deed.¹¹

§ 566. **Voluntary and fraudulent conveyances.**— Although a consideration may not be necessary to make a valid conveyance, as between the parties and their privies, the question presents a different phase in respect to the creditors of the grantor. Questions of this kind arise under the statutes 13 Eliz. ch. 5, and 27 Eliz. ch. 4, which have been substantially re-enacted in all the States of this country. The statutes are said to be affirmatory of the common law. Whether this be so is a matter of very little importance. Under the statutes, if a conveyance of lands is made without a substantial valuable consideration, while the grantor is in debt, under certain circumstances at least, existing creditors can avoid the conveyance, and satisfy their demands by proceeding against the land. If the conveyance is to any one except a child or wife, or in other words, where there is not even a good consideration passing between the parties, the conveyance is in any case void as against existing creditors.¹² But in a voluntary conveyance to a wife or child, if at the time of the conveyance sufficient was left in the hands of the grantor to amply secure existing creditors, the conveyance will nevertheless be

¹¹ *Goodspeed v. Fuller*, 46 Me. 141; *Bassett v. Bassett*, 55 Me. 127; *Pierce v. Brew*, 43 Vt. 295; *Miller v. Goodwin*, 8 Gray 542; *Murdock v. Gilchrist*, 52 N. Y. 246; *Grout v. Townsend*, 2 Denio 335; *Morris Canal v. Ryerson*, 27 N. J. L. 467; *Parker v. Foy*, 43 Miss. 260; *Rabshul v. Lack*, 35 Mo. 316; *Rhim v. Ellen*, 36 Cal. 362; *Gaze v. Hoyt*, 58 Vt. 536; *Mills v. Allen (Mills v. Dow's Admr.)*, 133 U. S. 423, 10 S. Ct. 413. See, for inadequate consideration, as a ground for avoidance of deed, *Stevens v. Osburn (Tenn. 1901)*, 1 Tenn. Ch. App. 213.

¹² *Sexton v. Wheaton*, 8 Wheat. 229; *Hinde's Lessee v. Longworth*, 11 Wheat. 199; *Lerow v. Wilmarth*, 9 Allen 386; *Washband v. Washband*, 27 Conn. 424; *Doe v. Hurd*, 7 Blackf. 510; *Mercer v. Mercer*, 29 Iowa 557; *Bullitt v. Taylor*, 34 Miss. 708.

good. But if the grantor is insolvent, then it may be avoided by existing creditors.¹³ Subsequent creditors have no interest in such conveyances, and cannot avoid them unless they have been made with an actual fraudulent intent,¹⁴ and then they may be avoided by subsequent as well as existing creditors.¹⁵ And even where the consideration is valuable, if it is done with a fraudulent intent, and the grantee participates in the fraud, the deed can be avoided by creditors. But if the grantee is an innocent purchaser for value, he acquires a good title free from the claims of the creditors.¹⁶ Voluntary conveyances are those which do not rest upon a valuable consideration. And under the term "valuable consideration" the law includes everything possessing a pecuniary value and likewise a promise to marry, as well as actual marriage. Conveyances possessing any one of these considerations are not voluntary.¹⁷ Although the valuable consideration must be substantial, it need not be adequate in order to make the con-

¹³ *Lerow v. Wilmarth*, 9 Allen 386; *Pomeroy v. Bailey*, 43 N. H. 118; *Van Wyck v. Seward*, 6 Paige 62; *Bridgford v. Riddel*, 55 Ill. 261; *Pratt v. Myers*, 56 Ill. 24; *Stewart v. Rogers*, 25 Iowa 395; *Baldwin v. Tuttle*, 23 Iowa 74.

¹⁴ *Thacher v. Phinney*, 7 Allen 150; *Beal v. Warren*, 2 Gray 447; *Trafton v. Hawes*, 102 Mass. 541; *Lormore v. Campbell*, 60 Barb. 62; *Stone v. Meyers*, 9 Minn. 311.

¹⁵ *Marston v. Marston*, 56 Me. 476; *Parkman v. Welch*, 19 Pick. 231; *Coolidge v. Melvin*, 42 N. H. 521; *Redfield v. Buck*, 35 Conn. 329; *Paulk v. Cooke*, 39 Conn. 566; *Williams v. Davis*, 69 Pa. St. 21; *Pratt v. Myers*, 56 Ill. 24; *Bridgford v. Riddle*, 55 Ill. 261; *Bullitt v. Taylor*, 34 Miss. 740; *Herschefeldt v. George*, 6 Mich. 466. "As to subsequent debts, the creditor who assails a voluntary conveyance must show circumstances justifying the presumption that the intent of the conveyance was fraudulent, before the land conveyed can be subjected to his debt." *Frazer v. Frisbie Furniture Co.* (Ky. 1905), 86 S. W. Rep. 539, 27 Ky. Law Rep. 688.

¹⁶ *Oriental Bank v. Haskins*, 3 Metc. 340; *Somes v. Brewer*, 2 Pick. 184; *Wadsworth v. Williams*, 100 Mass. 131; *Clapp v. Tirrell*, 20 Pick. 247; *Verplanck v. Sterry*, 12 Johns. 552; *Carpenter v. Murin*, 42 Barb. 300; *Wright v. Howell*, 35 Iowa 292.

¹⁷ *Prodgers v. Langham*, 1 Sid. 133; *Smith v. Allen*, 5 Allen 458; *Huston v. Cantril*, 11 Leigh 176; *Rockhill v. Spraggs*, 9 Ind. 32.

veyance good against creditors.¹⁸ It is further necessary, in order that a conveyance may be avoided by creditors, that the thing conveyed must be subject to levy and sale under execution. The conveyance of a homestead without consideration cannot be avoided by creditors for being voluntary.¹⁹

§ 567. *Operative words of conveyance.*—To make a complete and valid conveyance, it is also necessary that the deed should contain what are termed operative words of conveyance, *i. e.*, words which clearly manifest the intent of the grantor to part with his interest or estate in the land. It has been shown more at length in a previous chapter what are the technical operative words usually employed in the different kinds of common-law and statutory conveyances,²⁰ and nothing further in respect to them need be added here. The deed in general use in all the States contains ordinarily the words “give, grant, bargain, and sell,” and this deed may be construed to be a primary or secondary conveyance, a common-law conveyance, or one under the Statute of Uses, according as one or the other construction would best effectuate the intention of the parties.²¹ Not only is this the rule, but it is not even necessary to use the technical operative words in any

¹⁸ Washband *v.* Washband, 27 Conn. 424; Sexton *v.* Wheaton, 8 Wheat. 229; Hinde's Lessee *v.* Longworth, 11 Wheat. 199; Reade *v.* Livingston, 3 Johns. Ch. 500; Bullitt *v.* Taylor, 34 Miss. 708; Mercer *v.* Mercer, 29 Iowa 557; Doe *v.* Hurd, 7 Blackf. 510. “Inadequacy of consideration is generally held to be evidence of fraud, but not necessarily conclusive.” *F. & M. Schaefer Brewing Co. v. Moebis* (Mass. 1905), 73 N. E. Rep. 858, 187 Mass. 571.

¹⁹ Gassett *v.* Grout, 4 Metc. 490; Danforth *v.* Beattie, 43 Vt. 138; Wood *v.* Chambers, 20 Texas 254; 3 Washburn on Real Prop. 334. But see *contra*, Sec. 126, note. A conveyance of the homestead cannot be assailed in most of the States, by a creditor. Gibson *v.* Barrett (Ark. 1905), 87 S. W. Rep. 435; Isbell *v.* Jones (Ark. 1905), 88 S. W. Rep. 593; Glasser *v.* Crittenden (Mich.), 103 N. W. Rep. 601; Reed Bros. *v.* Nicholson (Mo.), 88 S. W. Rep. 71; Matador Co. *v.* Cooper (Texas), 87 S. W. Rep. 235.

²⁰ See *ante*, Ch. XXII, Sec. 3.

²¹ See *ante*, Sec. 548.

kind of conveyance, although it is advisable to do so to remove all doubt as to the validity of the conveyance. Any words, although not recognized as formal or technical words of conveyance, will be sufficient, if they establish clearly the intention to transfer the estate.²² Thus, where the grant was to A. and his heirs, provided if A. died in his minority without issue, then the property was *to go* to the issue of B., the word *go* was held sufficient, in connection with the previous grant, to pass the estate to the issue of B.²³ And the word *alien* has been held sufficient to pass an estate in reversion, where the conveyance would not operate as a bargain and sale, for the want of enrollment.²⁴ On the other hand, a deed, in which the only words of conveyance were "*sign over,*" was held to be invalid.²⁵ So, likewise, the word "*reserve*" was held to be insufficient.²⁶ In like manner, it would not be fatal to the validity of the deed if the operative words are in the past, instead of the present tense, for example, "*has given and granted,*" instead of "*do give and grant,*" but it is the prevailing custom in most parts of this country to use both tenses, viz.: *have given and granted and do hereby give and grant*, although the past tense is mere surplusage.²⁷

§ 568. Execution, what constitutes.—By the execution of a deed is here meant the various formalities required by law

²² *Roe v. Tranmarr*, 2 Wils. 75; *s. c.* Smith's Ld. Cas.; *Ivory v. Burns*, 56 Pa. St. 300; *Spencer v. Robbins*, 106 Ind. 580; *Wilson v. Albert*, 89 Mo. 537, 1 S. W. Rep. 209; *Wilcoxson v. Sprague*, 51 Cal. 640; 1 Wood on Conveyancing, 203; 2 Rolle. Abr. 789, pl. 30. See *Shep. Touch.* 82, 222; *Cornish on Purchase Deeds*, 29; 3 Washburn Real Prop. 379; *Schmitt v. Giovanari*, 43 Cal. 617; *Rowe v. Beckett*, 30 Ind. 154; and see *Folk v. Varn*, 9 Rich. Eq. 303; *Patterson v. Carneal*, 3 Marsh. A. K. 619.

²³ *Folk v. Varn*, 9 Rich. Eq. 303.

²⁴ *Adams v. Steer*, Cro. Jac. 210.

²⁵ *McKinney v. Settles*, 31 Mo. 541; *Webb v. Mullins*, 78 Ala. 111.

²⁶ *Hall v. Hall* (Miss.), 5 So. Rep. 623; *Davis v. McGrew*, 82 Cal. 135 ("Waive and renounce").

²⁷ 3 Washburn on Real Prop. 378; *Pierson v. Armstrong*, 1 Iowa 292.

for the completion of it, which include signing, sealing, attestation and acknowledgment. And, according to a late authority, delivery also.²⁸ A deed may be executed either by the grantor himself, or by an agent duly authorized to act for him.

§ 569. *Power of attorney.*— It requires, however, to enable an agent to execute a deed for his principal, a power of attorney under seal, the rule of agency being that the power must be of the same grade of instrument as that which the agent is to execute.²⁹ This statement must be qualified by the remark that, if it is executed by the agent in the presence of the principal, it is constructively the manual act of the principal, and needs no power of attorney under seal.³⁰ This is not only the rule in regard to ordinary agencies, but it applies also to the general agency of partners in a partnership. Without an express authority granted by a power of attorney under seal, the conveyance by one partner of partnership lands, although in the name of the partnership, will pass only his interest or share in the property. And a subsequent ratification, to be effective, must also be by an instrument under

²⁸ *Colee v. Colee*, 122 Ind. 109, 23 N. E. Rep. 687. See, *Parken v. Safford* (Fla. 1904), 37 So. Rep. 567; *Peters v. Berkemeier* (Mo. 1904), 83 S. W. Rep. 747.

²⁹ *Livingston v. Peru Iron Co.*, 9 Wend. 522; *Hanford v. McNair*, 9 Wend. 54; *Doe v. Blacker*, 27 Ga. 418; *Rhode v. Louthain*, 8 Blackf. 413; *Territory v. Klee* (Wash.), 23 Pac. Rep. 417. See *Skinner v. Dayton*, 19 Johns. 513, 5 Am. Dec. 286; *Cady v. Shepherd*, 11 Pick. 400, 22 Am. Dec. 379; *Hanford v. McNair*, 9 Wend. 54, 19 Am. Dec. 529; *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121; *McNaughten v. Partidge*, 11 Ohio 223, 38 Am. Dec. 731; *Gordon v. Bulkley*, 14 Serg. & R. 331; *Hunter v. Parker*, 7 Mees. & W. 322. See, for acts in excess of power, in sale of land, *Rogers v. Tompkins* (Texas 1905), 87 S. W. Rep. 379.

³⁰ *Ball v. Duntersville*, 4 T. R. 313; *King v. Longnor*, 4 B. & Ad. 647; *McKay v. Bloodgood*, 9 Johns. 285; *Mutual, etc., Ins. Co., v. Brown*, 30 N. J. Eq. 193; *King v. Longnor*, 4 Barn. & Adol. 647; *Lovejoy v. Richardson*, 68 Me. 386; *Lord Lovelace's Case*, *Jones*, W. 268.

seal.³¹ In respect to the manner in which the deed must be executed, when done by an agent, the law is extremely technical. In the execution, the act must appear to be that of the principal, and the deed must show through whom the principal acts. It must be the principal's deed; he must grant and convey the land. If the premises of the deed are in the name of the agent, although he signs the deed as agent, and the deed contains a recital of his authority, it will not be the deed of the principal, and hence inoperative.³² However, such a deed would be evidence of a sale having been made, and would vest in the grantee an implied equitable title, which could be converted into a legal title by an action for specific performance or for reformation of the deed.³³ The proper mode of signing is A. (principal) by B. (agent); and there are some authorities which hold that no other signature will be a good execution. But the rule has of late been somewhat relaxed, so that where the deed purports in terms to be the act of the principal, and the signature is B. (agent) for A. (principal), or B. as the attorney of A., and the like, it will be a valid execution.³⁴ But the deed must be in the name of the principal and it must be sealed with his seal.³⁵ If signed by the agent without affixing the principal's name, it will be a defective execution; and so also, if the principal's

³¹ Parsons on Part. 369; 3 Washburn on Real Prop. 262. In Iowa a parol ratification is held to be sufficient to effectuate the conveyance by one partner. *Haynes v. Seacrest*, 13 Iowa 455. But a ratification must be made with full notice of all the facts. *Quale v. Hazel* (S. D. 1905), 104 N. W. Rep. 215.

³² 3 Washburn on Real Prop. 277; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Squier v. Morris*, 1 Lans. 282; *Townsend v. Smith*, 4 Hill 351; *Martin v. Flowers*, 8 Leigh 158; *Briggs v. Partridge*, 7 J. & Sp. 339.

³³ *Joseph v. Fisher*, 122 Ind. 399.

³⁴ *Wilkes v. Back*, 2 East 142; *Mussey v. Scott*, 7 Cush. 216; *Jones v. Carter*, 4 Hen. & M. 196; *Hunter v. Miller*, 6 B. Mon. 612; *Martin v. Almond*, 25 Mo. 313; *Wilkinson v. Getty*, 13 Iowa 157.

³⁵ *Elwell v. Shaw*, 16 Mass. 42; *Townshend v. Corning*, 23 Wend. 439; *Echols v. Cheney*, 28 Cal. 160; *Morrison v. Bowman*, 29 Cal. 352.

name is signed without mentioning that it was done by attorney.³⁶ But it has been held that a recital in the deed, that it was executed by the grantor by attorney, does away with the necessity of the signature of the agent.³⁷ To be good the principal must also be alive. A common-law power of attorney dies with the principal, and the deed by the attorney after the death of the principal is absolutely void.³⁸ But the reader must here bear in mind the important distinction already explained between powers of attorney, a common-law authority, and powers of appointment, operating under the Statute of Uses and the Statute of Wills. The latter vest upon their creation an irrevocable equitable interest in the donee, which survives the principal, and is executed in the name of the donee. Authors very often speak of *powers coupled with an interest*, as distinguishable from common-law powers of attorney, in respect to the irrevocability of the former. Except as a power of appointment under the Statute of Uses and the Statute of Wills, there is no such power in the common-law of real property as one coupled with an interest.³⁹

§ 570. *Power of attorney granted by married woman.*—It is the settled law in a number of the States that a married woman cannot make a valid power of attorney, authorizing the conveyance of her lands, even though the power is executed jointly with her husband, and acknowledged by her in the manner pointed out by the statute for the acknowledg-

³⁶ *Elwell v. Shaw*, 16 Mass. 42; *Wood v. Goodridge*, 6 Cush. 117; *Thurman v. Cameron*, 24 Wend. 90.

³⁷ *Devinney v. Reynolds*, 1 Watts & S. 328.

³⁸ *Harper v. Little*, 2 Me. 14; *Bergen v. Bennett*, 1 Caines' Cas. 15; *Hunt v. Rousmaniere*, 2 Mason 248; *Wilson v. Troup*, 2 Cow. 236; *Mansfield v. Mansfield*, 6 Conn. 562; *Ferris v. Irving*, 28 Cal. 648; *Frink v. Roe*, 70 Cal. 296. Death does not revoke a power coupled with an interest in the land. *Fisher v. Southern L. & T. Co.* (N. C. 1905), 50 S. E. Rep. 592.

³⁹ See *ante*, Sec. 402. See, also, *Norton v. Whitehead*, 84 Cal. 263; *Fisher v. Southern L. & T. Co.*, 50 S. E. Rep. 592.

ment of her deeds.⁴⁰ And a deed by the husband's attorney, conveying lands of the wife, which is executed and acknowledged by the wife, has also been held invalid.⁴¹ But it is difficult to discover any reason for not permitting her to do by an agent what she is authorized to do herself, provided the formalities required by statute for the execution of deeds by married women have been complied with in the execution of the power of attorney. And such a power has been expressly recognized by statute in some of the States, while in others it seems to be taken for granted that she may execute a valid power of attorney.⁴² It is, however, apparently well settled that a power of attorney executed by a *feme sole* will be revoked by her subsequent marriage.⁴³

§ 571. **Signing.**—At common law it was not necessary for the parties to sign the deed, although under the Saxon laws the deeds were subscribed with the sign of the cross, and were not required to be sealed. After the Norman conquest sealing was invariably required, but signing became unnecessary.⁴⁴

⁴⁰ *Allen v. Hooper*, 50 Me. 373; *Holladay v. Daily*, 19 Wall. 609; *Sumner v. Conant*, 10 Vt. 9; *Earle v. Earle*, 1 Spen. 347; *Kearney v. Macomb*, 16 N. J. Eq. 189; *Lewis v. Cox*, 5 Harr. 401. See *Dawson v. Shirley*, 6 Blackf. 531.

⁴¹ *Toulmin v. Heidelberg*, 32 Miss. 268. There is no presumption of agency by the husband, from the fact of matrimony. *McNemor v. Cohn*, 115 Ill. App. 31.

⁴² *Roarty v. Mitchell*, 7 Gray 243; *Gridley v. Wynant*, 23 How. 503; *Jones v. Robbins*, 74 Texas 615. In *Hardenburg v. Larkin*, 47 N. Y. 113, it was held that the common law did not permit a married woman to execute a deed by attorney; but she is now authorized by statute to do so. In *Dawson v. Shirley*, 6 Blackf. 531, it was held that a married woman could not acknowledge her deed by attorney. "A married woman, her husband joining therein, may make a valid power of attorney to convey her lands." *Linton v. Moorhead* (Pa. 1904), 59 Atl. Rep. 264, 209 Pa. 646.

⁴³ 3 Washburn on Real Prop. 259; 2 Kent's Com. 645; *Judson v. Sierra*, 22 Texas 365.

⁴⁴ 3 Washburn on Real Prop. 270; Co. Lit. 171b; *Van Santwood v. Sandford*, 12 Johns. 198; *Hammond v. Alexander*, 1 Bibb 333; *Taylor v. Morton*, 5 Dana 345; 2 Bla. Com. 309; *Williams on Real Prop.* 152.

It seems that in some of the States to a very late day a deed is recognized as a valid conveyance without being signed by the parties, but in most of them, if not all, signing is absolutely required, and in all it is customary and advisable.⁴⁵ Sometimes the statute requires the deed to be *subscribed*. In that case the parties must write their names at the bottom of the instrument. But, generally, in the absence of such a statute, the signature in any part of the deed would suffice; and, although it is usual for the grantor to write the signature himself, it is not always necessary. To enable an ignorant person to execute a deed one may, at his request, and in his presence, sign his name, and, by affixing a mark to the signature, the grantor adopts the signature as his own, and the deed will be valid.⁴⁶ It is not even necessary that the grantor should affix his mark in order to adopt the signature as his own. If done in his presence, the signature by the authorized agent is theoretically the act of the principal, and the deed is valid, though it is not shown that the grantor has been disabled by any cause from signing himself.⁴⁷ And in one case it was held that where a wife signed her husband's name to a deed in his absence, and he afterwards acknowledged it as his act and deed, and delivered it to the grantee, the subsequent acknowledgment and delivery constituted a ratification, or rather an adoption, of the signature as his own, and that the deed was properly executed.⁴⁸ This case was different from the case where the entire execution of the deed was in-

⁴⁵ *Sicard v. Davis*, 6 Pet. 124; *Clark v. Graham*, Wheat. 519; *Hutchins v. Byrnes*, 9 Gray 367; *Isham v. Benington*, 19 Vt. 232; *Elliott v. Sleeper*, 2 N. H. 529; *McDill v. McDill*, 1 Dall. 64; *Plummer v. Russell*, 2 Bibb 174; *Chiles v. Conley*, 2 Dana 21. In Alabama, a deed is valid, when acknowledged, although not signed. *Lloyd v. Cotes* (1905), 38 So. Rep. 1022.

⁴⁶ *Baker v. Dening*, 8 Ad. & El. 94; *Truman v. Lore*, 14 Ohio St. 154.

⁴⁷ *Ball v. Duntersville*, 4 T. R. 313; *Frost v. Deering*, 21 Me. 156; *Gardner v. Gardner*, 5 Cush. 483; *Wood v. Goodridge*, 6 Cush. 117; *Burns v. Lynde*, 6 Allen 309; *McKay v. Bloodgood*, 9 Johns. 285; *Kime v. Brooks*, 9 Ired. 219; *Videau v. Griffin*, 21 Cal. 392.

⁴⁸ *Bartlett v. Drake*, 100 Mass. 175.

trusted to another. Then, as has been explained in a preceding paragraph, a power of attorney under seal would have been required.

§ 572. **Sealing.**—At common law sealing was an important part of the execution, although, as has been stated, signing was dispensed with.⁴⁹ This circumstance arose, no doubt, from the fact that very few people in the early days of the common law could write and sign their names, and it became customary to identify their solemn deed by attaching their seals, which were peculiar and easily recognized. Although it has now become a mere formality, it is still held to be indispensable in most of the States, possibly in all except California, Colorado, Kentucky, Iowa, Alabama, Kansas, Louisiana, Missouri, and Texas, where by statute seals have been abolished as a requisite of a deed.⁵⁰ The word “deed” means an instrument under seal, and, except in those States where seals are by statute dispensed with, no instrument can be called a deed without being sealed, whatever may be the intention of the parties.⁵¹ But there need be no reference in the attestation clause of the deed to the sealing, if the seal is actually affixed, although it is usual to state that the party has set his hand and seal thereto.⁵² It is not necessary for the party to affix the seal himself. It may be done by any one else, pro-

⁴⁹ 2 Bla Com. 309; 3 Washburn on Real Prop. 270, 271. Sealing is held to be essential, in Florida. *Parken v. Safford* (1904), 37 So. Rep. 567.

⁵⁰ 3 Washburn on Real Prop. 271. See *Shelton v. Armour*, 13 Ala. 647; *Smith v. Dall*, 13 Cal. 510; *Jones v. Crawford*, 1 McMull 373; *Goodlett v. Hensell*, 56 Ala. 346; *Simpson v. Mundee*, 3 Kan. 172; *Courand v. Vollmer*, 31 Texas 397. See also, *Bower v. Chambers*, 53 Miss. 259.

⁵¹ *Warren v. Lynch*, 5 Johns. 239; *Jackson v. Wood*, 12 Johns. 13; *Jackson v. Wendel*, 12 Johns. 355; *Alexander v. Polk*, 39 Miss. 737; *Deming v. Bullitt*, 1 Blackf. 241; *McCabe v. Hunter*, 7 Mo. 355; *Davis v. Judd*, 6 Wis. 85; *Parken v. Safford* (Fla. 1904), 37 So. Rep. 567.

⁵² *State v. Peck*, 53 Me. 299; *Bradford v. Randall*, 5 Pick. 496; *Mill Dam Foundry v. Hovey*, 24 Pick. 417; *Taylor v. Glaser*, 2 Serg. & R. 502.

vided he is authorized to do so, or the unauthorized act is subsequently ratified and adopted by the acknowledgment and delivery of the deed.⁵³ And one seal may be adopted as the seal of all the parties to the deed.⁵⁴ In respect to what will constitute a sufficient sealing the law is not uniform. At common law an impression upon wax or some tenacious substance was required. Lord Coke says: "It is required that the deed, charter, or writing, must be sealed, that is, have some impression upon wax; for *sigillum est cera impressa, quia cera sine impressione non est sigillum*."⁵⁵ In the New England States, and New Jersey, unless changed by recent legislation, the common-law seal is required, although probably in no place would it be necessary to use wax or substance of that character, an impression of a seal upon paper being sufficient. At least such is the opinion of the United States Supreme Court.⁵⁶ But in the majority of the States a simple scroll with "L. S." or the word "seal" written in it, is a sufficient

⁵³ *Koehler v. Black River, etc., Co.*, 2 Black 715; *Elwell v. Shaw*, 16 Mass. 42; Co. Lit. 6 a; 3 Washburn on Real Prop. 272.

⁵⁴ *Bradford v. Randall*, 5 Pick. 496; *Tasker v. Bartlett*, 5 Cush. 309; *Atlantic Dock Co. v. Leavett*, 54 N. Y. 35; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426; *Burnett v. McCluey*, 78 Mo. 676; *Carter v. Chaudron*, 21 Ala. 72; *Mackay v. Bloodgood*, 9 Johns. 285; *Flood v. Yanders*, 1 Blackf. 102; *Bank of Cumberland v. Bugbee*, 19 Me. 27; *Lambden v. Sharp*, 9 Humph. 224. "Under Rev. St. Wis. 1898, Sec. 1176, providing for the execution of tax deeds under the seal of the county, the fact that the seal used bore the words, 'the seal of the county clerk,' did not render the deed invalid." *Laughlin v. Kieper* (Wis. 1905), 103 N. W. Rep. 264.

⁵⁵ 3 Inst. 169. See *Warren v. Lynch*, 5 Johns. 239; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Warren v. Lynch*, 5 Johns. 239; 3 Caines, 362; *Beardsley v. Knight*, 4 Vt. 471; *Tusker v. Bartlett*, 5 Cush. 359, 364; *Bradford v. Randall*, 5 Pick. 496; 4 Kent's Com. 452.

⁵⁶ *Pillow v. Roberts*, 13 How. 473; *Bates v. B. & N. Y. Cent. R. R.*, 10 Allen 254; *Pillow v. Roberts*, 13 How. 473; s. c. 7 Eng. (12 Ark.) 822; *Bradford v. Randall*, 5 Pick. 495; *Bates v. Boston, etc., R. R. Co.*, 10 Allen 251. "Under Laws N. Y. 1896, p. 593, c. 547, which provides that a grant of real estate in fee shall be 'subscribed' by the grantor, such a deed is not required to be sealed." *Fitzpatrick v. Graham* (U. S. C. C. A., N. Y., 1903), 122 Fed. Rep. 401.

sealing.⁵⁷ But it has been held that to make a scroll a good sealing there must be a recital in the deed that the party has affixed his seal.⁵⁸ On the other hand, the recital, without the scroll or some other actual substitute for the common-law seal, would not be a sufficient sealing.⁵⁹

§ 573. **Attestation.**—A further requisite is that the execution be done in the presence of one or more witnesses. At common law this was not necessary,⁶⁰ and is still unnecessary

⁵⁷ The scroll is a good seal in Arkansas, Colorado, Connecticut, Delaware, Florida, Michigan, Wisconsin, Minnesota, Oregon, Missouri, Ohio, Texas, Illinois, Mississippi, Georgia, Indiana, Maryland, North Carolina, Pennsylvania, and South Carolina. 3 Washburn on Real Prop. 274, 275; *United States v. Stephenson*, 1 McLean 462; *Relf v. Gist*, 4 McCord 267; *Cummins v. Woodruff*, 5 Ark. 116; *Comerford v. Cobb*, 2 Fla. 418; *Hastings v. Vaughan*, 5 Cal. 315; *Bradfield v. McCormick*, 3 Blackf. 161; *Scruggs v. Brackin*, 4 Yerg. 528; *Parks v. Hewlett*, 9 Leigh 511; *Carter v. Penn*, 4 Ala. 140; *Trasher v. Everhart*, 3 Gill & J. 234; *Commercial Bank v. Ulmann*, 18 Miss. (10 Smed. & M.) 471; *Underwood v. Dollins*, 47 Mo. 259; *Pratt v. Clemens*, 4 W. Va. 443; *Taylor v. Morton*, 5 Dana 365; *Shortridge v. Catlett*, 1 Marsh. A. K. 587. In *Turner v. Field*, 44 Mo. 382, the Supreme Court of Missouri held that a piece of colored paper, attached to the deed by mucilage, would be sufficient. By special act, in Missouri, the necessity for a seal in all instruments executed by individuals is abolished. Sess. Laws, Mo. 1891.

⁵⁸ *Cromwell v. Tate*, 7 Leigh 301. But see *Ashwell v. Ayers*, 4 Gratt. 283; *Bell v. Keefe*, 13 La. An. 524; *Moore v. Lesseur*, 18 Ala. 606; *Deming v. Bullitt*, 1 Blackf. 241. See *Jenkins v. Hart*, 2 Rand. 446; *contra*, *Lewis v. Overby*, 28 Gratt. 627; *Hudson v. Poindexter*, 42 Miss. 304. But see *Whitley v. Davis*, 1 Swan. 333. See *Wittington v. Clarke*, 16 Miss. (8 Smedes & M.) 480; *Hudson v. Poindexter*, 42 Miss. 304; *Shackleford, C. J., McGuire v. McRann*, 9 Smedes & M. 34; *Whittington et al. v. Clarke*, 8 Smedes & M. 480; *Commercial Bank of Manchester v. Ullmann*, 10 Smedes & M. 411. But a mere scroll is held sufficient, in Wisconsin, although the deed specifies a seal. *Laughlin v. Kieper*, 103 N. W. Rep. 264.

⁵⁹ *Alexander v. Polk*, 39 Miss. 737; *Taylor v. Glaser*, 2 Serg. & R. 502, per Telghman, C. J. See also *Warren v. Lynch*, 5 Johns. 239; *Deming v. Bullitt*, 1 Blackf. 241; *Davis v. Brandon*, 1 How. (Miss.) 154. And see also *McCarley v. Tappah County Supervisors*, 58 Miss. 483, 749.

⁶⁰ 2 Bla. Com. 307; *Dale v. Thurlow*, 12 Mete. 157; *Thatcher v. Phin-*

in some of the States.⁶¹ But generally, in the United States, witnesses are required, the number varying with the statutory regulation of each State. In some only one witness is required, but the usual number is two.⁶² And if the number of witnesses required by law is not obtained, the deed is generally held to be invalid as a legal conveyance, although in New Hampshire, Georgia and Kentucky, the deed without proper attestation is good between the parties,⁶³ and in Vermont and Minnesota, where two witnesses are required, subscription by one witness will enable the deed to be used in equity to support an action for specific performance.⁶⁴ The witnesses are required in making a proper attestation to sign their names to the instrument, and to witness the execution of it by the grantor.⁶⁵ But it is not necessary that it should be executed by the parties in his presence. It is sufficient if the witnesses are requested by the parties to subscribe to the attestation clause, and the signatures on the deed are acknowledged by the parties to be theirs.⁶⁶ Witnesses to deeds are intended merely to attest the execution of the deed, and

ney, 7 Allen 149; *Craig v. Pinson*, Cheves 273; *Meuley v. Zeigler*, 23 Texas 88.

⁶¹ *Dale v. Thurlow*, 12 Mete. 157; *Long v. Ramsey*, 1 Serg. & R. 73; *Wisswall v. Ross*, 4 Port. 321; *Ingram v. Hall*, 1 Hayw. 205.

⁶² *Clark v. Graham*, 6 Wheat. 577; *Kingsley v. Holbrook*, 45 N. H. 320; *Wilkins v. Wells*, 8 Smed. & M. 325; *Shirley v. Fearne*, 33 Miss. 653; *Ross v. Worthington*, 11 Minn. 443. "To render a deed affective in conveying an estate, the signing and sealing in the presence of two subscribing witnesses and its delivery are essential." *Parken v. Saford* (Fla. 1904), 37 So. Rep. 567.

⁶³ *Stone v. Ashley*, 13 N. H. 38; *Hastings v. Cutler*, 24 N. H. 481; *Kingsley v. Holbrook*, 45 N. H. 320; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429. See *contra*, *Crane v. Reeder*, 21 Mich. 24; *Marable v. Mayer*, 78 Ga. 60; *Loyd v. Oates* (Ala. 1905), 38 So. Rep. 1022.

⁶⁴ *Day v. Adams*, 42 Vt. 520; *Ross v. Worthington*, 11 Minn. 438.

⁶⁵ *Janes v. Penny*, 76 Ga. 796.

⁶⁶ *Parke v. Mears*, 2 B. & P. 217; *Jackson v. Phillips*, 9 Cow. 113; *Jones v. Robbins*, 74 Texas 615; *Poole v. Jackson*, 66 Texas 380. "Where a husband and wife acknowledge their signatures to a conveyance, it is valid, though neither actually signed their names." *Loyd v. Oates* (Ala. 1905), 38 So. Rep. 1022.

cannot, like witnesses to wills, express opinions upon the mental capacity of the parties to the deed.⁶⁷ Mr. Washburn cites Mr. Barrington to the effect that anciently the witnesses were a necessary part of the jury which was to try the validity of the instrument, and a statute then dispensed with the necessity of their presence, when after being duly summoned, they fail to appear.⁶⁸

§ 574. **Acknowledgment or probate.**—As a general rule, it is not required, to make the deed valid, that a certificate of acknowledgment or probate be attached to it.⁶⁹ But in Ohio the certificate is necessary to pass the title, and in New York and Texas an unacknowledged deed is not good against subsequent purchasers and incumbrancers.⁷⁰ And perhaps in all the States the acknowledgment by a married woman is absolutely required, and must conform strictly to the requirements of the statute, in order to bind her.⁷¹ But in all the States, except Colorado and Illinois, in order that a deed may be recorded, and the record furnish constructive notice to subsequent purchasers, it must be acknowledged and proved before some officer authorized to take such acknowledgments,

⁶⁷ *Dean v. Fuller*, 40 Pa. St. 474.

⁶⁸ 3 Washburn on Real Prop. 277, citing *Barring. St.* (4 ed.) 175.

⁶⁹ *Gibbs v. Swift*, 12 Cush. 393; *Blain v. Stewart*, 2 Iowa 383; *Lake v. Gray*, 30 Iowa 415; *s. c.* 35 Iowa 459; *Doe v. Naylor*, 2 Blackf. 32. But see *Gaskins v. Allen* (Md. 1905), 49 S. E. Rep. 919.

⁷⁰ *Smith v. Hunt*, 13 Ohio 260; *Genter v. Morrison*, 31 Barb. 155; *Raggen v. Avery*, 63 Barb. 65; *Morse v. Salisbury*, 48 N. Y. 636; *Meuley v. Zeigler*, 23 Texas 93. See *Kimmarle v. Houston, etc., R. R. Co.*, 76 Texas 686, 12 S. W. Rep. 698; *Trustees Catholic Church v. Manning* (Md.), 19 Atl. Rep. 599. As to necessity for acknowledgment of corporate land in South Dakota, see, *State v. Coughran*, 103 N. W. Rep. 31. And for necessity of acknowledgment of deed of individual, in Tennessee, see, *Robertson v. Newman* (Tenn. 1902), 2 Tenn. Ch. App. 181.

⁷¹ See *Bruce v. Perry*, 11 Rich. 121; *McBride v. Wilkinson*, 29 Ala. 662; *Corey v. Moore* (Va.), 11 S. E. Rep. 114; *Lineberger v. Tidwell*, 104 N. C. 506, 10 S. E. Rep. 758; *Coffey v. Hendricks*, 66 Texas 676, 2 S. W. Rep. 47; *Witt v. Harlan*, 66 Texas 660, 2 S. W. Rep. 41. See, also, *Johnson v. Callaway* (Texas 1905), 87 S. W. Rep. 178.

and the certificate of acknowledgment must be indorsed on the deed.⁷² And where the recording law, in express terms, requires the "execution" of a deed to be acknowledged or proved, the acknowledgment or probate must include proof of delivery as well as of signing and sealing.⁷³ It must also be signed by the party who is proving the execution of the deed. An unsigned acknowledgment is ineffectual.⁷⁴ But the deed need not be signed by grantor in presence of the officer.⁷⁵ An alteration in the deed enlarging its scope, when made after the execution of an acknowledgment, necessitates the taking of a new acknowledgment. It is different where the alteration restricts the prior scope of the deed.⁷⁶

In some of the States the acknowledgment is required to be made by the grantor, while in others the deed is probated by the oath of one of the witnesses. But only one form of probate is required in any particular deed, in those States in which both are permitted.⁷⁷ If the grantor and attesting witnesses die before acknowledgment and probate of the deed, it may be probated by proof of genuineness of the signature of one of the attesting witnesses or of the grantor.⁷⁸ And if the attesting witness is alive but cannot testify to the due execution of the deed, it may be probated by any one who saw its execution.⁷⁹

The taking of the acknowledgment is a ministerial and not

⁷² 3 Washburn on Real Prop. 314; *Simpson v. Mundee*, 3 Kan. 181; *Carpenter v. Dexter*, 8 Wall. 582; *Woolfolk v. Graniteville Mfg. Co.*, 22 S. C. 332; *New England, etc., Co. v. Ober*, 84 Ga. 294; *Fisher v. Cowles*, 41 Kan. 418; *Cox v. Wayt*, 26 W. Va. 807; *Shelton v. Aultman, etc., Co.*, 82 Ala. 315.

⁷³ *Edwards v. Thom*, 25 Fla. 222.

⁷⁴ *Carlisle v. Carlisle*, 78 Ala. 542; *Clark v. Wilson*, 27 Ill. App. 610; *s. c.* 127 Ill. 449, 19 N. E. Rep. 860.

⁷⁵ *Brown v. Swift (Ky.)*, 1 S. W. Rep. 474.

⁷⁶ *Webb v. Mullins*, 78 Ala. 111. See *Gaskins v. Allen* (N. C. 1905), 49 S. E. Rep. 919.

⁷⁷ *Simmons v. Havens*, 101 N. Y. 427.

⁷⁸ *Davis v. Higgins*, 91 N. C. 382; *Howell v. Ray*, 92 N. C. 510.

⁷⁹ *Jones v. Hough*, 77 Ala. 437.

a judicial act. It is, therefore, no objection to the acknowledgment that it was taken by an officer related to the parties, although if he is interested in the conveyance the certificate will be valueless.⁸⁰ And where the officer is only authorized to perform his special duties within certain limits of territory, an acknowledgment taken by him without these limits, would, of course, be void.⁸¹ So, also, where the officer's commission had expired by limitation, when he took the acknowledgment or probate.⁸² But the authority of a notary *de facto* cannot be questioned in a collateral proceeding.⁸³ A proper certificate should show that all the requirements of the statute were substantially complied with.⁸⁴ But if the certificate of acknowledgment is erroneously prepared it may be corrected and made to conform to the facts by the officer

⁸⁰ *Beaman v. Whitney*, 20 Me. 413; *Withers v. Baird*, 7 Watts 227; *Stevens v. Hampton*, 46 Mo. 408; *Dekeman v. Arnold* (Mich.), 44 N. W. Rep. 407; *Bowden v. Parrish* (Va.), 9 S. E. Rep. 616. But see *Stevenson v. Brasher* (Ky. 1890), 13 S. W. Rep. 175; *Corey v. Moore* (Va.), 11 S. E. Rep. 114. In one of the Western States a deed was presented for registration, in which the acknowledgment of a married woman, as grantor, was taken by her husband as notary public, and he certified that she was examined *separate and apart from her husband*. It is needless to remark that the deed was not a valid conveyance. "A deed of trust acknowledged before the grantee named therein as notary public is void." *Lance v. Tainter* (N. C. 1904), 49 S. E. Rep. 211.

⁸¹ *Lynch v. Livingston*, 8 Barb. 463; *s. c.* 6 N. Y. 422; *Thurman v. Cameron*, 24 Wend. 91; *Mut. Life Ins. Co. v. Corey*, 54 Hun 493, 7 N. Y. S. 939. *Contra*, *Odiorne v. Mason*, 9 N. H. 30. But in Massachusetts a magistrate for one county may take acknowledgments in another county. *Learned v. Riley*, 14 Allen, 109. "In Michigan, under the statute, a notary public of one county may take acknowledgments in another." *Lamb v. Lamb* (Mich. 1905), 102 N. W. Rep. 645, 11 Detroit Leg. N. 805.

⁸² *Quimby v. Boyd*, 8 Col. 194.

⁸³ *Bullene v. Garrison*, 1 Wash. 587.

⁸⁴ *Chandler v. Spear*, 22 Vt. 388; *Wood v. Cochrane*, 39 Vt. 544; *Tully v. Davis*, 30 Ill. 108; *Jacoway v. Gault*, 20 Ark. 190; *Huff v. Webb*, 64 Texas 284; *Butler v. Brown*, 77 Texas 342, 14 S. W. 136; *Owen v. Baker* (Mo.), 14 S. W. Rep. 175.

who took the acknowledgment.⁸⁵ In some of the States the certificate is not conclusive evidence of the facts stated therein, but it contains *prima facie* evidence of its own genuineness, as well as of the facts therein stated.⁸⁶ And, no doubt, in all of the States, as between the parties, the certificate may be impeached for fraud.⁸⁷ But in other States the certificate is conclusive against subsequent purchasers as to the facts stated therein.⁸⁸ It must be observed that the acknowledgment or probate is intended to evidence the due execution of the deed, and not to supply any of its deficiencies. If the deed is in itself inoperative, on account of some serious deficiency, it cannot be cured by any statements or admissions in the certificate.⁸⁹

§ 575. *Reading of the deed, when necessary.*—Although the reading of the deed to the grantor and grantee can hardly be

⁸⁵ *Ralston v. Moore*, 83 Ky. 571. See *Wilson v. Braden* (W. Va.), 49 S. E. Rep. 409.

⁸⁶ *Jackson v. Schoonmaker*, 4 Johns. 161; *Jackson v. Hoyner*, 12 Johns. 472; *Hall v. Patterson*, 51 Pa. St. 289; *Landers v. Bolton*, 26 Cal. 406; *Harrison v. Oakman*, 56 Mich. 390; *Farrior v. New England, etc., Co.*, 88 Ala. 275; *O'Neil v. Webster*, 150 Mass. 572, 23 N. E. Rep. 235.

⁸⁷ *Eyster v. Hathaway*, 50 Ill. 522; *Williams v. Baker*, 71 Pa. St. 482; *Graham v. Anderson*, 42 Ill. 514; *Bissett v. Bissett*, 1 Har. & McH. 211; *Razor v. Dowan* (Ky.), 3 S. W. Rep. 914.

⁸⁸ *Bissett v. Bissett*, 1 Har. & McH. 211; *McNeely v. Rucker*, 6 Blackf. 391; *Hester v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 461; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204. And this is true, also, in respect to the certificate of acknowledgment by a married woman. *White v. Graves*, 107 Mass. 325, 9 Am. Rep. 38; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Singer Mfg. Co. v. Rook*, 84 Pa. St. 442, 24 Am. Rep. 204; *Johnstone v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699. And where the certificate in a married woman's deed is defective, it cannot be subsequently amended, unless the defect or mistake relates to an unimportant fact. *Angier v. Schieffelin*, 72 Pa. St. 106, 13 Am. Rep. 659; *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128. But see, *Masterson v. Harris* (Texas 1904), 83 S. W. Rep. 428; *Johnson v. Callaway* (Texas 1905), 87 S. W. Rep. 178.

⁸⁹ *White v. Connelly*, 105 N. C. 65; *Turner v. Connelly*, 105 N. C. 72.

called a requisite of the deed, yet if the party is unable to read, and requests the deed to be read to him, a failure to comply with his request, or a false reading or statement of its contents, would vitiate the deed.⁹⁰ The same rule applies to those who cannot read the language in which the deed is written.⁹¹ But he must make the request. If he does not, he comes under the general rule that a grantor is presumed to know the contents of the deed, and cannot avoid it on the plea of ignorance of its contents, unless the circumstances of the transaction are sufficient to sustain the charge of fraud, accident or mistake.⁹²

§ 576. Delivery and acceptance.— After the deed has been signed, sealed and acknowledged, the next requisite is its delivery by the grantor and its acceptance by the grantee. These acts are as essential to the validity of a deed as signing or sealing.⁹³ As long as it remains in the possession of

⁹⁰ *Manser's Case*, 2 Rep. 3; *Henry Pigot's Case*, 11 Rep. 27 b; *Souverye v. Arden*, 1 Johns. Ch. 252; *Jackson v. Hayner*, 12 Johns. 460; *Withington v. Warren*, 10 Metc. 434; *Shofer v. Bonander* (Mich.), 45 N. W. Rep. 487; *Suffern v. Butler*, 18 N. J. Eq. (3 Green, C. E.) 220; *Thoroughgood's Case*, 2 Co. 9, a. b.; *Hallenbeck v. DeWitt*, 2 Johns. 404. See *Withington v. Warren*, 10 Met. 434; *Rex v. Longnor*, 1 Nev. & M. 576; *Rossetter v. Simmons*, 6 Serg. & R. 452; *Lyons v. Van Riper*, 26 N. J. Eq. (11 C. E. Green) 337; *Morrison v. Morrison*, 26 Gratt. 190.

⁹¹ *School Committee of Prov., etc., v. Kesler*, 67 N. C. 443; *Jackson v. Cory*, 12 Johns. 427.

⁹² *Hartshorn v. Day*, 19 How. 223; *Truman v. Lore*, 14 Ohio St. 155; *School Committee of Prov., etc., v. Kesler*, 67 N. C. 443; *Jackson v. Cory*, 12 Johns. 427; *Rogers v. Place*, 29 Ind. 577; *Russell v. Branham*, 8 Blackf. 277. See, *Stevens v. Ozburn* (Tenn. 1901), 1 Tenn. Ch. App. 213; *Cor. Mem. Ch. Lat. Day Saints v. Watson* (Utah 1902), 69 Pac. Rep. 531. "It is not necessary that a person about to execute a deed should have the ability to understand the legal effect of the words employed, if the effect of the instrument as a conveyance of property is understood." *Moorhead v. Scovel* (Pa. 1904), 60 Atl. Rep. 13.

⁹³ *Goddard's Case*, 2 Rep. 4 b; *Younge v. Gilbeau*, 3 Wall. 641; *Church v. Gilman*, 15 Wend. 656; *Fisher v. Hall*, 41 N. Y. 421; *Johnson v. Farley*, 45 N. H. 510; *Overman v. Kerr*, 17 Iowa 486; *Fisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546; 1 Dev. 222, n. 1.

the grantor, and even where the deed has been stolen, and the property passes into the hands of an innocent purchaser, or where the deed falls into the possession of the grantee in any other way than by the consent of the grantor and *with the intention to pass the title*, the title is still in the grantor, and no one can acquire title from the grantee.⁹⁴ But if it is once delivered, no subsequent act of the grantor can impair the validity of the conveyance. The title is in the grantee, and it cannot be recovered from him except in one of the legal and formal ways recognized by the law for acquiring property.⁹⁵ And though the delivery was made by the grantor through the fraudulent misrepresentations of the grantee, or through some mistake of fact or law, if the delivery was an intentional act, it passes the title, and can only be divested by an equitable proceeding. If the property is in the meantime conveyed to an innocent purchaser, he acquires an indefeasible title.⁹⁶ The title also passes, notwith-

⁹⁴ *Thoroughgood's Case*, 9 Rep. 136; *Chamberlain v. Staunton*, 1 Leon. 140; *Mills v. Gore*, 20 Pick. 28; *Black v. Lamb*, 12 N. J. Eq. 108; *Fisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546; *Dwinell v. Bliss*, 58 Vt. 353; *Mitchell v. Shortt*, 113 Ill. 251; *Miller v. Murfield* (Iowa), 44 N. W. Rep. 540; *McElroy v. Hiner* (Ill.), 24 N. E. Rep. 435; *Martling v. Martling* (N. J.), 20 Atl. Rep. 41; *Cline v. Jones*, 111 Ill. 563; *Anderson v. Anderson* (Ind.), 24 N. E. Rep. 1036; *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. Rep. 357; 4 Kent. Com. 459; 5 Greenl. Cruise, Tit. Deed 45, 46, 3 Am. Dec. 415; 1 Story's Eq. Juris., Secs. 75, 76; *Hoag v. Owen*, 60 Barb. 34; *Fisher v. Hall*, 41 N. Y. 416; *Crosby v. Hillyer*, 24 Wend. 280; *Fonda v. Sage*, 48 N. Y. 173; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543; *Sutton v. Gibson* (Ky. 1904), 84 S. W. Rep. 335; *Houston L. & T. Co. v. Hubbard* (Tex. 1904), 85 S. W. Rep. 474; *Gardiner v. Gardiner* (Mich. 1903), 95 N. W. Rep. 973; *Parken v. Safford* (Fla. 1904), 37 So. Rep. 567; *Joslin v. Goddard* (Mass. 1905), 72 N. E. Rep. 948; *Peters v. Bernheimer* (Mo. 1904), 83 S. W. Rep. 747; *Powers v. Rude* (Okla. 1904), 79 Pac. Rep. 89.

⁹⁵ *Shelton's Case*, Cro. Eliz. 7; *Souverbye v. Arden*, 1 Johns. Ch. 255; *Connelly v. Doe*, 8 Blackf. 320; *Hyne v. Osborn*, 62 Mich. 235, 28 N. W. Rep. 821; *Denver & S. F. R. R. Co. v. School Dist.* (Colo.), 23 Pac. Rep. 978.

⁹⁶ *Berry v. Anderson*, 22 Ind. 41.

standing both parties believed that the title will not pass by delivery of the deed.⁹⁷ To make a good delivery, the deed must be executed completely.⁹⁸ A delivery before its completion is of no effect. But, except in the case of a married woman's deed, a delivery before the acknowledgment of probate will be good, particularly in those States where the acknowledgment is not a requisite to the validity of the deed; although it seems that a delivery will not be presumed to have been made before the date of acknowledgment.⁹⁹ Usually the deed contains the date of its execution and delivery, and although a date is not necessary to the validity of the deed,¹ if it contains a date, the deed will be presumed to have been executed and delivered on that date.² But the deed only takes effect from the actual time of delivery, and the actual date of delivery will always control the date mentioned in the deed.³ It has, however, been held that the delivery will be presumed from the date of acknowledgment.⁴ The deed must

⁹⁷ *Henchliffe v. Hinman*, 18 Wis. 138.

⁹⁸ *Burns v. Lynde*, 6 Allen 305; *McKee v. Hicks*, 2 Dev. 379.

⁹⁹ *People v. Snyder*, 41 N. Y. 402; *Blanchard v. Tyler*, 12 Mich. 339. See *Fischen v. U. T. Co.* (Mich. 1904), 101 N. W. Rep. 852.

¹ *Goddard's Case*, 2 Rep. 4 b; *Jackson v. Schoonmaker*, 2 Johns. 234; *Genter v. Morrison*, 31 Barb. 155; *Banning v. Edes*, 6 Minn. 402.

² *Kent, C. J.*, in *Jackson v. Schoonmaker*, 2 Johns. 230, 231; *Meech v. Fowler*, 14 Ark. 29; *Lyerly v. Wheeler*, 12 Ired. 290, 53 Am. Dec. 414; *Newlin v. Osborne*, 4 Jones (N. C.) 157, 67 Am. Dec. 269; *Costigan v. Gould*, 5 Denio 290; *Ellsworth v. Central R. R. Co.*, 34 N. J. L. 93; *Sweetser v. Lowell*, 33 Me. 446; *Treadwell v. Reynolds*, 47 Cal. 171; *Raines v. Walker*, 77 Va. 92; *Harman v. Oberdorfer*, 33 Gratt. 497; *Ellsworth v. Central R. R. Co.*, 34 N. J. L. 93; 3 Washburn on Real Prop. 286; *Faulkner v. Adams*, 126 Ind. 459. "A deed is presumed to have been delivered on the day of its date." *McBayer v. Walker* (Ga. 1905), 50 S. E. Rep. 95. Delivery is a question of fact. *Chastek v. Souba* (Minn. 1904), 101 N. W. Rep. 618.

³ *Xenos v. Wickham*, 14 C. B. (N. S.) 469; *Mitchell v. Bartlett*, 51 N. Y. 453; *Smith v. Porter*, 10 Gray 67; *Lyon v. McIlvain*, 24 Iowa 15; *Walker v. Rand*, 22 N. E. Rep. 1006 (Ill.). Mr. Justice Breese in *Blake v. Fash*, 44 Ill. 302; *Sweetser v. Lowell*, 33 Me. 446.

⁴ *Fontaine v. Boatmen's Savings Institution*, 57 Mo. 552, 561; *County of Henry v. Bradshaw*, 20 Iowa 355; *Loomis v. Pingree*, 43 Maine 299,

also be delivered during the life-time of the grantor. A delivery after his death will have no effect.⁵ But there may be an acceptance by the grantee after the grantor's death.⁶ Acceptance by the grantee is equally essential with delivery by the grantor. And where no proof of acceptance is offered, and the facts do not justify the legal presumption of acceptance, no title passes.⁷ Until acceptance by the grantee, the title is subject to the claims of creditors who have levied upon the property after a tender of delivery.⁸ So, also, if the grantor tenders the deed and the grantee declines to accept, the title remains unaffected in the grantor.⁹ But the acceptance may precede the complete execution of the deed.¹⁰ If there are several grantees in a deed, the deed may be delivered to them individually on separate days. But the grantor may by express declaration make the delivery to one

308. "Where deeds are duly signed, acknowledged, and recorded, it is presumed that they were properly delivered." *Webb v. Webb* (Iowa 1905), 104 N. W. Rep. 438.

⁵ *Shoenberger v. Zook*, 34 Pa. St. 24; *Jackson v. Leek*, 12 Wend. 107; *Jackson v. Phipps*, 12 Johns. 421; *Woodbury v. Fisher*, 20 Ind. 388; *Weisinger v. Cocke* (Miss.), 7 So. Rep. 495; *Peters v. Bernheimer* (Mo. 1904), 83 S. W. Rep. 747.

⁶ See *post*, Sec. 578. "A grantor who delivers a deed to a third party, to be delivered to the grantee upon the grantor's death, cannot change his purpose and revoke the conveyance." *Tompkins v. Thompson* (N. Y. Sup. 1905), 93 N. Y. S. 1070. "The delivery of a deed in escrow, to be delivered to the grantee on the grantor's death, immediately vests the title in the grantee, qualified only by the life estate of the grantor." *Wilhoit v. Salmon* (Cal. 1905), 80 Pac. Rep. 705.

⁷ *Rogers v. Cary*, 47 Mo. 232; *Younge v. Guilbeau*, 3 Wall. 636; *Jackson v. Phipps*, 12 Johns. 421; *Wilsey v. Dennis*, 44 Barb. 359; *Fonda v. Sage*, 46 Barb. 123; *Hatch v. Bates*, 54 Me. 140; *Baker v. Haskell*, 47 N. H. 479; *Kingsbury v. Burnside*, 58 Ill. 310. "The acceptance of a conveyance which is for the benefit of the grantees will be presumed." *Whitaker v. Whitaker* (Mo. 1903), 74 S. W. Rep. 1029.

⁸ *Parmelee v. Simpson*, 5 Wall. 86; *Derry Bank v. Webster*, 44 N. H. 268; *Johnson v. Farley*, 45 N. H. 509; *Hibberd v. Smith*, 67 Cal. 547.

⁹ *Tompkins v. Wheeler*, 16 Pet. 119; *Derry Bank v. Webster*, 44 N. H. 268; *Johnson v. Farley*, 45 N. H. 509; *Xenos v. Wickham*, 14 C. B. (N. S.) 474; *Welsh v. Sackett*, 12 Wis. 243.

¹⁰ *Dikeman v. Arnold* (Mich.), 44 N. W. Rep. 407.

answer as a delivery to all, and in that case, the acceptance by one is presumed to be a sufficient acceptance for all.¹¹ And where the deed conveys conditional limitations and remainders, the delivery to the tenant of the particular estate always constitutes a delivery to the tenants of the future or expectant estate.¹²

§ 577. **What constitutes a sufficient delivery.**—If the deed is found in the possession of the grantee, a delivery and acceptance are presumed.¹³ But, like other legal presumptions, it is liable to be rebutted by proof that the possession of it was obtained without the intention of the grantor to make a delivery, or without his consent, and parol evidence is admissible to establish this fact.¹⁴ In determining what will constitute a sufficient delivery, it is found that the intention is the controlling element.¹⁵ No particular formality need

¹¹ *Hannah v. Swarner*, 8 Watts 9; *Tewksbury v. O'Connell*, 20 Cal. 69; *Shelden v. Erskine* (Mich.), 44 N. W. Rep. 146.

¹² *Phelps v. Phelps*, 17 Md. 134; *Folk v. Varn*, 9 Rich. Eq. 303. "Delivery to the life tenant alone of a deed conveying a life estate, with remainder to others, is sufficient." *Chapin v. Nott* (Ill. 1903), 67 N. E. Rep. 833, 203 Ill. 341.

¹³ *Ward v. Lewis*, 4 Pick. 518; *Ward v. Ross*, 1 Stew. (Ala.) 136; *Butrick v. Tilton*, 141 Mass. 93; *Simmons v. Simmons*, 78 Ga. 365; *Sturtevant v. Sturtevant*, 116 Ill. 340; *Brown v. Danforth*, 9 N. Y. S. 19; *Strough v. Wilder*, 119 N. Y. 530, 23 N. E. Rep. 1057; *Faulkner v. Adams*, 126 Ind. 459. "In the absence of testimony that there was no delivery, the law will presume a delivery from possession of the deed by the grantee." *Wilbur v. Grover* (Mich. 1905), 103 N. W. Rep. 583, 12 Detroit Leg. N. 99. "In case of a voluntary settlement, the law presumes much more in favor of the delivery of the deed, whereby the settlement is created, than it does in ordinary cases of deeds of bargain and sale." *Baker v. Hall* (Ill. 1905), 73 N. E. Rep. 351, 214 Ill. 364.

¹⁴ *Johnson v. Baker*, 4 B. & Ald. 440; *Adams v. Frye*, 3 Metc. 109; *Ford v. James*, 2 Abb. Pr. 162; *Black v. Shreve*, 13 N. J. 457; *Little v. Gibson*, 39 N. H. 505; *Williams v. Sullivan*, 10 Rich. Eq. 217; *Morris v. Henderson*, 37 Miss. 501; *Wolverton v. Collins*, 34 Iowa 238; *Major v. Todd*, 84 Mich. 85.

¹⁵ *Jordan v. Davis*, 108 Ill. 336; *Warren v. Swett*, 31 N. H. 332; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Thompson v. Hammond*, 1 Edw. Ch. 497; *Dukes v. Spangler*, 9 Cent. L. J. 398; *Burkholder v. Casad*, 47

be observed, and the intention to deliver the deed may be manifested by acts, or by words, or by both. But one or the other must be present to make a good delivery. The grantor may direct the grantee to take the deed lying upon the table, and if the latter does so, the delivery is complete. So also if the deed is thrown down upon the table by the grantor, with the intention that the grantee should take it, although nothing should be said, it will be a good delivery.¹⁶ But the intention may be manifested by still more informal proceedings. The deed need not be actually delivered if the grantor intends the execution to have the effect of a delivery, and the parties act upon the presumption.¹⁷ Thus leaving the deed to be recorded, if done with the knowledge of the grantee, and more particularly when this is done with the evident or expressed intention that the title shall pass to the grantee, will ordinarily be held a good delivery.¹⁸ But the intention that

Ind. 418; *Hastings v. Vaughn*, 5 Cal. 315. And see *Harris v. Harris*, 59 Cal. 620.

¹⁶ *Souveryby v. Arden*, 1 Johns. Ch. 253; *Scrugham v. Wood*, 15 Wend. 545; *Pennsylvania Co. v. Dovey*, 67 Pa. St. 260; *Ray v. Hallenbeck*, 42 Fed. Rep. 381; *Hubbard v. Cox*, 76 Texas 239, 13 S. W. Rep. 170; *Beiser v. Beiser*, 8 N. Y. S. 55; *Messelback v. Norman*, 46 Hun 414; *Walker v. Walker*, 42 Ill. 311; *Cannon v. Cannon*, 26 N. J. Eq. (11 Green, C. E.) 316; *Whittaker v. Miller*, 83 Ill. 381; *Wood on Conveyancing*, 193; 3 Washburn on Real Prop. 286; *O'Neal v. Brown*, 67 Ga. 707; *Snow v. Orleans*, 126 Mass. 453; *Jones v. Loveless*, 99 Ind. 327; *Davis v. Cross*, 14 La. (Tenn.) 637, 52 Am. Rep. 177; *Brown v. Brown*, 66 Me. 316, 320; *Turner v. Whidden*, 22 Me. 121; *Shep. Touch.* 57, 58; *Chess v. Chess*, 21 Am. Dec. 350; *Hughes v. Easten*, 4 Marsh. J. J. 572, 20 Am. Dec. 230; *Warren v. Sweet*, 31 N. H. (11 Frost.) 332; *Eastman, J.* (p. 340). "To constitute delivery of a deed, it is not imperatively necessary that there be an actual manual delivery of the instrument." *Chastek v. Souba* (Minn. 1904), 101 N. W. Rep. 618.

¹⁷ *Walker v. Walker*, 42 Ill. 311; *Rogers v. Carey*, 47 Mo. 235.

¹⁸ *Parmelee v. Simpson*, 5 Wall. 86; *Elmore v. Marks*, 39 Vt. 538; *Pennsylvania Co. v. Dovey*, 64 Pa. St. 260; *Jackson v. Phipps*, 12 Johns. 418; *Stillwell v. Hubbard*, 20 Wend. 44; *Mills v. Gore*, 20 Pick. 28; *Hawks v. Pike*, 105 Mass. 560; *Hatch v. Bates*, 54 Me. 139; *Cusack v. Tweedy*, 56 Hun 617; *Greene v. Conant* (Mass.), 24 N. E. Rep. 44; *Geissmann v. Wolf*, 46 Hun 289; *Gifford v. Corrigan*, 117 N. Y. 257, 22

the registration is to operate as a delivery must be established, if it is disputed or thrown into doubt.¹⁹ The execution of a deed before witnesses will be a fact from which delivery may be presumed.²⁰ On the other hand, if after execution the deed is retained by the grantor for any purpose which prevents the transaction from being complete, as where it is held as security for the purchase-money, there will be no presumption of delivery.²¹ In order that any acts may constitute a sufficient delivery, except in the case of an escrow, the grantor must part with all control of the deed. If he retains the control in any manner, as where he makes the delivery conditionally, the delivery will not be sufficient.²² Where the grantor is a corporation, nothing more is usually required to make a good delivery than that the deed should be executed and the common seal of the corporation affixed to the deed.

N. E. Rep. 756; *Colee v. Colee*, 122 Ind. 109, 23 N. E. Rep. 687; *Ross v. Campbell*, 73 Ga. 309; *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Vaughn v. Godman*, 109 Ind. 499; *Messelback v. Norman*, 46 Hun 414; *Collins v. Collins*, 45 N. J. Eq. 813, 18 Atl. Rep. 860; *Diefendorf v. Diefendorf*, 8 N. Y. S. 617; *Reid v. Abernethy*, 77 Iowa 438; *Huse v. Den*, 85 Cal. 300. "The acknowledgment and recording of a deed affords a presumption of a legal delivery by the grantor." *Dayton v. Stewart* (Md. 1904), 59 Atl. Rep. 281. "The recording of a deed by the grantor is not necessarily a delivery, but a circumstance which may be looked to on that question." *Johnson v. Johnson* (Tex. Civ. App. 1905), 85 S. W. Rep. 1023.

¹⁹ *Maynard v. Maynard*, 10 Mass. 456; *Jackson v. Phipps*, 12 Johns. 418; *Elsev v. Metcalf*, 1 Denio 326; *Pennel v. Weyant*, 2 Harr. 501; *Jones v. Bush*, 4 Harr. 1; *Stevens v. Castell*, 63 Mich. 111, 29 N. W. Rep. 828.

²⁰ *Moore v. Hasleton*, 9 Allen 106; *Howe v. Howe*, 99 Mass. 98; *Loud v. Brigham* (Mass.), 28 N. E. Rep. 7.

²¹ *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Turner v. Carpenter*, 63 Mo. 333; *Wainwright v. Low*, 57 Hun 386.

²² *Cook v. Brown*, 34 N. H. 476; *Phillips v. Houston*, 5 Jones L. 302; *Somers v. Pumphrey*, 24 Ind. 240; *Rivard v. Walker*, 39 Ill. 413. "A valid delivery of a deed conveying land is not shown, when it appears that it was the intent of the grantor that the delivery should relate to the date of his death." *Schlicher v. Keleer* (N. J. 1905), 61 Atl. Rep. 434.

But if the corporation, in executing the deed, appoint an agent to make a delivery, the formal delivery will be required.²³ Where the grantee is a corporation, a delivery to an authorized agent and acceptance by him are considered the acts of the corporation, and, therefore, constitute a sufficient delivery and acceptance.²⁴

§ 578. Delivery to stranger, when assent of grantee presumed.—Although some doubt was entertained at an early day as to its validity, it seems now to be well settled that if a deed is delivered to a stranger for the grantee, even though the grantee has not authorized the third person to receive it, if it is subsequently assented to by the grantee, it will constitute a good delivery.²⁵ But the grantor must part with his entire control over the deed. If the deed is handed to a stranger to be delivered to the grantee when the grantor should so direct, or the direction is to deliver it at a specified time, unless the order is countermanded, if the circumstances do not make the deed an escrow, the delivery to the stranger will not be sufficient to pass the title.²⁶ And although the law

²³ 3 Washburn on Real Prop. 287, 288; Co. Lit. 22 n, 36 n.

²⁴ *Western R. R. v. Babcock*, 6 Metc. 356.

²⁵ *Doe v. Knight*, 5 B. & C. 671; *Hatch v. Bates*, 54 Me. 139; *Rugles v. Lawson*, 13 Johns. 285; *Church v. Gilman*, 15 Wend. 656; *Stephens v. Rinehart*, 72 Pa. St. 440; *Kingsbury v. Burnside*, 58 Ill. 310; *Ray v. Hallenbeck*, 42 Fed. Rep. 381; *Brown v. Danforth*, 9 N. Y. S. 19; *Ward v. Small's Admr.* (Ky.), 13 S. W. Rep. 1070; *Orr v. Clark* (Vt.), 19 Atl. Rep. 929; *Diefendorf v. Diefendorf*, 8 N. Y. S. 617; *Munoz v. Wilson*, 111 N. Y. 295; *Hatch v. Bates*, 54 Me. 136; *Stephens v. Huss*, 54 Pa. St. 20; *Turner v. Whidden*, 22 Me. 121; *Cincinnati R. R. Co. v. Iliff*, 13 Ohio St. 235; *Merrills v. Swift*, 18 Conn. 257, 46 Am. Dec. 315; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Peavey v. Tilton*, 18 N. H. 151, 45 Am. Dec. 365; *Ells v. Mo. Pac. Ry.*, 40 Mo. App. 165.

²⁶ *Prestman v. Baker*, 30 Wis. 644; *Phila. W. & B. R. R. v. Howard*, 13 How. 334; *Black v. Shreve*, 13 N. J. 459; *Cook v. Brown*, 34 N. H. 476; *Phillips v. Houston*, 5 Jones L. 302; *Millett v. Parker*, 2 Metc. (Ky.) 613; *Shirley v. Ayres*, 14 Ohio 310; *Fitch v. Bunch*, 30 Cal. 213; *Porter v. Woodhouse*, 59 Conn. 568; *Robertson v. Woodhouse*, *ib.* "The

presumes that a delivery of a deed to the grantee personally is done with the intention of passing the title, there is no such presumption indulged in when the deed is handed to a stranger. To make the delivery to a stranger effectual, the intention with which the delivery was made must be expressed at the time. There are, however, no formal words or declarations required.²⁷ But where the deed was mailed at the request of the grantee, the deposit in the post-office was held to be a good delivery.²⁸ The knowledge and assent of the grantee are just as necessary in this mode of delivery as in the delivery or tender of the deed to the grantee himself, and until acceptance, expressed or presumed, the delivery is inoperative to pass the title.²⁹ It has been held that a deed is revocable by the grantor after delivery until it is accepted by the grantee.³⁰ Delivery and acceptance are "mutual and concurrent acts," and unless the delivery is an open and continuing one an acceptance at a subsequent period will not give validity to the deed.³¹ But the subsequent assent will be good, although the grantor may have died in the meantime.³²

delivery of a deed by the grantor to a third person, which was not made with intention to part with the right to recall the deed, was insufficient to pass title." *Spacy v. Ritter* (Ill. 1905), 73 N. E. Rep. 447, 214 Ill. 266.

²⁷ *Church v. Gilman*, 15 Wend. 656; *Tibbals v. Jacobs*, 31 Conn. 428; *Folk v. Varn*, 9 Rich. Eq. 303; *Cecil v. Beaver*, 28 Iowa 240. See *Lutes v. Reed*, 138 Pa. St. 191.

²⁸ *McKinney v. Rhoades*, 5 Watts 343.

²⁹ *Young v. Guilbeau*, 3 Wall. 636; *Jackson v. Bodle*, 20 Johns. 184; *Wilsey v. Dennis*, 44 Barb. 359; *Bullitt v. Taylor*, 34 Miss. 741; *Derry Bank v. Webster*, 44 N. H. 268; *Jackson v. Phipps*, 12 Johns. 422; *Dike v. Miller*, 24 Texas 417; *Mitchell v. Ryan*, 3 Ohio St. 386; *Mills v. Gore*, 20 Pick. 28; *Stillwell v. Hubbard*, 20 Wend. 44.

³⁰ *Derry Bank v. Webster*, 44 N. H. 268; *Johnson v. Farley*, 45 N. H. 509; *Owings v. Tucker* (Ky.), 13 S. W. Rep. 1078. But see, where deed is for the grantee's benefit, as to presumption of his acceptance. *Whittaker v. Whittaker* (Mo. 1903), 74 S. W. Rep. 1029.

³¹ *Jackson v. Dunlap*, 1 Johns. Cas. 114; *Jackson v. Bodle*, 20 Johns. 187; *Church v. Gilman*, 15 Wend. 656; *Canning v. Pinkham*, 1 N. H. 353; *Buffum v. Green*, 5 N. T. 71; *Hulick v. Scovil*, 9 Ill. 177.

³² *Hatch v. Hatch*, 5 N. H. 307; *O'Kelly v. O'Kelly*, 8 Metc. 439;

The assent of the grantee need not always be proved affirmatively and expressly. It may in certain cases be presumed from the delivery. If the grantee was aware of the delivery for his use, and the conveyance was beneficial to him, his assent may be presumed from the time of delivery.³³ And if it is questioned, it will be necessary to show affirmatively that the grantee was *in esse*, in order to support the presumption of acceptance.³⁴ But this presumption in reference to the assent of the grantee is only *prima facie*. If the grantee actually dissents or refuses to receive the deed, of course no title passes.³⁵ But where the grantee is under disabilities, as in the case of infant grantees, and perhaps married women, the presumption of assent to a beneficial conveyance becomes a *rule of law*, and knowledge of the conveyance and delivery is not essential.³⁶ The relation existing between the person receiving the deed and the grantee may often make the assent and acceptance of the deed by the former sufficient to give the title to the grantee. For example, an acceptance by the father or mother of a deed to an infant child is a good ac-

Stephens v. Huss, 54 Pa. St. 26; Mather v. Corless, 103 Mass. 568; McCalla v. Bayne, 45 Fed. Rep. 828. But see State Bank v. Evans, 3 Green 155; Diefendorf v. Diefendorf, 8 N. Y. S. 617.

³³ Robinson v. Gould, 26 Iowa 93; Cecil v. Beaver, 28 Iowa 241; Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. Rep. 756; Munoz v. Wilson, 111 N. Y. 295. But an acceptance will not be presumed, as long as the grantee is ignorant of the conveyance. Maynard v. Maynard, 10 Mass. 456; Prestman v. Baker, 30 Wis. 644; Baker v. Haskell, 47 N. H. 479; Thompson v. Lloyd, 49 Pa. St. 128; Miller v. Murfield (Iowa), 44 N. W. Rep. 540; McElroy v. Hiner (Ill.), 24 N. E. Rep. 435. See Whittaker v. Whittaker (Mo. 1903), 74 S. W. Rep. 1029.

³⁴ Hulick v. Scovil, 9 Ill. 177; Walker v. Walker, 42 Ill. 311; Bensley v. Atwill, 12 Cal. 231.

³⁵ Peavey v. Tilton, 18 N. H. 152; Townson v. Tickell, 3 B. & Ald. 36; Younge v. Guilbeau, 3 Wall. 641; Tompkins v. Wheeler, 16 Pet. 119; Read v. Robinson, 6 Watts & S. 329; Fonda v. Sage, 46 Barb. 109; St. Louis I. M. & S. R. R. Co. v. Ruddell (Ark.), 13 S. W. Rep. 418; Dikeman v. Arnold (Mich.), 44 N. W. Rep. 407.

³⁶ Baker v. Haskell, 47 N. H. 479; Spencer v. Carr, 45 N. Y. 410; Gregory v. Walker, 38 Ala. 26; Rivard v. Walker, 39 Ill. 413; Cecil v. Beaver, 28 Iowa 241; Diefendorf v. Diefendorf, 8 N. Y. S. 617.

ceptance.³⁷ And on the same ground at common law, a conveyance to a married woman was void, if her husband dissented. But his assent is binding upon her even after his death.³⁸

§ 579. *Escrows*.—Although the delivery of the deed will pass the title, if such is the intention of the grantor, and such intention will be presumed in the absence of anything to the contrary, yet there may be a conditional delivery, conditioned that the deed shall only take effect upon the happening of an event specified at the time of delivery. Such a deed is called an *escrow*. In order that a deed may be an *escrow*, it must be delivered to a stranger to hold until the condition is performed, and then to be delivered to the grantee. If the delivery is made to the grantee, it will be an absolute delivery, whatever conditions may be annexed thereto, and the title will immediately pass to the grantee.³⁹ But if the delivery to the grantee is merely for the purpose of having it delivered immediately to a third person to hold as an *escrow*, the delivery to the grantee will not vest a title in him, the intent, with which it was done, controlling its effect.⁴⁰

³⁷ *Baker v. Haskell*, 47 N. H. 479; *Souverbye v. Arden*, 1 Johns. Ch. 456; *Jaques v. Methodist Church*, 17 Johns. 577; *Gregory v. Walker*, 38 Ala. 27; *Rogers v. Carey*, 47 Mo. 236; *Cloud v. Calhoun*, 10 Rich. Eq. 362.

³⁸ *Butler & Baker's Case*, 3 Rep. 26; *Melvin v. Props., etc.*, 16 Pick. 167; *Foley v. Howard*, 8 Clarke (Iowa) 36; *Diefendorf v. Diefendorf*, 8 N. Y. S. 617.

³⁹ *Fairbanks v. Metcalf*, 8 Mass. 230; *Ward v. Lewis*, 4 Pick. 520; *Gilbert v. N. A. F. Ins. Co.*, 23 Wend. 43; *Black v. Shreve*, 13 N. J. 458; *Foley v. Cowgill*, 5 Blackf. 18; *Jane v. Gregory*, 42 Ill. 416; *Herdman v. Bratten*, 2 Harr. 396; *Fireman's Ins. Co. v. McMillan*, 29 Ala. 160. But see *Bibb v. Reid*, 3 Ala. 88; *Stevenson v. Crapnell*, 114 Ill. 19. "A delivery of a deed to one of several grantees, to hold the same for herself and the others, with the knowledge and consent of the latter, is a delivery to all." *Webb v. Webb* (Iowa 1905), 104 N. W. Rep. 438. See also, *Kirkwood v. Smith*, 212 Ill. 395, 72 N. E. Rep. 427.

⁴⁰ *Murray v. Stair*, 2 B. & C. 82; *Jackson v. Sheldon*, 22 Me. 569; *Gilbert v. N. A. Fire Ins. Co.*, 23 Wend. 43; *Simonton's Estate*, 4 Watts

Where the deed is delivered to a stranger for the grantee, whether it shall operate as a present deed, or as an escrow, depends upon the intention of the parties, as expressed at the time of the delivery. If the deed is handed to the stranger with the instruction that the delivery to the grantee shall depend upon the happening of a condition, it is an *escrow*; but if the delivery is made to the stranger, although accompanied by instructions that it shall not be delivered until the death of the grantor, it is a grant *in præsentia*.⁴¹ The importance of distinguishing escrows from other deeds like those above described lies in this fact: escrows can operate only from the time that the condition is performed. A delivery before the performance of the condition will not have the effect of passing the title to the grantee, not even against innocent purchasers for value of the grantee.⁴² But if the deed is one operating immediately, even though the bailee of the deed is instructed not to deliver it before the grantor's death, it passes the title immediately, and a delivery before the grantor's death will be good. Indeed, it does not seem that any formal delivery to the grantee is required.⁴³ For

180; *Den v. Partee*, 2 Dev. & B. 530. But see *Fairbanks v. Metcalf*, 8 Mass. 239; *Braman v. Bingham*, 26 N. Y. 483.

⁴¹ *Foster v. Mansfield*, 3 Metc. 414; *Cook v. Brown*, 34 N. H. 405; *Tooley v. Dibble*, 2 Hill 641; *Braman v. Bingham*, 26 N. Y. 483; *Hathaway v. Payne*, 34 N. Y. 106; *Price v. P.*, Ft. W. & C. R. R., 34 Ill. 13.

⁴² *Fairbanks v. Metcalf*, 8 Mass. 230; *Hinman v. Booth*, 21 Wend. 267; *Black v. Shreve*, 13 N. J. 458; *Jackson v. Sheldon*, 22 Me. 569; *Illinois Cent. R. R. v. McCullaugh*, 59 Ill. 170; *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1; *Chicago, etc., R. R. Land Co. v. Peck*, 112 Ill. 400. In *Rhodes v. Gardiner*, 30 Me. 110, it was held that sufficient title passed by such an authorized delivery to give a good title to an innocent purchaser from the grantee. But see *Houston L. & T. Co. v. Hubbard* (Texas 1905), 85 S. W. Rep. 474; *Sutton v. Gibson* (Ky.), 84 S. W. Rep. 335; *Wisconsin Ry. Co. v. McKenna* (Mich. 1905), 102 N. W. Rep. 281.

⁴³ *Murray v. Stair*, 2 B. & C. 82; *Shaw v. Hayward*, 7 Cush. 175; *Mather v. Corless*, 103 Mass. 568; *Braman v. Bingham*, 26 N. Y. 483; *Hathaway v. Payne*, 34 N. Y. 106; *Price v. P.*, Ft. W. & C. R. R., 34

this reason it is always necessary in delivering a deed as an escrow to be explicit as to the intent with which the delivery was made, and it would be much more prudent if the delivery is accompanied by a memorandum in writing, explaining the character of the delivery to the bailee, and the terms of the condition upon which the delivery to the grantee depends. No technical or formal language is required, provided the intention is made clear by the use of any other language.⁴⁴ In an escrow no title vests in the grantee until the second delivery.⁴⁵ But though the deed after the first delivery can only be revoked by the grantor, for default in the performance of the condition,⁴⁶ the premises so far continue to be the property of the grantor that they can be levied upon by the grantor's creditors, and their attachments will take precedence to the title acquired by the grantee.⁴⁷ But notwithstanding the deed does not take effect until the second delivery, yet for many purposes, after the second delivery, the deed relates back to the first delivery, and takes effect *nunc pro tunc*. This is the case when the doctrine of relation is necessary on account of some intervening obstacle which would otherwise invalidate the deed, as where the grantor dies before the second delivery.⁴⁸

Ill. 13; *Goodpaster v. Leathers* (Ind.), 23 N. E. Rep. 1090. See *Kirkwood v. Smith*, 212 Ill. 395, 72 N. E. Rep. 427.

⁴⁴ *Jackson v. Catlin*, 2 Johns. 248; *Clark v. Gifford*, 10 Wend. 310; *Gilbert v. N. A. Fire Ins. Co.*, 23 Wend. 43; *State v. Peck*, 53 Mo. 293; *White v. Bailey*, 14 Conn. 271; *Shoenberger v. Hackman*, 37 Pa. St. 87; *Millett v. Parker*, 2 Metc. (Ky.) 616.

⁴⁵ *Frost v. Beekman*, 1 Johns. Ch. 297; *James v. Vanderheyden*, 1 Paige 385; *Everts v. Agnes*, 4 Wis. 351.

⁴⁶ *Worrall v. Munn*, 6 N. Y. 229; *Millet v. Parker*, 2 Metc. (Ky.) 608; *Wright v. Shelby R. R.*, 16 B. Mon. 4.

⁴⁷ *Frost v. Beekman*, 1 Johns. Ch. 297; *Jackson v. Catlin*, 2 Johns. 248; *Jackson v. Rowland*, 6 Wend. 666. See *Rutherford v. Carr* (Texas 1905), 87 S. W. Rep. 815.

⁴⁸ *Ruggles v. Lawson*, 13 Johns. 285; *Jackson v. Rowland*, 6 Wend. 666; *Evans v. Gibbs*, 6 Humph. 405; *Jackson v. Catlin*, 2 Johns. 248; *Carr v. Hoxie*, 5 Mason 60.

§ 580. **Registration of deeds and other instruments.**—Except in respect to the enrollment of deeds of bargain and sale, deeds were not required by the English law to be registered or recorded. And although a system of registration has been in operation since the reign of Queen Anne in some of the counties of England, no general registration law has ever been in force there.⁴⁹ But in the United States, from an early period, every State in the Union has had a general registration law and officers appointed whose duty it was to record all deeds of conveyance, and other written instruments mentioned in the statute. The object of recording a deed is to furnish a subsequent purchaser with reliable means of investigating titles. And hence it must be recorded in the county in which the land lies.⁵⁰ The record simply furnishes evidence of the conveyance, and the law provides that if a deed is recorded, the record is constructive notice of the conveyance, and that an unrecorded deed shall not prevail against subsequent purchasers without notice.⁵¹

§ 581. **Requisites of a proper record.**—But in order that the record may be constructive notice of the deed and its contents, the deed must be a valid one, and possess all the requisites of a valid deed. The record of a defective deed furnishes no notice, except to one who has seen it. And the deed or other instrument must further be one required or permitted

⁴⁹ 3 Washburn on Real Prop. 313; Williams on Real Prop. 466, 467.

⁵⁰ Oberholtzer's Appeal, 124 Pa. St. 583.

⁵¹ Earle v. Fiske, 103 Mass. 492; Trull v. Bigelow, 16 Mass. 406; Stephens v. Morse, 47 N. H. 433; Murphy v. Nathans, 46 Pa. St. 512; Van Rensselaer v. Clark, 17 Wend. 25; Jackson v. Leek, 19 Wend. 339; Wells v. Morrow, 38 Ala. 125; Martin v. Quattlebaum, 3 McCord 205; Burkhalter v. Ector, 25 Ga. 55; Lillard v. Rucker, 9 Yerg 64; Dixon v. Doe, 1 Smed. & M. 70; Givan v. Doe, 7 Blackf. 210; Applegate v. Gracy, 9 Dana 224; Hopping v. Burnham, 2 Greene (Iowa) 39; Fitzhugh v. Barnard, 12 Mich. 110. Registration laws are not intended to protect creditors, but to give notice of conveyances of real estate to them, as well as subsequent grantees. Ilfeld v. DeBoca, 79 Pac. Rep. 723.

by law to be recorded.⁵² A quit-claim deed is sufficient to give the grantee priority over a prior unrecorded deed.⁵³ And a subsequent grantee, who takes without notice of the prior unrecorded deed, can claim priority over such prior conveyance, although his own deed may be unrecorded.⁵⁴

If a deed has been properly recorded, in most of the States it may be used in evidence without any other proof of its execution.⁵⁵ And in some of them a certified copy of the record is made original evidence in establishing the claim of title from one grantor to another.⁵⁶ But in other of the

⁵² *De Witt v. Moulton*, 17 Me. 418; *Shaw v. Poor*, 6 Pick. 88; *Blood v. Blood*, 23 Pick. 80; *McKeen v. Mitchell*, 35 Pa. St. 289; *Harper v. Barsh*, 10 Rich. Eq. 149; *Harper v. Tapley*, 35 Miss. 510; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Sands v. Beardsley*, 32 W. Va. 594; *Brown v. Lunt*, 37 Me. 423; *Stevens v. Morse*, 47 N. H. 532; *Blood v. Blood*, 23 Pick. 80; *Hodgson v. Butts*, 3 Cranch 140; *Shults v. Moore*, McLean 521; *Harper v. Reno*, 1 Freem. Ch. 323; *Parkist v. Alexander*, 1 Johns. Ch. 394; *Green v. Drinker*, 7 W. & S. 440; *Heistner v. Fortner*, 2 Binn. 40; *Strong v. Smith*, 3 McLean 362; *Cockey v. Milne*, 16 Md. 200. In *Musgrove v. Bouser* (5 Oreg. 313, 20 Am. Rep. 737), the Supreme Court of Oregon held that the record of a deed, not properly admitted to record, furnishes constructive notice of the contents of the deed to all who have actually seen the record. See, also, to same effect, *Kerns v. Swope*, 2 Watts 75; *Hastings v. Cutler*, 4 Fost. 481. It is also a general rule that the record must be properly made, in order to raise constructive notice to subsequent purchasers; and it has been held in Wisconsin, though denied in Missouri and Pennsylvania, that a record without an index furnishes no notice. *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 553; *Schell v. Stein*, 76 Pa. St. 398, 18 Am. Rep. 416.

⁵³ *Cutler v. James*, 64 Wis. 173, 54 Am. Rep. 603.

⁵⁴ *Edwards v. Thom*, 25 Fla. 222.

⁵⁵ *Younge v. Guilbeau*, 3 Wall. 640; *Houghton v. Jones*, 1 Wall. 702; *Carpenter v. Dexter*, 8 Wall. 532; *Samuels v. Borrowscale*, 104 Mass. 207; *Young v. Ringo*, 1 B. Mon. 30; *Fell v. Young*, 63 Ill. 106; *Hinchliffe v. Hinman*, 18 Wis. 135; *Toulmin v. Austin*, 5 Stew. & P. 410.

⁵⁶ *Scanlan v. Wright*, *Samuels v. Borrowscale*, 104 Mass. 207; *Farrar v. Fessenden*, 39 N. H. 268; *Dixon v. Doe*, 5 Blackf. 106; *Bogan v. Frisby*, 36 Miss. 178; *Clague v. Washburn*, 42 Minn. 371, 44 N. W. Rep. 130.

States the deed must be proved as at common law, unless it comes under the head of *ancient deeds*, i. e., deeds thirty years old.⁵⁷

§ 582. **To whom is record constructive notice.**—This record is constructive notice to only subsequent purchasers claiming under the grantor, i. e., those who acquire an interest in the property subsequently, and as privy to the grantor, whether as grantee, mortgagee, or attaching creditor.⁵⁸ It is not notice to those who claim independently of the grantor,⁵⁹ as, for example, where a mortgagee assigns the mortgage. The record of the assignment is not constructive notice to the mortgagor or his assignees.⁶⁰ So, also, is the mortgagee or his assignee not charged with constructive notice by the record of the mortgagor's assignment.⁶¹ The same rule applies in general to those who acquire their interests from the grantor

⁵⁷ See *Woolfolk v. Graniteville Mfg. Co.*, 22 S. C. 332.

⁵⁸ *Tilton v. Hunter*, 24 Me. 35; *Shaw v. Poor*, 6 Pick. 85; *Bates v. Norcross*, 14 Pick. 224; *Doe v. Beardsley*, 2 McLean 412; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Ely v. Wilcox*, 20 Wis. 530; *Traphagen v. Irwin*, 18 Neb. 195. See *Ilfeld v. DeBoca*, 79 Pac. Rep. 723.

⁵⁹ *Blake v. Graham*, 6 Ohio St. 480; *Iglehart v. Crane*, 42 Ill. 261; *Baker v. Griffin*, 50 Miss. 158; *Bates v. Norcross*, 14 Pick. 224; *George v. Wood*, 9 Allen 80; *Murray v. Ballou*, 1 Johns. Ch. 566; *Page v. Waring*, 76 N. Y. 463; *Lightner v. Mooney*, 10 Watts 412; *Losey v. Simpson v. Stockt. Ch. 246*; *Farmers' L. & T. Co. v. Maltby*, 8 Paige 361; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359; *Wood v. Farmere*, 7 Watts 282.

⁶⁰ *Jones v. Gibbons*, 9 Ves. 410; *Mitchell v. Burnham*, 44 Me. 302; *James v. Johnson*, 6 Johns. Ch. 417; *Ely v. Schofield*, 35 Barb. 330; *Belden v. Meeker*, 47 N. Y. 307; *Titus v. Haynes*, 9 N. Y. S. 742; *Castle v. Castle* (Mich.), 44 N. W. Rep. 378. In some of the States, notably California, Indiana, Kansas, Michigan, Minnesota, Nebraska, New York, Oregon, Wisconsin and Maryland, the same rule is established by statute. *Jones on Mort.*, Sec. 473; 2 *Washburn on Real Prop.* 148. See *Watson v. Dundee Mortgage, etc., Co.*, 12 Ore. 474. And see Sec. 579.

⁶¹ 4 *Kent's Com.* 174; *Stuyvesant v. Hall*, 2 Barb. Ch. 158; *Bell v. Fleming*, 12 N. J. Eq. 16; *Blair v. Ward*, 10 N. J. Eq. 126; *Groesbeck v. Mattison*, 43 Minn. 547; *Clark v. McNeal*, 114 N. Y. 287; *First Nat. Bank v. Honeyman* (Dakota), 42 N. W. Rep. 771. See Sec. 579.

by a prior deed.⁶² It has also been held that the doctrine of constructive notice from record of a deed does not apply where A.'s deed to B. is unrecorded and B. then conveys to C., who puts his deed upon record, without notice of the fact that B., the grantor, has derived his title from A. It is held that a subsequent purchaser is not charged with constructive notice of the prior recorded deed from B. to C.⁶³ But it is a doubtful question whether the registration of the prior deed, before the title has been acquired by the grantor and recorded, would properly be considered constructive notice of the estoppel, whereby the after-acquired title would inure to the prior grantee even as against a subsequent purchaser without actual notice. It is certainly in violation of the spirit of the registration laws, which only require the investigator to search the records for any incumbrance or conveyance which occurs between the time when the grantor acquired the title, and the time when he offers the title for conveyance.⁶⁴

It has been held by some of the courts that a purchaser from the heir cannot claim precedence for his recorded deed over the unrecorded deed of the ancestor, on the ground that

⁶² *George v. Wood*, 9 Allen 80; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Holley v. Hawley*, 39 Vt. 532; *Boone v. Clark*, 129 Ill. 466; 2 Pom. Eq. n. 142. See *Maul v. Rider*, 59 Pa. St. (9 P. F. Sm.) 106, 171; *Birnie v. Main*, 29 Ark. 591; *Ward's Exr. v. Hague*, 25 N. J. Eq. (10 C. E. Green) 397; *Guion v. Knapp*, 6 Paige 42; *Hill v. McCarter*, 27 N. J. Eq. 41; *Doolittle v. Cook*, 75 Ill. 355; *Deuster v. McCamus*, 14 Wis. 307; *Halsteads v. Bk. of Ky.*, 4 J. J. Marsh. 558. "A vendee's title is not divested by his failure to record his deeds." *Gibson v. Brown* (Ill. 1905), 73 N. E. Rep. 578.

⁶³ *Veazie v. Parker*, 53 Me. 170; *Pierce v. Taylor*, 23 Me. 246; *Felton v. Pitman*, 14 Ga. 530; *Roberts v. Bourne*, 23 Me. 165; *Lightner v. Mooney*, 10 Watts 407; *Calder v. Chapman*, 52 Pa. St. 353; *Chicago v. Witt*, 75 Ill. 211.

⁶⁴ *Calder v. Chapman*, 2 P. F. Smith 359; *McCusker v. McEvey*, 10 R. I. 606, the dissenting opinion of Judge Potter; *Bright v. Buchman*, 39 Fed. Rep. 243; *Pike v. Calvin*, 29 Me. 183; *Jarvis v. Aikens*, 25 Vt. 635; *White v. Patten*, 24 Pick. 324; *Tefft v. Munson*, 57 N. Y. 97; *Doyle v. Peerless Pet. Co.*, 44 Barb. 239; *Farmers L. & T. Co. v. Maltby*, 8 Paige 361. But see *Wilson v. Smith*, 52 Hun 171.

since the unrecorded deed was a good conveyance against the heir, nothing descended to the heir which he could convey.⁶⁵ But the better opinion seems to be that the deed from the heir in such a case would be entitled to priority, and would vest the superior title in the grantee of the heir, for the reason that the registry laws declare a deed void against all subsequent purchasers without notice if it has not been recorded.⁶⁶ If one has a recorded deed which has a priority over an antecedent unrecorded deed, the holder of the recorded deed acquires an absolute paramount title, which he can convey even to those who have notice of the prior unrecorded deed,⁶⁷ with the exception of his own grantor, who originally acquired title with notice of the prior unrecorded deed. Such a person cannot improve his title by conveying the land to an innocent purchaser, and repurchasing it, relying upon the superior title of the intermediate grantee.⁶⁸ And if the recorded deed is to one who has notice of the prior deed, although in his hands the recorded deed does not have precedence,⁶⁹ if he conveys to one having no notice, his grantee acquires a good title. But if the prior deed is recorded before the conveyance by the first grantee who has had notice, the grantee of the second conveyance is bound by the constructive notice.⁷⁰ But no one can take advantage of the record for the purpose of

⁶⁵ *Hill v. Meeker*, 24 Conn. 211; *Hancock v. Beverly*, 6 B. Mon. 532; *Harlan v. Seaton*, 18 B. Mon. 312.

⁶⁶ *Earle v. Fiske*, 103 Mass. 491; *Powers v. McFerron*, 2 Serg. & R. 47; *McCullough v. Endaly*, 3 Yerg. 346; *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Nortrup*, 15 Ill. 148.

⁶⁷ *Lowther v. Carlton*, 2 Atk. 133; *Trull v. Bigelow*, 15 Mass. 406; *Bumpus v. Platner*, 1 Johns. Ch. 219; *Bell v. Twilight*, 18 N. H. 159.

⁶⁸ *Clark v. McNeal*, 114 N. Y. 287.

⁶⁹ *Cox v. Wayne*, 26 W. Va. 807.

⁷⁰ *Flynt v. Arnold*, 2 Metc. 619; *Trull v. Bigelow*, 16 Mass. 406; *Adams v. Cuddy*, 13 Pick. 460; *Brackett v. Ridlon*, 54 Me. 434; *Hagthorpe v. Hook*, 1 Gill & J. 270; *Baylis v. Young*, 51 Ill. 127. "An unrecorded deed may be good as to the parties thereto and as to those who have notice thereof." *Licata v. De Corte* (Fla. 1905), 39 So. Rep. 58.

giving his deed priority over another unrecorded deed, who has not paid a substantial valuable consideration therefor, and he must show by extraneous evidence that it has been paid.⁷¹

§ 583. *Priority of unrecorded mortgages over judgment creditors.*—It is also claimed by many of the authorities, that an unrecorded mortgage or conveyance will have priority over the subsequently docketed judgment, although the judgment is obtained and docketed without notice of the prior conveyance or mortgage, on the ground that the lien of the judgment on the property is acquired by the judgment creditor without any consideration and that the assertion of the prior unrecorded mortgage or conveyance against such subsequently docketed judgment would not give to the judgment creditor any claim of being injured, for he has parted with nothing in securing the judgment lien in reliance upon the apparently valid title of the judgment debtor. The equitable doctrine then is that a judgment lien will cover only the actual interest of the judgment debtor, and attaches to such interest subject to all the prior equitable claims against such interest.⁷² This

⁷¹ *Boone v. Chiles*, 10 Pet. 211; *Watkins v. Edwards*, 23 Texas 447; *Parker v. Foy*, 43 Miss. 260; *Maupin v. Emmons*, 47 Mo. 304; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Shotwell v. Harrison*, 22 Mich. 410; *Cox v. Voght*, 26 W. Va. 807.

⁷² *Bartley, J.*, in *White v. Denman*, 1 Ohio St. 110, 112; *Finney v. Earl of Winchelsea*, 1 P. Wms. 277; *Legard v. Hodges*, 1 Ves. 477; *Burn v. Burn*, 3 Ves. 573, 582; *Lodge v. Tyseley*, 4 Sim. 70; *Beavan v. Earl of Oxford*, 6 De. M. & G. 507, 517, 518; *Newlands v. Paynter*, 4 My. & Cr. 408; *Langton v. Horton*, 1 Hare 549; *Everett v. Stone*, 3 Story 446, 455; *In re Howe*, 1 Paige 125; *Buchan v. Sumner*, 2 Barb. Ch. 165, 207; *Hoagland v. Latourette*, 1 Green's Ch. 254; *Dunlap v. Burnett*, 5 Sm. & Mar. 702; *Bank v. Campbell*, 2 Rich. Eq. 179; *Cover v. Black*, 1 Barr. 493; *Shryock v. Waggoner*, 4 Casey 430; *Richeson v. Richeson*, 2 Gratt. 497; *Bayley v. Greenleaf*, 7 Wheat 46, 51; *Stevens v. Watson*, Abb. App. Dec. 302; *Wheeler v. Kirtland*, 24 N. J. Eq. (9 C. E. Green) 552; *Wilder v. Butterfield*, 50 How. Pr. 385; *Schroeder v. Gurney*, 73 N. Y. 430; *Wilcoxson v. Miller*, 49 Cal. 193; *First Nat. Bk. v. Hayzlett*, 40 Iowa 659; *Kelly v. Mills*, 41 Miss. 267;

rule, however, has been repudiated by the courts of many of the States in which it is held, that the judgment creditor is entitled to priority over other earlier equitable interests, on the ground that he does suffer a damage of a legal character in consequence of the recognition of the priority in the earlier equities whenever he goes to the trouble and expense of procuring the judgment lien, and is induced by the apparently unincumbered condition of the debtor's title to rely upon such judgment lien. In accordance with this principle it is held in these States, that the judgment lien, docketed subsequently to an unrecorded mortgage, or to the acquisition of some equitable interest or lien, shall have precedence over such prior equity or interest;⁷³ but where the judgment lien is given priority over the earlier equity, the claim for priority depends upon the want of notice of the prior equity when the lien was acquired. In other words, if when the judgment lien was acquired and the judgment docketed, the judgment creditor knows of the existence of the earlier equitable claim against the property, he cannot claim for his judgment lien any precedence over the prior equity.⁷⁴ Where, however, the recording laws declare that a judgment lien shall have precedence over the unrecorded mortgage, or a conveyance, the statutory provision must prevail, giving to the judgment lien

Righter v. Forrester, 1 Bush. (Ky.) 278; *Morton v. Robards*, 4 Dana 258; *Orth v. Jennings*, 8 Blackf. 420; *Hempton v. Levy*, 1 McCord Ch. 107, 111; *Galway v. Mulchow*, 7 Neb. 285; *Van Thorniley v. Peters*, 26 Ohio St. 471.

⁷³ *Corpman v. Baccastow*, 84 Pa. St. 363; *King v. Portis*, 77 N. C. 25; *Vat Thorniley v. Peters*, 26 Ohio St. 471; *Guiteau v. Wisely*, 47 Ill. 433; *Barker v. Bell*, 37 Ala. 354; *Mainwaring v. Templeman*, 41 Texas 266; *Andrews v. Mathews*, 59 Ga. 466; *Anderson v. Nagle*, 12 W. Va. 98. See *London v. Bymm* (N. C. 1904), 48 S. E. Rep. 764; *Owens v. Atlanta T. & B. Co.* (Ga. 1905), 50 S. E. Rep. 379; *Morris Supply Co. v. McColgon* (Md. 1905), 60 Atl. Rep. 608.

⁷⁴ *Priest v. Rice*, 1 Pick. 164; *Hart v. Farm. & Mech. Bk.*, 33 Vt. 252; *O'Rourke v. O'Connor*, 39 Cal. 442; *Britton's Appeal*, 9 Wright 172; *Mellon's Appeal*, 8 Casey 121; *Lawrence v. Stratton*, 6 Cush. 163, 167; *Dixon v. Doe*, 1 Sm. & Mar. 70; *Ayres v. Duprey*, 27 Texas 593; *Wyatt v. Stewart*, 34 Ala. 716, 721; *Garwood v. Garwood*, 4 Halst. 193.

priority over the unrecorded mortgage, even though the judgment creditor knew when the judgment was docketed that such unrecorded mortgage existed.⁷⁵ But whether in any particular State the judgment lien is held to have priority over the prior equity or interest, or not, if the judgment lien should be enforced by execution, and the property sold under such execution to a *bona fide* purchaser, the legal title in such a purchaser would be taken by him free from the priority of the earlier equity, and such equities could not be enforced against the lien in the hands of such a purchaser.⁷⁶ Where, however, the purchaser under the execution of the judgment takes the land with notice of the prior equity, and the judgment creditor also loses his precedence, because of his knowledge of the existence of the prior equity, or the question arises in a State in which the judgment creditor is denied all claim of priority over the earlier equity, such a purchaser cannot claim to take the legal title from the earlier equitable claim.⁷⁷ But if the question arose in a State in which the

⁷⁵ *Guerrant v. Anderson*, 4 Rand. 208; *Davidson v. Cowan*, 1 Dev. Eq. 474; *Davey v. Littlejohn*, 2 Ired. Eq. 495; *Mayham v. Coombs*, 14 Ohio 428; *Butler v. Maury*, 10 Humph. 420; *Lillard v. Ruckers*, 9 Yerg. 64. See *Koston v. Storey* (80 Pac. Rep. 217, Or. 1905) for priority of judgment over grantee's title from a mortgagor, after redemption from a prior mortgage.

⁷⁶ *Orth v. Jennings*, 8 Blackf. 420; *Rodgers v. Gibson*, 4 Yeates 111; *Heister v. Fortner*, 2 Binney 40; *Jackson v. Town*, 4 Cow. 599; *Gouverneur v. Titus*, 6 Paige 347; *Den v. Richman*, 1 Green 43; *Mann's Appeal*, 1 Barr. 24; *Wilson v. Shoneberger*, 10 Casey 121; *Ehle v. Brown*, 31 Wise 405, 414; *Rogers v. Hussey*, 36 Iowa 664; *Ayres v. Dubrey*, 27 Texas 593, 605; *Gower v. Doheney*, 33 Iowa 36, 39; *Wright v. Douglass*, 10 Barb. 97; *Sargent v. Sturm*, 23 Cal. 359; *Orme v. Roberts*, 32 Texas 768.

⁷⁷ *Ells v. Tousley*, 1 Paige 280; *Parks v. Jackson*, 11 Wend. 442; *Simon v. Schurck*, 29 N. Y. 598; *Bank v. Campbell*, 2 Rich. Eq. 179; *Churchill v. Morse*, 23 Iowa 229; *O'Rourke v. O'Connor*, 39 Cal. 442; *Byers v. Engles*, 16 Ark. 543; *Ogden v. Haven*, 24 Ill. 57; *Ayres v. Duprey*, 27 Texas 593. "Where a mortgage is older than a judgment, a sale under the power contained therein conveys to the purchaser a title good against the judgment lien." *Williams v. J. P. Williams Co.* (Ga. 1905), 50 S. E. Rep. 52.

judgment creditor can claim for his lien, priority over the equitable interest of the earlier date, because he does not know of its existence when the judgment lien was secured, then this priority recognized by the law in the judgment creditor in favor of his lien passes to the purchaser, so that the purchaser under the execution on the judgment can claim priority in his character as assignee of the judgment creditor, although when he takes the deed to the property he knows of the existence of the prior equitable interest or claim.⁷⁸

§ 584. Of what is record constructive notice.—Not only is the record constructive notice of the recorded deed and its contents, but it will also be notice of all other deeds and their contents, to which reference is made in the recorded deed.⁷⁹ But it has been held that the record of a deed which describes the subject of the grant in very general terms, as, for example, “all the lands the grantor owns in Louisiana,” does not furnish constructive notice of any particular tract.⁸⁰ The record is constructive notice of the contents of deeds only as they appear upon the record. A mistake of the register in the description of the property, or the amount of the mortgage, will fall upon the holder of the deed.⁸¹ Such would also

⁷⁸ *Jaques v. Weeks*, 7 Watts 261, 270; *Uhler v. Hutchinson*, 23 Pa. St. (11 Harris), 110; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359, 362; *Massey v. Westcott*, 40 Ill. 160; *Henderson v. Downing*, 23 Miss. 105; *Fash v. Raveries*, 32 Ala. 451; *De Venbell v. Hamilton*, 27 *Id.* 156; *Pollard v. Cocke*, 19 *Id.* 188; *Smith v. Jordan*, 25 Ga. 687.

⁷⁹ *White v. Foster*, 102 Mass. 375; *Aer v. Westcott*, 46 N. Y. 384; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Hamilton v. Nutt*, 34 Conn. 501; *Baker v. Matcher*, 25 Mich. 53; *Hetherington v. Clark*, 30 Pa. St. 393; *Morris v. Wadsworth*, 17 Wend. 103; *Humphreys v. Newman*, 51 Me. 40; *Tripe v. Marcy*, 39 N. H. 439; *Leach v. Beattie*, 33 Vt. 195; *Buchanan v. International Bank*, 78 Ill. 500; *Montefiore v. Browne*, 7 H. L. Cas. 241; *Viele v. Judson*, 82 N. Y. 32.

⁸⁰ *Greene v. Witherspoon*, 37 La. An. 751.

⁸¹ *Frost v. Beekman*, 1 Johns. Ch. 299; *Beekman v. Frost*, 18 Johns. 544. See *ante*, Sec. 338; *Jennings v. Wood*, 20 Ohio 261; *Wyatt v.*

be the case where a deed absolute on its face was recorded without a defeasance and such deed was intended to operate as a mortgage. A purchaser from such mortgagee would not be charged with notice of any other title than that of an absolute owner.⁸² The same rule applies where an absolute conveyance is made to one who was intended to take title as trustee for another.⁸³ And in some States a failure to index the deed will deprive the record of the constructive notice.⁸⁴ But the absence in the record of some material part of the deed is not conclusive proof of the fact that the defect appears in the original.⁸⁵

It is also a requisite of registration, in order to raise constructive notice to a purchaser, that the deed be recorded in the county and State in which the land conveyed lies.⁸⁶ So also will the record be defective where a mistake is made as to the books in which the instrument is recorded, as where a

Barwell, 19 Ves. 439; *Beekman v. Frost*, 18 Johns. 544; *Tarrell v. Andrews Co.*, 44 Mo. 309; *Jennings v. Wood*, 20 Ohio 261.

⁸² *Jacques v. Weeks*, 7 Watts 261, 271; *Orvis v. Newell*, 17 Conn. 97; *Bailey v. Myrick*, 50 Me. 171; *Brown v. Dean*, 3 Wend. 208; *James v. Morey*, 2 Cow. 246; *Dey v. Dunham*, 2 Johns. Ch. 182; *Freidley v. Hamilton*, 17 Serg. & R. 70; *Jaques v. Weeks*, 7 Watts 261, 287; *Edwards v. Trumbull*, 14 Wright 509; *Hendrickson's Appeal*, 12 Harris 363; *Cogan v. Cook*, 22 Minn. 137.

⁸³ *Flynt v. Arnold*, 2 Metc. 619; *Mahoney v. Middleton*, 41 Cal. 41, 50; *Fallas v. Pierce*, 30 Wis. 443; *Sims v. Hammond*, 33 Iowa 368; *Van Rensselaer v. Clark*, 17 Wend. 25. See also *post*, Sec. 761; *Crane v. Turner*, 6 Hun 357, 67 N. Y. 437; *Digman v. McCollum*, 47 Mo. 372, 375, 376; *Farmer's Loan Co. v. Maltby*, 8 Paige 361; *Page v. Waring*, 76 N. Y. 463, 407-469; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359; *Losey v. Simpson*, 3 Stackt. Ch. 246.

⁸⁴ *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Barney v. McCarty*, 15 Iowa 522; *Whitley v. Small*, 25 Iowa 188. *Contra*, *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Schnell v. Stein*, 76 Pa. St. 398, 18 Am. Rep. 416; *Lane v. Duchac*, 73 Wis. 646.

⁸⁵ *Todd v. Union Dime Sav. Bank*, 118 N. Y. 337, 23 N. E. Rep. 299.

⁸⁶ *King v. Portis*, 77 N. C. 25; *Astor v. Wells*, 4 Wheat. 466; *Lewis v. Baird*, 3 McLean 56; *Kerns v. Swope*, 2 Watts 75; *Hundley v. Mount*, 8 Sm. & Mar. 387; *St. John v. Conger*, 40 Ill. 535; *Stewart v. McSweeney*, 14 Wis. 468.

mortgage is recorded in the book for absolute conveyances and *vice versa*.⁸⁷

§ 585. From what time does priority take effect.—As a general proposition, in the absence of special rules, the priority acquired by the registration takes effect from the date of the record.⁸⁸ And the date of the record is taken at the time when the deed was deposited for registration.⁸⁹ But in some of the States the recording law provides that if a deed is recorded within the time allowed by law, it relates back to the time of delivery of the deed, and has priority over a subsequently executed deed which has been previously recorded. Statutory provisions of this character are to be found in Ohio, Kentucky, Mississippi, Georgia, South Carolina, Pennsylvania, Alabama, Indiana, Delaware, Tennessee, and Maryland.⁹⁰ The time allowed for recording varies with the different States. If in these States a deed has been recorded after the expiration of the time allowed by law, the record gives con-

⁸⁷ Leech's Appeal, 8 Wright, 140; *Calder v. Chapman*, 52 Pa. St. (2 P. F. Sm.) 359; *McLanahan v. Reeside*, 9 Watts 508; *Colomer v. Morgan*, 13 La. An. 202; *Grimstone v. Carter*, 3 Paige 421; *Viele v. Judson*, 82 N. Y. 32; *Mut. Life Ins. Co. v. Dake*, 1 Abb. N. C. 381; *Throckmorton v. Price*, 28 Texas 605; *Green v. Garrington*, 16 Ohio St. 548. But see *contra*, *Speer v. Evans*, 47 Pa. St. 141, per Woodward, J.; *Pringle v. Dunn*, 37 Wis. 449, 460, 461; *Van Throniley v. Peters*, 26 Ohio St. 471.

⁸⁸ 4 Kent's Com. 457; *Cushing v. Hurd*, 4 Pick. 252; *Goodsell v. Sullivan*, 40 Conn. 83; *Robinson v. Willoughby*, 70 N. C. 658; *Fleming v. Burgin*, 2 Ired. Eq. 584; *Leggett v. Bullock*, Busb. L. 283; *Rood v. Chapin*, Walk. Ch. 79; *Westbrook v. Gleason*, 79 N. Y. 23, and cases cited; *Dickenson v. Glenney*, 27 Conn. 104; *Patten v. Moore*, 22 N. H. 382, 384; *Dacoway v. Galt*, 20 Ark. 190; *Senter v. Turner*, 10 Iowa 517; *Forepaugh v. Appoid*, 17 Mon. 625, 631; *Porter v. Sevey*, 43 Me. 515.

⁸⁹ *Den v. Richmond*, 1 Green (N. J.) 52; *Gill v. Fauntleroy*, 3 B. Mon. 177; *Lane v. Duchac*, 73 Wis. 646; *Kessler v. State*, 24 Ind. 315; *Coffin v. Ray*, 1 Metc. 212; *Thomas v. Blackemore*, 5 Yerg. 113, 124; *May v. McKeenon*, 6 Humph. 209.

⁹⁰ 3 Washburn on Real Prop. 320, 321; 2 Pomeroy Eq. Jur. 86; cases of third and fourth class.

structive notice from the time of the record, but does not relate back to the time of delivery.⁹¹

§ 586. What constitutes sufficient notice of title — Possession.— As has been already stated, not only is an unrecorded deed good against the grantor, his heirs, devisees and subsequent voluntary grantees, but it is also good against subsequent purchasers for value, if they are charged with notice of the prior deed. In order to bind a subsequent purchaser with notice, he must have actual notice of the deed, or knowledge of such facts which would set a prudent man upon his inquiry, and as a deduction from this rule, the law imputes to a purchaser a knowledge of every fact which appears upon the muniments of title, or which one should inquire after in the investigation of the title.⁹² Thus, a deed in the chain of title discovered by the investigator is constructive notice of all other deeds referred to in the deed which was discovered.⁹³ And the notice that the grantor had made a prior deed of the

⁹¹ *McRaven v. McGuire*, 9 Smed. & M. 39; *Ledger v. Doyle*, 11 Rich. L. 109; *Anderson v. Dugas*, 29 Ga. 440; *Lightner v. Mooney*, 10 Watts 407; *Belk v. Massey*, 11 Rich. L. 614; *Beem v. Lockhart*, 93 N. C. 191; *King v. Fraser*, 23 S. C. 545; *Fleschner v. Sumpter*, 12 Or. 161; *Hardaway v. Semmes*, 24 Ga. 305; *Doe v. Bank of Cleveland*, 3 McLean 140; *Smith v. Smith*, 13 Ohio St. 532; *Williams v. Beard*, 1 S. C. 309; *Strokes v. Hodges*, 11 Rich. Eq. 135; *Bank of State v. S. C. Man. Co.*, 3 Strobbh. 190; *Tact v. Crawford*, 1 McCord 265; *McClure v. Thistle's Exrs.*, 2 Gratt. 182; *Rearsoner v. Edmundson*, 5 Ind. 393; *Byles v. Tome*, 39 Md. 461; *Hoffman v. Strohecker*, 7 Watts 90; *Nice's Appeal*, 54 Pa. St. 200; *Britton's Appeal*, 45 Pa. St. 172; *Brooke's Appeal*, 64 Pa. St. 127; *Boggs v. Varner*, 6 W. & S. 469; *Epley v. Withrow*, 7 Watts 167; *Randall v. Silverthorn*, 4 Barr. 173; *Hetherington v. Clark*, 6 Casey 393; *Bellas v. McCarty*, 10 Watts 13; *Phillips v. Bank of Lewistown*, 6 Harris 394; *Mott v. Clark*, 9 Barr. 399; *Lightner v. Mooney*, 10 Watts 407; *Huffman v. Strohecker*, 7 *Id.* 86.

⁹² *Mills v. Smith*, 3 Wall. 33; *Jackson v. Livingston*, 10 Johns. 374; *Maupin v. Emmons*, 47 Mo. 306; *Brush v. Ware*, 15 Pet. 93; *Jumel v. Jumel*, 7 Paige 591; *Burch v. Carter*, 44 Ala. 115; *Baltimore, etc., v. White*, 2 Gill 444; *Slattery v. Schwannecke*, 118 N. Y. 543; *Lee v. Ogden*, 83 Ga. 325, 10 S. E. Rep. 349.

⁹³ *Aeer v. Westcott*, 46 N. Y. 384; *Cambridge Valley Bank v. Delano*,

same land is sufficient, although the purchaser knew nothing of its contents.⁹⁴ Notice to a general agent or trustee is notice to the principal or *cestui que trust*, if it is given to such agent or trustee while he is engaged in the performance of his duties as such. It is not notice to the principal or *cestui que trust*, if communicated at any other time.⁹⁵ It is also generally held in the United States that possession of the grantee under a prior unrecorded deed is constructive notice of the title under which he claims.⁹⁶ But in some of the States it is held that such possession is not to be considered conclusive evidence of notice. The second grantee may show in rebuttal that he made a diligent but unsuccessful inquiry.⁹⁷ And in order that possession may raise a constructive notice of title, it must be open, notorious, and unequivocal. A joint possession with the grantor, or one which is rendered ambiguous from any other cause, will not be sufficient.⁹⁸

48 N. Y. 326; *Hamilton v. Nutt*, 34 Conn. 501; *Baker v. Matcher*, 25 Mich. 53.

. ⁹⁴ *Galland v. Jackman*, 26 Cal. 87.

⁹⁵ *Myers v. Ross*, 3 Head 59; *Slatten v. Schwannecke*, 118 N. Y. 543; *Shoemaker v. Smith* (Iowa), 45 N. W. Rep. 744; *Connell v. Connell*, 32 W. Va. 319; *Bunker v. Gordon*, 81 Me. 66; *Constant v. University of Rochester*, 111 N. Y. 604; *Constant v. Am. Baptist, etc., Society*, 58 N. Y. Super. 170.

⁹⁶ *Lea v. Polk Co. Copper Co.*, 21 How. 493; *Helms v. May*, 29 Ga. 121; *Maupin v. Emmons*, 47 Mo. 307; *Coleman v. Barklew*, 3 Dutch. 357; *Watrous v. Blair*, 32 Iowa 63; *Berg v. Shipley*, 1 Grant's Cas. 429; *Billington v. Welsh*, 5 Binn. 129; *McGlaughlin v. Holman* (Wash.), 24 Pac. Rep. 439; *Bassett v. Wood*, 55 Hun 587; *Toland v. Corey Utah*, 24 Pac. Rep. 190; *Griffin v. Haskins*, 22 Ill. App. 264; *Phelan v. Brady*, 19 Abb. N. C. 289; *s. c.* 1 N. Y. S. 626; *Smith v. Gibson*, 25 Neb. 511; *Bright v. Buckman*, 39 Fed. Rep. 243.

⁹⁷ *Pomroy v. Stevens*, 11 Metc. 244; *Dooley v. Wolcott*, 4 Allen 406; *Mara v. Pierce*, 9 Gray 306; *Nutting v. Herbert*, 37 N. H. 346; *Fair v. Stevenot*, 19 Cal. 490.

⁹⁸ *Billington v. Welsh*, 5 Binn. 129; *Patten v. Moore*, 32 N. H. 384; *Truesdale v. Ford*, 37 Ill. 210; *Lindley v. Martindale*, 78 Iowa 379; *Ellis v. Young*, 31 S. C. 322; *Matesky v. Feldman*, 75 Wis. 103. For validity of unrecorded deed or mortgage, as to all those with actual notice, see *LeCorta v. De Corte* (Fla. 1905), 39 So. Rep. 58.

SECTION II.

COMPONENT PARTS OF A DEED.

- SECTION 587.** Deeds-poll and of indenture.
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§ 587. Deeds-poll and of indenture.— After explaining the requisites of a deed to convey land, it is necessary to present the formal and component parts. But before proceeding to the discussion of them in their regular order, reference must be made to the two kinds of deeds known to the law, and differing in form, viz.: deeds of indenture, and deeds-poll. A deed of indenture is a deed consisting of as many parts as

there are parties. Originally, these parts, or copies, were written on the same piece of paper or parchment, and for the purpose of identifying the several parts, they were cut apart in an irregular line, somewhat resembling the teeth of a saw, *instar dentium*, some word having been written over the proposed line of severance. It is from this quaint method of execution that the name *indenture* is derived. But this practice is rarely, if ever, followed now, and a deed of indenture means simply a deed executed by all the parties, and consisting of as many parts or copies as there are parties. Formerly, it was customary for each party to execute only one and a different part, and the part executed by the grantor was called the *original*, while that which was executed by the grantee was called the *counterpart*. But now it is usual for both parties to execute each part.⁹⁹ A deed-poll is designed simply to transfer the grantor's interest, and is executed by him alone.¹ Deeds-poll are in the first person, while deeds of indenture are in the third person. But this is a mere formality, the non-observance of which will not invalidate the deed; and, although the deed is in form one of indenture, it will be good as a deed-poll, if the grantor executes it alone.² Indeed, the distinction is of very little practical value. Although it is said that a deed of indenture is a stronger deed for raising an estoppel against the grantee,³ yet a deed-poll can and does raise all the estoppels necessary for the protection of the grantor's interests, and by accepting the deed-poll the grantee takes the estate so granted, subject to all the con-

⁹⁹ 3 Washburn on Real Prop. 311; Co. Lit. 229 a, Butler's note 140; Dyer v. Sandford, 9 Metc. 395; Dudley v. Sumner, 5 Mass. 438.

¹ 3 Washburn on Real Prop. 311; Dyer v. Sandford, 9 Metc. 395; Giles v. Pratt, 2 Hill (S. C.) 439.

² 3 Washburn on Real Prop. 312; Hallett v. Collins, 10 How. 174; Hipp v. Hackett, 4 Texas 20.

³ 3 Washburn on Real Prop. 312; Finley v. Simpson, 2 N. J. 311. "While only the parties to a deed of indenture can take a present interest, yet persons not parties, such as after-born children, may take an interest *in futuro*." Hall v. Wright (Ky. 1905), 87 S. W. Rep. 1129, 27 Ky. Law Rep. 1185.

ditions, exceptions, reservations, and conditions contained in the deed. If the deed is to operate as a deed of exchange, or one of partition, all parties must join in the execution of the deed, and the deed must be an indenture, since in those cases each party is, successively, and in respect to his estate thus conveyed, a grantor. There is a technical difference between deeds-poll and deeds of indenture still prevailing, in respect to the form of action upon the grantee's covenants. In some of the States, where the common-law pleading still prevails, it is held that the action on the grantor's covenant in a deed-poll must be *assumpsit*, since his agreement or contract is not one under his seal. And no doubt this is the correct view.⁴ But in the so-called code States, viz., where the common-law pleading has been supplanted by the New York code of procedure, this distinction has passed away with the abolition of all forms of actions.⁵

§ 588. **Component parts of a deed.**— These parts have been divided and named by Lord Coke as follows: the premises, *habendum*, *tenendum*, *reddendum*, condition, warranty, and covenants. And although it is advisable, *ex abundante cautela*, to follow the form and order here prescribed, making use of the technical and thoroughly adjudicated phraseology, it is not absolutely necessary. If a deed contains all the requisites hereinbefore explained, it will be a good and effective deed, even though the various elements are presented in the most irregular order, and in the most informal language. The premises is the only essential part of a deed for the conveyance of an estate.⁶

⁴ *Goodwin v. Gilbert*, 9 Mass. 510; *Newell v. Hill*, 2 Metc. 180; *Hinsdale v. Humphrey*, 15 Conn. 431; *Johnson v. Massy*, 45 Vt. 419; *Maule v. Weaver*, 7 Pa. St. 829.

⁵ *Atlantic Dock Co. v. Leavett*, 54 N. Y. 34.

⁶ 3 Washburn on Real Prop. 365; Co. Lit. 6 a, 7 a; 4 Kent's Com. 461; *Roe v. Trammar*, Willes 682; *Staton v. Mullis*, 92 N. C. 623.

§ 589. *The premises.*—The term, *premises*, is given to all that part of a deed which precedes the *habendum* clause, and generally includes the names of the parties, the recitals which may be necessary to an explanation of the deed and its operation, the consideration and receipt of the same, the operative words of conveyance, description of the thing granted, and, if it is a deed of indenture, the date.⁷ But these may appear in other parts of the deed, and will be equally effective. And it has been held that where the premises do not contain the name of the grantee, or even sufficient operative words of conveyance, these may be supplied by the *habendum*.⁸ This is but an application of the general principle, already enunciated, that a logical or systematic arrangement of the parts is not essential. All the elements of the premises have been already fully discussed, except the matter of description of land granted, and nothing further need be said here concerning them. We will, therefore, proceed to a discussion of the description.

§ 590. *Description — General statement.*—At first blush, it would appear easy enough to describe specifically and clearly what is granted, and if extreme caution was observed in every case, in framing the description, there would be little need of rules of construction. For a clearly written description can never be controlled by parol evidence.⁹ But at times so little precaution is taken, and so many uncertainties and inconsistencies creep in, that resort must be made to established rules of construction in order to ascertain the intention of the parties. And in construing a deed, very little attention, if any, is paid to the punctuation of the description.¹⁰ If a

⁷ 3 Washburn on Real Prop. 366.

⁸ 3 Washburn on Real Prop. 366; *Staton v. Mullis*, 92 N. C. 623; *Wallace v. Crow* (Tex.), 1 S. W. Rep. 372; *post*, Sec. 609. See *Thompson v. Speck* (Tenn 1905), 2 Tenn. Ch. App. 759.

⁹ *Broom's Leg. Max.* 477; *Cole v. Lake Co.*, 54 N. H. 278; *Hannum v. West Chester*, 70 Pa. St. 472.

¹⁰ 3 Washburn on Real Prop. 397; *Doe v. Martin*, 4 T. R. 65; *Ewing v. Burnett*, 11 Pet. 54; *Bunn v. Wells*, 94 N. C. 67.

description is hopelessly uncertain, so that the thing granted cannot be ascertained from the deed with any reasonable degree of certainty, the deed will be void.¹¹ But if it is possible to gather the intention from the description by any reasonable rules of construction, it will be enforced,¹² it matters not how general the description may be.¹³ And in applying these rules of construction on the assumption, particularly in a deed-poll, that the deed is in the language of the grantor, and he is in fault, if uncertainties or inconsistencies arise, the deed is construed most favorably to the grantee. But this is only done when all other rules fail to remove the doubt.¹⁴ Another fundamental principle is that a rational intention must be sought after. The construction must be reasonable and consistent with common sense.¹⁵ In order to ascertain the intention, it is sometimes necessary that resort should be

¹¹ *Presbrey v. Presbrey*, 13 Allen 283; *Walters v. Breden*, 70 Pa. St. 238; *Wofford v. McKinna*, 23 Texas 45; 3 Washburn on Real Prop. 381; *Harrell v. Butler*, 92 N. C. 20; *Tryon v. Huntoon*, 67 Cal. 325; *Cunningham v. Thornton*, 28 Ill. App. 58; *Coffey v. Hendricks*, 66 Texas 676, 2 S. W. Rep. 47; *Blow v. Vaughan*, 105 N. C. 198, 19 S. E. Rep. 891. See *Kennedy v. Moness* (N. C. 1905), 50 S. E. Rep. 450.

¹² *Abbott v. Abbott*, 51 Me. 582; *Bond v. Fay*, 12 Allen 88; *Crafts v. Hibbard*, 4 Metc. 452; *Smith v. Green*, 41 Fed. Rep. 455; *Westmoreland v. Carson*, 76 Texas 619; *Smith v. Brown*, 66 Texas 543, 1 S. W. Rep. 273; *Smith v. Greaves*, 15 Lea 459; *Coe v. Ritter*, 86 Mo. 277; *Prior v. Scott*, 87 Mo. 303; *Wabash, etc., R. R. Co. v. McDougal*, 113 Ill. 603; *Mann v. State*, 116 Ind. 383.

¹³ *Smith v. Westall*, 76 Texas 509, 13 S. W. Rep. 540; *Witt v. Harlan*, 66 Texas 660, 2 S. W. Rep. 41; *Galbraith v. Engleke* (Tex.), 1 S. W. Rep. 346. "A description of land as 'ten acres of land situated in [a certain district], where I now reside,' is not too indefinite to be made certain by parol evidence." *Brice v. Sheffield* (Ga. 1903), 44 S. E. Rep. 843.

¹⁴ *Worthington v. Hylyer*, 4 Mass. 205; *Clough v. Bowman*, 15 N. H. 504; *Sanborn v. Clough*, 40 N. H. 339; *Carroll v. Norwood*, 5 Har. & J. 155; *Vance v. Fore*, 24 Cal. 446. See *Negaunee Iron Co. v. Iron Cliffs Co.* (Mich. 1903), 96 N. W. Rep. 468.

¹⁵ *Lyman v. Arnold*, 5 Mason 198; *Day v. Adams*, 42 Vt. 510; *Magoon v. Harris*, 46 Vt. 271. See *Abercrombie v. Simmons* (Kan. 1905), 81 Pac. Rep. 208.

had to parol evidence. But this can only be done when there is some uncertainty arising outside of the deed. Then parol evidence is admissible to explain the ambiguities arising in this manner by showing the circumstances surrounding the parties, explaining words of art and by proof of any other facts which will tend to render certain the intentions of the parties.¹⁶ Parol evidence, however, is inadmissible to explain away an ambiguity which appears upon the face of the deed, as where the deed shows upon its face that the description applies equally to two lots.¹⁷ When the deed contains everything necessary for a correct understanding of the intention of the parties, and there is, therefore, no uncertainty or ambiguity, parol evidence cannot control the construction or add to the provisions of the deed.¹⁸ Where the deed, upon a reasonable construction, conveys other property, or imposes other restrictions or conditions than were intended by the parties, the courts, more particularly those of equity, are authorized, either by statute or under the general equitable jurisdiction, to reform it, so as to conform to the intention of the parties.¹⁹ But the reformation must be necessary to effectuate the intention of the parties. It will not be ordered

¹⁶ *Shore v. Wilson*, 9 Cl. & Fin. 556; *Eaton v. Smith*, 20 Pick. 150; *Putnam v. Bond*, 100 Mass. 58; *Charles v. Patch*, 87 Mo. 450; *Wabaah, etc., R. R. Co. v. McDougal*, 113 Ill. 603; *Mack v. Bensley*, 63 Wis. 90; *Thompson v. S. Cal. M. R. Co.*, 82 Cal. 497, 23 Pac. Rep. 130; *Eastman v. St. Anthony, etc., Co.*, 43 Minn. 60, 44 N. W. Rep. 882; *Westmoreland v. Carson*, 76 Texas 619; *Bollinger Co. v. McDowell*, 99 Mo. 632; *McKinley v. Smith*, 29 Ill. App. 106; *Brice v. Sheffield* (Ga. 1903), 44 S. E. Rep. 843.

¹⁷ *Brandon v. Leddy*, 67 Cal. 43.

¹⁸ *Bond v. Fay*, 12 Allen 88; *Caldwell v. Fulton*, 31 Pa. St. 489; *Morrison v. Wilson*, 30 Cal. 347; *Lippett v. Kelly*, 46 Vt. 516; *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 430; *Matley v. Long*, 71 Md. 585; *Holcomb v. Mooney*, 13 Or. 513, 11 Pac. Rep. 274; *Bradish v. Yocum*, 130 Ill. 386, 23 N. E. Rep. 114. See *Dorr v. Reynolds*, 26 Pa. Super. Ct. 139.

¹⁹ *Metcalf v. Putnam*, 9 Allen 97; *Canedy v. Marcy*, 14 Gray 373; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 317; *Adams v. Stevens*, 49 Me. 362; *Cramer v. Burton*, 60 Barb. 225; *Andrews v.*

where the uncertainty may be removed by the application of well-known rules of construction.²⁰ Nor will a deed be reformed because the parties have mistaken the legal operation of the deed.²¹ But reformation of instruments is a branch of equity jurisprudence, and does not properly belong to a work on Real Property. Suffice it to say that, until it is reformed, an absolutely defective deed conveys nothing.

§ 591. *Contemporanea exposito est optima et fortissima in lege.*—In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed. For, in describing the property, parties are presumed to refer to its condition at that time, and the meaning of their terms of expression can only be properly understood by a knowledge of their position and that of the property conveyed.²² Thus, where the channel of a stream running through a tract of land, was changed by the proprietor, and he subsequently sold it in parcels to different persons, so that the new channel

Gillespie, 47 N. Y. 487; *Ilse v. Lamsheimer*, 76 Texas 459; *Stafford v. Giles* (Pa.), 19 Atl. Rep. 1028; *McShane v. Main*, 62 N. H. 24.

²⁰ *White v. White*, L. R. 15 Eq. 247; *Andrews v. Spurr*, 8 Allen 416; *Clement v. Youngman*, 40 Pa. St. 344; *Keene's Appeal*, 64 Pa. St. 274; *Mills v. Lockwood*, 42 Ill. 111. And the mistake must have been mutual. *Kruse v. Koelzer* (Wis. 1905), 102 N. W. Rep. 1072. "A court of equity will not decree the correction of a mistake in a deed of voluntary conveyance." *Henry v. Henry* (Ill. 1905), 74 N. E. Rep. 126.

²¹ *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 317; *Glass v. Hulburt* 102 Mass. 44; *Canedy v. Marcy*, 13 Gray 363; *Hutchings v. Huggins*, 59 Ill. 32.

²² *Dunklee v. Wilton R. R.*, 24 N. H. 489; *Richardson v. Palmer*, 38 N. H. 218; *Connery v. Brooke*, 73 Pa. St. 84; *Commonwealth v. Roxberry*, 9 Gray 493; *Abbott v. Abbott*, 51 Me. 581; *Lane v. Thompson*, 43 N. H. 324; *Thompson v. Southern Cal. M. R. Co.*, 82 Cal. 497, 23 Pac. Rep. 130; *Staples v. May* (Cal.), 23 Pac. Rep. 710. "In construing a doubtful description in a deed, the court will consider the position of the contracting parties and circumstances, and interpret the language in the light of the circumstances." *Abercrombie v. Simons* (Kan. 1905), 81 Pac. Rep. 208.

was completely within the boundaries of one parcel, the grantee of this parcel could not, by restoring the stream to its old channel, inundate the other parcels.²³ And if at the time of the conveyance by the government of land bounding on a stream, the stream was declared by act of Congress to be navigable, making the boundary line the low-water mark on the shore, a subsequent repeal of the act of Congress can have no effect on the location of the boundary line.²⁴ So, also, if the grant was made of a farm, describing the same, but not particularizing what parcels were included under the general description, all parcels will pass by the deed which were at the time of the conveyance used and occupied together.²⁵ Where the description is susceptible of two constructions, the extent of the possession will control.²⁶ And where, at the time of the conveyance, the grantor had, in addition to some lands, a right of entry upon the breach of a condition, and the breach had not yet occurred, the land acquired by a subsequent exercise of the right of entry was held not to pass under a mortgage of all his rights and interests in lands in C.²⁷

§ 592. *Falsa demonstratio non nocet*.—It is a general rule of construction that the deed should be so construed, that the whole deed shall stand and be enforced.²⁸ If this is impossible, and the description contains several elements of description, all of which are necessary to the identification of the property intended to be conveyed, the deed will be void if no property of the grantor can be found which will correspond

²³ 3 Washburn on Real Prop. 384; *Roberts v. Roberts*, 55 N. Y. 275. See, also, *Buras v. O'Brien* (La.), 7 So. Rep. 632; *St. Louis, etc., Ry. Co. v. Ramsey* (Ark.), 13 S. W. Rep. 931.

²⁴ *Serrin v. Grefe*, 67 Iowa 196.

²⁵ *Bell v. Woodward*, 46 N. H. 337. See *Webb v. Walters* (Tex. 1905), 87 S. W. Rep. 1051.

²⁶ *Booth v. Patte*, L. R. 15 App. Cas. 188.

²⁷ *Richardson v. Cambridge*, 2 Allen 118.

²⁸ *Walters v. Breden*, 70 Pa. St. 238. See *Hubbird v. Fain*, 137 Fed. Rep. 822.

with every part of the description.²⁹ But if the intention, as gathered from the deed, does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with other parts, and enough of them are consistent to identify the property intended by the parties to pass, whatever is repugnant is rejected, and the deed is enforced under this construction.³⁰ Where two inconsistent parts of the description are equally balanced, it has been held that the grantee may choose that which is most favorable to him.³¹ The first part of the description will prevail over the last, provided both appear in the granting portion of the deed; and if one part is *written* and the other is *printed*, the written part will prevail.³² A particular description prevails over and limits the application of a general description.³³ If, therefore, a deed defines with reasonable certainty what is intended to be conveyed, the fact that a portion of the description is not satisfied by the specific property will not invalidate the conveyance.³⁴ But if there are lands in the possession of the grantor which comply with all the particulars

²⁹ 3 Washburn on Real Prop. 400; *Brown v. Saltonstall*, 3 Me. 423; *Warren v. Coggs*, 10 Gray 76. See *Kennedy v. Moness* (N. C. 1905) 50 S. E. Rep. 450.

³⁰ *Corbin v. Healy*, 20 Pick. 514; *Bond v. Fay*, 8 Allen 212; *Presbrey v. Presbrey*, 13 Allen 283; *Doane v. Wilcutt*, 10 Gray 371; *Scully v. Preiden*, 92 N. C. 168; *Chadwick v. Carson*, 78 Ala. 166; *Holston v. Needles*, 115 Ill. 461; *Irving v. Cunningham*, 66 Cal. 15; *Gerald v. Gerald*, 31 S. C. 171; *Maguire v. Bissell*, 119 Ind. 345; *Cake v. Cake*, 127 Pa. St. 400; *Casler v. Byers*, 129 Ill. 657; *Ambs v. Chicago, etc., R. Co.*, 44 Minn. 266.

³¹ *Esty v. Baker*, 50 Me. 331; *Melvin v. Proprietors, etc.*, 8 Metc. 27. See *Brandon v. Leddy*, 67 Cal. 43. "When there are two descriptions in a deed, which are inconsistent with each other, the grantee is at liberty to select that which is most favorable to him." *McBride v. Burns* (Tex. Civ. App. 1905), 88 S. W. Rep. 394.

³² *Webb v. Webb*, 29 Ala. 606; *McNear v. McComber*, 18 Iowa 17; *Duffield v. Hue*, 129 Pa. St. 94.

³³ *Johnson Co. v. Wood*, 84 Mo. 489.

³⁴ *Parker v. Kane*, 22 How. 1; *Crosby v. Bradbury*, 20 Me. 61; *Parks v. Loomis*, 6 Gray 467; *Presbrey v. Presbrey*, 13 Allen 283; *Jackson v. Clark*, 7 Johns. 223; *Lush v. Druse*, 4 Wend. 313; *Spiller v. Scribner*,

of the description, then only such lands will pass by the deed although it might appear from evidence that other parcels are intended to pass also.³⁵ In determining what is the *falsa demonstratio*, which may be rejected without invalidating the deed, it must be remembered that a particular or special description will generally control a general or implied description, in whatever order they may come.³⁶

§ 593. Description in conveyances of joint estates.—A tenant cannot, without the consent of his co-tenants, give an absolute title to any part of the estate, described by metes and bounds, equal in value to his undivided share in the joint estate, which will be binding upon his co-tenants.³⁷ And some of the courts deny the efficacy of such a conveyance for any purpose, without the consent of the co-tenants. It conveys to the grantee no interest whatsoever in the general estate.³⁸

36 Vt. 246; Johnson v. Simpson, 36 N. H. 91; Weeks v. Martin, 10 N. Y. S. 656; Trentman v. Neff (Ind.), 24 N. E. Rep. 895.

³⁵ Brown v. Saltonstall, 3 Me. 423; Morrell v. Fisher, 4 Exch. 591; Warren v. Cogswell, 10 Gray 76; Griffiths v. Penson, 1 H. & Colt. 862; Llewellyn v. Jersey, 11 Mees. & W. 183. See Owsley v. Johnson (Minn. 1905), 103 N. W. Rep. 903. "A deed of 'ten acres of land where I now reside' is sufficiently identified by evidence that at the time of its execution the grantor was living in the district named in the deed on land which contained just 10 acres." Brice v. Sheffield (Ga. 1903), 44 S. E. Rep. 843.

³⁶ Smith v. Strong, 14 Pick. 128; Whiting v. Dewey, 15 Pick. 428; Winn v. Cabot, 18 Pick. 553; Dana v. Middlesex Bank, 10 Metc. 250; Howell v. Saule, 5 Mason 410. But see Moran v. Somes (Mass.), 28 N. E. Rep. 152, where it is held that, where a deed conveys "all my right, title and interest," it passes the whole estate of the grantor, which were four undivided fifths, although the deed described the interest to be three undivided fifths.

³⁷ Brown v. Bailey, 1 Metc. 254; Nichols v. Smith, 22 Pick. 316; Peabody v. Minot, 24 Pick. 329; Whilton v. Whilton, 38 N. H. 127; Jewett's Lessee v. Stockton, 3 Yerg. 492; Good v. Combs, 28 Texas 51; McKey v. Welch, 22 Texas 390.

³⁸ Soutter v. Porter, 17 Me. 405; Phillips v. Tudor, 10 Gray 82; Johnson v. Stevens, 7 Cush. 431; Crippen v. Morse, 49 N. Y. 67; 3 Washburn on Real Prop. 261; Cox v. McMullin, 14 Gratt. 84. But where the joint estate consists of several distinct parcels, there is no

But the more rational and equitable theory would seem to be, that such a conveyance would pass whatever was the grantor's proportionate share in that part of the joint estate, and make the grantee a co-tenant in the general estate to the extent of the interest so conveyed. Thus, if one of two equal co-tenants conveys his share in one-half of the joint estate, described by metes and bounds, his grantee would become a co-tenant with the others in an undivided one-fourth of the whole estate.³⁹ For it is undisputed that if the owner of lands grants a specified number of acres in the estate without describing them, his grantee will become a tenant in common with him, his share being covered by the ratio which his number of acres bore to the whole estate.⁴⁰ The description by metes and bounds may be treated as surplusage, except for the purpose of determining the grantee's aliquot share in the entire joint estate. If the property has been divided up into town lots, it is clear and beyond dispute, that a co-tenant may by metes and bounds convey his undivided interest in one or more of the lots.⁴¹

§ 594. The elements of description—A full and complete description gives monuments, courses, and distances, and the quantity of land conveyed. The relative value of them, in

objection to the reconveyance of one co-tenant's interest in one parcel. *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Peabody v. Minot*, 24 Pick. 329. See *Costello v. Graham* (Ariz. 1905), 80 Pac. Rep. 336.

³⁹ *Reinicker v. Smith*, 2 Har. & J. 421; *Campan v. Godfrey*, 18 Mich. 39. See *Newton v. Home and Drury*, 29 Wis. 531, 9 Am. Rep. 616; *Boylston Ins. Co. v. Davis*, 68 N. C. 17, 12 Am. Rep. 624; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Jewett v. Foster*, 14 Gray 496; *Gibbs v. Swift*, 12 Cush. 393; *Jackson v. Livingston*, 7 Wend. 136; *Wilford v. McKinna*, 23 Texas 45; *Furrrh v. Winston*, 66 Texas 521; *Charleston C. & C. R. R. v. Leech* (S. E.), 11 S. E. Rep. 631; *Howse v. Dew* (Ala.), 7 So. Rep. 239. *Contra*, *Shackleford v. Bailey*, 35 Ill. 391.

⁴⁰ *Jewett v. Foster*, 14 Gray 496; *Gibbs v. Swift*, 12 Cush. 393; *Preston v. Robinson*, 24 Vt. 593; *Jackson v. Livingston*, 7 Wend. 136; *Wolford v. McKinna*, 23 Texas 45; *Schenck v. Evoy*, 24 Cal. 110. *Contra*, *Shackleford v. Bailey*, 35 Ill. 391.

⁴¹ *Shepherd v. Jernigan*, 51 Ark. 275.

determining the boundaries, is in the order given. Monuments control the courses and distances, and both control the quantity of land.⁴² The reason for this order of preference lies in the rule of construction, that where there is an inconsistency in the description, that element of description will be followed as to which there is the least likelihood of a mistake.⁴³ And, generally, the description contains *data* for the location of all four sides of the tract of land. But where three are given, and there is sufficient description as to their courses and distances to establish the fourth by reasonable intendment, the deed will not be void.⁴⁴

§ 595. **Monuments — Natural and artificial.**— There are two kinds of monuments, *natural*, or those objects which are permanent, and are found upon the land; and *artificial*, or those which are placed there for the very purpose of pointing out the boundary. Among the natural objects which may serve as monuments may be mentioned trees, streams, ponds, or lakes, shores and highways;⁴⁵ and where reference is made in a deed to artificial monuments which do not then exist, they

⁴² *Brown v. Huger*, 21 How. 305; *Powell v. Clark*, 5 Mass. 355; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Hall v. Davis*, 36 N. H. 569; *Jackson v. Diefendorf*, 1 Caines 493; *Mann v. Pearson*, 2 Johns. 37; *Drew v. Swift*, 46 N. Y. 207; *Mackentile v. Savoy*, 17 Serg. & R. 164; *Commissioners v. Thompson*, 4 McCord 434; *Miller v. Cherry*, 3 Jones Eq. 29; *Colton v. Seavey*, 22 Cal. 496; *Coburn v. Coxeter*, 51 N. H. 158; *Wilder v. Davenport*, 58 Vt. 642; *Friend v. Friend*, 64 Md. 321. See *Person v. Champbliss' Admr.* (Miss. 1905), 38 So. Rep. 286. "Wherever a deed refers to monuments actually erected as boundaries of the land, they must prevail, whatever mistakes the deed may contain as to courses and distances." *Leverett v. Bullard* (Ga. 1904), 49 S. E. Rep. 591.

⁴³ *Miller v. Cherry*, 3 Jones Eq. 39; *Melvin v. Proprietors, etc.*, 5 Metc. 28; *Esty v. Baker*, 50 Me. 311; *Ferris v. Coover*, 10 Cal. 628.

⁴⁴ *Commonwealth v. Roxbury*, 9 Gray 490. See *Wall v. Club St. Co.* (Texas 1905), 88 S. W. Rep. 534.

⁴⁵ *Flagg v. Thurston*, 13 Pick. 159; *Bloch v. Pfaff*, 101 Mass. 538; *Bates v. Tymanson*, 13 Wend. 300; *Carroll v. Norwood*, 5 Har. & J. 163; *Smith v. Murphy*, 1 Tayl. 303.

may be located subsequently by the parties. They will then control the courses and distances, although it may be possible to show by parol evidence that the artificial monuments as erected do not show the true line.⁴⁶ Parol evidence is not admissible to control the boundaries in a deed.⁴⁷ But if the monuments are lost, or have been moved, or there is doubt as to which of the two objects was intended to be the monument, parol evidence is admissible to determine the monument or its location.⁴⁸ And the question, where the boundaries are and what is the location of the monuments, is one of fact for the jury.⁴⁹ Natural monuments are higher in value than artificial ones, and are always given the preference in the case of an inconsistency in the description arising from a reference to both.⁵⁰ Where a line is described as running from one monument to another, it is always a straight line between those two points. And if three monuments are referred to as points on the boundary, the line must be straight from one

⁴⁶ *Kennebec Purchase v. Tiffany*, 1 Me. 219; *Knowles v. Toothacker*, 58 Me. 175; *Corning v. Troy Co.*, 40 N. Y. 208; *Waterman v. Johnson*, 13 Pick. 261; *Cleveland v. Flagg*, 4 Cush. 81; *Claney v. Rice*, 20 Pick. 62; *Hathaway v. Evans*, 108 Mass. 270; *Rockwell v. Baldwin*, 53 Ill. 22; *Smith v. Hamilton*, 20 Mich. 433; *Leverett v. Bullard* (Ga. 1905), 49 S. E. Rep. 591; *Elsae v. Adkins* (Ind. 1905), 74 N. E. Rep. 242.

⁴⁷ *Parker v. Kane*, 22 How. 1; *Dean v. Erskine*, 18 N. H. 83; *Frost v. Spaulding*, 19 Pick. 445; *Spiller v. Scribner*, 36 Vt. 247; *Drew v. Swift*, 46 N. Y. 209; *McCoy v. Galloway*, 3 Ohio 283. See *Dorr v. Reynolds*, 26 Pa. Super. Ct. 139.

⁴⁸ *Stone v. Clark*, 1 Metc. 378; *Frost v. Spaulding*, 19 Pick. 445; *Gratz v. Bates*, 45 Pa. St. 504; *Middleton v. Perry*, 2 Bay 539; *Colton v. Seavey*, 22 Cal. 496.

⁴⁹ *Abbott v. Abbott*, 51 Me. 581; *Opdyke v. Stephens*, 28 N. J. L. 90. "The application of the description in a deed to the land is for the jury." *Snooks v. Wingfield* (W. Va. 1903), 44 S. E. Rep. 277; *Cole v. Mueller* (Mo. 1905), 86 S. W. Rep. 193; *Neumeister v. Goddard* (Wis. 1905), 103 N. W. Rep. 241.

⁵⁰ *Bolton v. Lann*, 16 Texas 96; *Falwood v. Graham*, 1 Rich. 497; *Beahan v. Stapleton*, 13 Gray 427; *Brown v. Huger*, 21 How. 305; *McIver v. Walker*, 4 Wheat. 444; *Newson v. Pryor*, 7 Wheat. 7; *Duren*

monument to another successively.⁵¹ Furthermore, if a line is described as running from a given point to a natural object, like a highway or stream, unless the course or length of the line is given, it must be the shortest line drawn from the point to the object, and must, therefore, be at right angle with the stream or highway.⁵² Where the line is described as running "between" two objects, the objects, as well as the land lying between them, are excluded from the grant. So, also when the description is "from" one object, "to" another.⁵³

§ 596. Artificial monuments in the United States' surveys.—The public lands of the Western Territories, which became the property of the United States government upon the foundation of the present Union, were by acts of Congress surveyed and divided up into townships, sections, and subdivisions of sections, as has been already explained.⁵⁴ When afterwards these lands were sold to private individuals, they were always described by referring to the number of the township, section, and subdivision of the section. The boundaries of these sections and of the quarter and half sections were marked for the most part by artificial monuments, which constituted the corners of these tracts of land. If, therefore, the deed calls for a certain quarter section of a certain section in a certain township, a reference to the maps and field notes *v. Presberry*, 25 Texas 512. See *Marshall v. Corbett* (N. C. 1905), 50 S. E. Rep. 210.

⁵¹ *Allen v. Kingsbury*, 16 Pick. 235; *Jenks v. Morgan*, 6 Gray 448; *Hovey v. Sawyer*, 5 Allen 585; *Nelson v. Hall*, 1 McLean 519; *Caraway v. Chancy*, 6 Jones L. 364; *Baker v. Talbott*, 6 B. Mon. 179; *McCoy v. Galloway*, 3 Ohio 382. "Ordinarily, a boundary line marked part of the way will be continued in the same direction for the full distance." *Seitz v. People's Sav. Bank* (Mich. 1905), 103 N. W. Rep. 545.

⁵² *Van Gorden v. Jackson*, 5 Johns. 474; *Bradley v. Wilson*, 58 Me. 360; *Craig v. Hawkins*, 1 Bibb. 64; *Hicks v. Coleman*, 25 Cal. 142; *Caraway v. Chancy*, 6 Jones L. 364.

⁵³ *Bonney v. Morrill*, 52 Me. 256; *Hatch v. Dwight*, 17 Mass. 289; *Carbrey v. Willis*, 7 Allen 370; *Millett v. Fowie*, 8 Cush. 150; *Wells v. Jackson Iron Co.*, 48 N. H. 491.

⁵⁴ See *ante*, Sec. 519.

of the survey will determine the location of the land, for maps and surveys are generally proper evidence for the establishment of boundaries,⁵⁵ and the United States Statutes makes the field notes and plats of the original surveyor the primary and controlling evidence of boundary.⁵⁶ These field notes and the plats call for artificial monuments to designate the corners of the tract, and when they are found, since artificial monuments control distances and courses in government surveys as well as in ordinary cases,⁵⁷ no difficulty will be experienced in ascertaining the boundaries, except in two cases: *First*, if the deed calls for natural monuments, and the land is described in part by reference to them; and *secondly*, where the description consists in a reference to the township and section, and it is ascertained that one or more of the corners have been lost. In the first case, the general rule that natural monuments control in the matter of boundary both the artificial monuments and the courses and distances, ap-

⁵⁵ *Haring v. Van Houten*, 22 N. J. L. 61; *Alexander v. Lively*, 5 B. Mon. 159; *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Steele v. Taylor*, 3 A. K. Marsh. 226; *Madison City v. Hildreth*, 2 Ind. 274; *Tate v. Gray*, 1 Swan 73; *Carmichael v. Trustees*, 4 Miss. 84; *McClintock v. Rogers*, 11 Ill. 279. "Where lands are conveyed by a reference to a plat, the plat, with its notes, lines, etc., is as controlling as if such description were written in the deed." *Neumeister v. Goddard* (Wis. 1905), 103 N. W. Rep. 241. "Where meander corners of a government survey are lost or obliterated, they are to be restored in accordance with the circular of the United States Land Office of March 14, 1901." *Kleven v. Gunderson* (Minn. 1905), 104 N. W. Rep. 4.

⁵⁶ U. S. Rev. Stat., Sec. 2396. "The boundary lines actually run and marked in the surveys returned by the Surveyor-General shall be established as the proper boundary lines of the sections or subdivisions for which they were intended." *Bruce v. Taylor*, 2 J. J. Marsh. 160; *Steele v. Taylor*, 3 A. K. Marsh. 226; *McClintock v. Rogers*, 11 Ill. 279. See *Hogg v. Lusk* (Ky. 1905), 86 S. W. Rep. 1128. See *Washington Rock Co. v. Young*, 80 Pac. Rep. (Utah) 382.

⁵⁷ *Robinson v. Moore*, 4 McLean 279; *Esmond v. Tarbox*, 7 Me. 61; *Hall v. Davis*, 36 N. H. 569; *Hunt v. McHenry*, Wright 599; *Bayless v. Rupert*, Wright 634; *Bruckner v. Lawrence*, 1 Dougl. (Mich.) 19; *Climmer v. Wallace*, 28 Mo. 556. See *Washington Rock Co. v. Young* (Utah), 80 Pac. Rep. 382.

plies here in its full force, although the plats and field notes would indicate a different location.⁵⁸ The second case presents a greater difficulty. It is a general rule of construction that where the natural and artificial monuments cannot be ascertained by any proper evidence, the courses and distances must govern the location of the boundary, and this is also the rule in respect to the lost corners in the government surveys.⁵⁹ But before the courses and distances can determine the boundary, *all means for ascertaining the location of the lost monuments must first be exhausted*. Parol evidence is admissible to establish the location of monuments, and even *hearsay* evidence and evidence of general reputation are admissible in such cases.⁶⁰ But in the case of government or public lands, as a general rule, the courts and the parties rely chiefly upon the surveys and plats returned by the Surveyor-General for the evidence of boundary, and where the corners are lost and cannot be established by parol evidence, the surveys and plats only give the courses and distances. If the surveys were accurate and the courses and distances given in the field notes corresponded exactly with the actual location of corners, a resort to these courses and distances would do complete justice to all the parties interested in the ascertainment of the boundary. But, as a matter of fact, the chains used

⁵⁸ *Brown v. Hager*, 21 How. 305; *McIver v. Walker*, 4 Wheat. 444; *Newsom v. Pryor*, 7 Wheat. 7; *Duren v. Presberry*, 25 Texas 512; *East Omaha Land Co. v. Jeffreys*, 40 Fed. Rep. 386; s. c. 134 U. S. 178.

⁵⁹ *Heaton v. Hodges*, 14 Me. 66; *Dudd v. Brooke*, 2 Gill 198; *Bruckner v. Lawrence*, 1 Dougl. (Mich.) 19; *Calvert v. Fitzgerald*, 6 Litt. 391. See *Witt v. Middleton* (Ky. 1905), 86 S. W. Rep. 968. "Where, on an issue as to the location of a government corner by the surveyors, the actual location of the corner is shown, the actual location controls, though it does not correspond fully with the calls in the field notes." *Tyler v. Haggart* (S. D. 1905), 102 N. W. Rep. 682.

⁶⁰ *Boardman v. Reed*, 6 Pet. 341; *Jackson v. McCall*, 10 Johns. 377; *Lay v. Neville*, 25 Cal. 545; *Smith v. Shackelford*, 9 Dana 452; *Nixon v. Porter*, 34 Miss. 697; *Smith v. Prewitt*, 1 A. K. Marsh. 158; *Stroud v. Springfield*, 28 Texas 649; *Yates v. Shaw*, 24 Ill. 367. See, for competency of evidence of chainbearer, *Marshall v. Corbett* (N. C.), 50 S. E. Rep. 210.

in making the measurements were stretched by constant use, so that they were in most cases much longer than the standard chain, thus making the courses and distances call for less land than was actually included within the established corners. The Supreme Court of Missouri, relying upon the rule that courses and distances control the boundary when the monuments are lost, has held that where a corner is lost the surveyor must measure from the known corner on the eastern line of the township or section the distance called for by the plat and field notes, and the corner must be established at that distance, the surplus of land being given to the western section or quarter section.⁶¹ This is contrary to the provisions of the United States Statutes, which must govern in all disputes as to the boundaries of government lands. It is provided by statute that "all the corners *marked in the surveys*, returned by the Surveyor-General, shall be established as the proper corners of sections or subdivisions of sections, which they would intend to designate; and the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equi-distant from two corners which stand on the same line." This statutory provision clearly makes the field notes the proper and the best means of ascertaining lost corners, and the interpretation of the field notes must be governed largely, if not exclusively, by the principles of civil engineering. The object being to ascertain the exact location of a lost corner, it is necessary and the United States Statutes require it, that the errors in the measurements should be noted. If, therefore, the courses and distances fall below the actual amount of land included in the two contiguous sections or subdivisions of sections, between which the boundary is to be ascertained, the surplus of land should be divided be-

⁶¹ Knight v. Elliott, 57 Mo. 322; Vaughn v. Tate, 64 Mo. 491; Major v. Watson, 73 Mo. 665. And this seems also to be the position of the court of Virginia upon a parallel case. Overton v. Devissan, 1 Gratt. 211. See Hogg v. Lusk (Ky.), 86 S. W. Rep. 1128; Washington Rock Co. v. Young (Utah), 80 Pac. Rep. 382.

tween the two tracts of land in proportion to the respective lengths of their lines in the plats.⁶²

§ 597. **Non-navigable streams**—Generally, where land is bounded by a stream which is not navigable, the boundary line is the center line of the stream, the *filum aquæ*; and the line changes its course with the natural and gradual change in the current.⁶³ But it does not always follow that the thread of the stream will be the boundary line, because the stream is referred to in the deed. If the stream is mentioned as the boundary in general terms, or the land is described as “bounding on” or “running along” a river, the stream will be held to be the monument and the thread of the stream is the boundary line. And this is true, although the deed describes the line on the stream as extending from one object to another, both of which are on the shore; as, for example, “bounding on” the stream and “extending from” one tree on the bank to another. The *termini* of the boundary line are ascertained by drawing lines at right angles with the shore from these objects to the center of the stream.⁶⁴ But

⁶² This rule is recognized and adopted in *Jones v. Kimble*, 19 Wis. 429, and constitutes one of the printed instructions to the United States deputy and county surveyors; and these instructions are by statute made a part of every contract for surveying land. Sec. 2399, U. S. Rev. Stat.

⁶³ *Morrison v. Keen*, 3 Me. 474; *Hatch v. Dwight*, 17 Mass. 289; *People v. Canal Appraisers*, 13 Wend. 355; *Commissioners v. Kempshall*, 26 Wend. 404; *People v. Platt*, 17 Johns. 195; *Morgan v. Reading*, 3 Smed. & M. 366; *Browne v. Kennedy*, 5 Har. & J. 195; *Hayes v. Bowman*, 1 Rand. 417; *Lynch v. Allen*, 4 Dev. & B. 62; *State v. Gimlanton*, 9 N. H. 461; *Love v. White*, 20 Wis. 432. See, *Whittaker v. McBride*, 65 Neb. 137, 90 N. W. Rep. 966, 197 U. S. 510; *Edwards v. Woodruff*, 25 Pa. Super. Ct. 575.

⁶⁴ *Lunt v. Holland*, 14 Mass. 150; *Cold Springs Iron Works v. Tolland*, 9 Cush. 492; *Newhall v. Ireson*, 13 Gray 262; *Railroad v. Schurmeier*, 7 Wall. 286; *Luce v. Carley*, 24 Wend. 451; *Varick v. Smith*, 9 Paige Ch. 547; *Robinson v. White*, 42 Me. 218; *Cox v. Freedley*, 33 Pa. St. 129; *Norcross v. Griffiths*, 65 Wis. 599. See, *Whittaker v. McBride*, 197 U. S. 510.

if the land is described as bounding *on the bank or shore* of the stream, then the low-water mark on the banks will be the boundary. The particular reference to the bank excludes the stream.⁶⁵ Where the stream or its bank is the boundary line, it follows its meanderings so that if the distance is given it is ascertained by reducing the irregular lines of the shore to a straight line.⁶⁶

§ 598. **Navigable streams.**—Where land is bounded by a navigable stream, strictly so-called, *i. e.*, where the tide ebbs and flows, the boundary line is the high-water mark on the shore.⁶⁷ But in the States where the large rivers of this country are held to be navigable, although having no tide-water, the boundary line is held on those rivers to be at low-water mark.⁶⁸ But in both cases the riparian owner has, as appurtenant to his ownership, the right to erect and maintain wharfs and piers, subject to the governmental control neces-

⁶⁵ *Bradford v. Cressey*, 45 Me. 9; *Child v. Starr*, 4 Hill 369; *Halsey v. McCormick*, 13 N. Y. 296; *Babcock v. Utter*, 1 Abb. Pr. 27; *Martin v. Nance*, 3 Head 650; *Watson v. Peters*, 26 Mich. 516; *Litchfield v. Ferguson*, 141 Mass. 97; *Carter v. Chesapeake, etc., R. R. Co.*, 26 W. Va. 644, 53 Am. Rep. 116.

⁶⁶ *Calk v. Stribling*, 1 Bibb. 122; *Hicks v. Coleman*, 25 Cal. 142; *People v. Henderson*, 40 Cal. 32.

⁶⁷ *Canal Commrs. v. The People*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 377; *Niles v. Patch*, 13 Gray 254; *Stewart v. Fitch*, 30 N. J. L. 20; *Middleton v. Pritchard*, 4 Ill. 520. See, *Edwards v. Woodruff*, 25 Pa. Super. Ct. 575. "Where a devisor owns land under the waters of a river, separate devises of land on the east and west banks thereof, where there is no clause limiting them, carry title to the thread of the stream, though the river is navigable and the tide ebbs and flows therein." Judgment (1903) 81 N. Y. S. 231, 79 App. Div. 174, reversed. *Smith v. Bartlett* (N. Y. 1905), 73 N. E. Rep. 63, 180 N. Y. 360.

⁶⁸ *Stover v. Jack*, 60 Pa. St. 339; *Wood v. Appal*, 63 Pa. St. 221; *Wainwright v. McCullough*, 63 Pa. St. 66; *Martin v. Evansville*, 32 Ind. 85; *Ensminger v. People*, 47 Ill. 384; *People v. Canal Commrs.* 33 N. Y. 461; *Edder v. Burrus*, 6 Humph. 367; *Martin v. Nance*, 3 Head 650.

sary for the protection of the public.⁶⁹ The same rule applies to land bounded by the sea or by the arms of the sea. The boundary line is the high-water mark, and what is called the shore or beach is the property of the State.⁷⁰ In Massachusetts, by statute, the common law has been changed, and now riparian owners on navigable rivers and arms of the sea own up to the low-water mark,⁷¹ unless the land is described as bounding *on the beach*, when the high-water mark becomes the boundary line.⁷² In determining the exact location of either the low or high-water mark, reference is always had to the ordinary or medium rise and fall of the water.⁷³

§ 599. What is a navigable stream.—Perhaps there is not a more difficult question to answer in the law of real property. The English common-law rule was that all streams, in which the tide ebbed and flowed, were navigable streams, and all others were non-navigable.⁷⁴ In England that is not, as a matter of fact, the arbitrary rule, which it would be if applied without qualification to the streams of this country. With the exception of the Thames, above tide-water, there are no

⁶⁹ *Ensminger v. Davis*, 47 Ill. 384; *Ryan v. Brown*, 18 Mich. 196; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Commrs.*, 18 Wall. 64. For a discussion of what is a navigable stream, and for the distinction between public, navigable and non-navigable stream, see *post*, Sec. 599.

⁷⁰ *Storer v. Freeman*, 6 Mass. 435; *Commonwealth v. Roxbury*, 9 Gray 492; *Niles v. Patch*, 13 Gray 254; *Goodtitle v. Kibbe*, 9 How. 477; *Hodge v. Boothby*, 48 Me. 71; *Cortelyou v. Van Brundt*, 2 Johns. 362; *Ledyard v. Ten Eyck*, 36 Barb. 125; *Mather v. Chapman*, 40 Conn. 382; *Dana v. Jackson St. Wharf*, 31 Cal. 120.

⁷¹ *Boston v. Richardson*, 105 Mass. 353; *Paine v. Woods*, 108 Mass. 168; *Valentine v. Piper*, 22 Pick. 94. See, also, *Smith v. Bartlett*, 180 N. Y. 360, 73 N. E. Rep. 63.

⁷² *Litchfield v. Ferguson*, 141 Mass. 97.

⁷³ *Stover v. Jack*, 60 Pa. St. 339; *Wood v. Appal*, 63 Pa. St. 221; *Commonwealth v. Alger*, 7 Cush. 63; *Commonwealth v. Roxbury*, 9 Gray 451; *Martin v. O'Brien*, 32 Miss. 21; *City of Galveston v. Menard*, 23 Texas 349; *Nixon v. Walter*, 41 N. J. Eq. 103.

⁷⁴ 3 Washburn on Real Prop. 413; *People v. Tibbetts*, 19 N. Y. 523; *Commonwealth v. Chapin*, 6 Pick. 199.

important streams in England which are practically and actually navigable, except those in which the tide ebbs and flows; and there are no tide-water streams of any importance which are not actually navigable. But in the United States the situation is altogether different. Here we have fresh-water streams, which are navigable, and salt-water streams of great value which are not navigable. The application of the common-law rule to this country would, therefore, result in nothing but absurd conclusions. The courts of this country have been discussing the problem for many years and have come to different conclusions on the various branches or subdivisions of the question. On only one point is there an absolute agreement, viz.: that the common-law rule does not govern such questions in the United States, so far as the right of the public to navigate the streams is concerned. That is, the courts hold uniformly that where the streams are sufficiently deep and wide to float boats, used in the interests of commerce and agriculture, the public has a right to use them as highways.⁷⁵ But in whom is the title of the soil of the river's bed, or in what rivers does the State own the title to the bed, is differently decided in different courts. The courts are unanimous in holding that ordinarily, where the tide ebbs and flows, the title to the bed of the stream is in the State.⁷⁶ But the

⁷⁵ *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 439; *Brown v. Chadbourne*, 31 Me. 9; *Ingraham v. Wilkinson*, 4 Pick. 268; *Commonwealth v. Alger*, 7 Cush. 53; *The Canal Commrs. v. People*, 5 Wend. 423; *People v. Platt*, 17 Johns. 195; *Palmer v. Mulligan*, 3 Caines 315; *Blanchard v. Porter*, 11 Ohio 138; *Home v. Richards*, Call 441; *Shrunk v. Schuylkill Co.*, 14 Serg. & R. 71; *Commrs., etc., v. Withers*, 29 Miss. 29; *Charleston S. Ry. Co. v. Johnson*, 74 Ga. 306. But a stream is non-navigable by the public in which logs can be floated only at high water or during a freshet. *Lewis v. Coffee Co.*, 77 Ala. 190, 54 Am. Rep. 55.

⁷⁶ *Commonwealth v. Chapin*, 5 Pick. 199; *Keyport Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. 13; *Cobb v. Davenport*, 32 N. J. L. 369; *Flanagan v. Philadelphia*, 42 Pa. St. 219; *State v. Pacific Guano Co.*, 22 S. C. 50; *State v. Pinckney*, 22 S. C. 484. See, *Whittaker v. McBride*, 197 U. S. 510; *Smith v. Bartlett*, 180 N. Y. 360, 73 N. E. Rep. 63.

State does not own the soil or bed of every creek in which the tide ebbs and flows. In order that the title to the soil of such creeks may be claimed by the State, the creeks must be practically navigable.⁷⁷ But in respect to the title to the beds of fresh water navigable streams the courts are divided. A number of the courts have held that the fresh water streams are governed by the common-law rule, in respect to the title to the soil under navigable streams, and that the title to the beds of fresh water streams is in the State.⁷⁸ But the Supreme Court of Mississippi, in a very able and learned opinion, drew a distinction between *public* and *navigable* rivers. It was there asserted that the principle, that the title to the soil of navigable rivers, *i. e.*, rivers in which the tide ebbs and flows, was in the State, was derived from international law. Tidal waters are the highways of nations, and very properly the title of the beds of such streams was vested in the State. But where the navigable river is a fresh water stream, although a sound policy would require a grant to the public of a right of way over it, there is no reason why a distinction should be made between them and non-navigable streams, in respect to the location of the title to the soil. It was, therefore, held that the public have a right of way over fresh water streams which can be navigated, but that the title to the bed is in the riparian owners, and the boundary line is the *filum aquæ* of the stream.⁷⁹ It is so essential that there

⁷⁷ *Rowe v. Granite Bridge Corp.*, 21 Pick. 344; *Glover v. Powell*, 10 N. J. Eq. 211. See, *State v. Gilmanton*, 14 N. H. 467; *Wilson v. Forbes*, 2 Dev. L. 30; *Am. River, etc., Co. v. Amsden*, 6 Cal. 443; *Wilson v. Welch*, 12 Oreg. 353.

⁷⁸ *Barney v. Keokuk*, 94 U. S. 324; *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Co.*, 14 Serg. & R. 71; *Wainwright v. McCullough*, 63 Pa. St. 66; *Martin v. Evansville*, 23 Ind. 85; *People v. Canal Com-mrs.*, 33 N. Y. 461; *Martin v. Nance*, 3 Head 650; *Wilson v. Forbes*, 2 Dev. L. 30; *Goodwin v. Thompson*, 15 Lea 209, 54 Am. Rep. 410.

⁷⁹ *Steamboat Magnolia v. Marshall*, 39 Miss. 109. The rule that the title to the beds of those rivers is in the riparian owners is supported by the following authorities: *Canal Appraisers v. People*, 17 Wend. 595; *Ingraham v. Wilkins*, 4 Pick. 268; *Commonwealth v. Alger*, 7

should be uniformity in the adjudications on this subject that the author is induced to offer the following suggestions, which will probably point out a common meeting-ground for variant courts, and which seems, also, to be consistent with reason and the necessities of life. Only those streams will be navigable streams which can be actually navigated, whether the tide ebbs or flows in them or not. The Supreme Court of the United States has held that those rivers which, from their location, constitute the boundaries of States, and which are used, or may be adopted for use, in interstate and foreign commerce, are navigable streams of the United States.⁸⁰ Let that be a controlling principle, and declare the title to the bed of such streams to be in the riparian States, in conformity with the decisions of the United States Supreme Court. Those streams might very properly be classed among the highways of nations, for the States in this connection are to be considered as separate and independent bodies politic. But the *intra-territorial* streams cannot be called international highways, and, therefore, the title to the soil of such streams should be vested in the riparian owners, subject to the public easement of navigation.

§ 600. Ponds and lakes.— If the pond or lake is a natural object, the boundary line is along the edge at low water mark.⁸¹ If the pond is artificial, the boundary is through its center.⁸² And if a natural pond or lake is raised by artificial

Cush. 53; *People v. Platt*, 17 Johns. 195; *Palmer v. Mulligan*, 3 Caines 315; *Morgan v. Reading*, 3 Smed. & M. 366; *Rhodes v. Otis*, 33 Ala. 578; *Berry v. Snyder*, 3 Bush 266; *Walker v. Public Works*, 16 Ohio 540; *Ensminger v. People*, 47 Ill. 384; *Norcross v. Griffiths*, 65 Wis. 599. See, *Rowe v. Lumber Co. (N. C.)*, 50 S. E. Rep. 848.

⁸⁰ *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 Wall. 411.

⁸¹ *Waterman v. Johnson*, 13 Pick. 261; *West Roxbury v. Stoddard*, 7 Allen 167; *Manton v. Blake*, 62 Me. 38; *Canal Commrs. v. People*, 5 Wend. 446; *Wheeler v. Spinola*, 54 N. Y. 377; *Austin v. Rutland R. R.*, 45 Vt. 215; *Primm v. Walker*, 38 Mo. 99.

⁸² *Bradley v. Rice*, 13 Me. 198; *Waterman v. Johnson*, 13 Pick. 261; *Phinney v. Watts*, 9 Gray 269; *Wheeler v. Spinola*, 54 N. Y. 377.

means by a dam or trench, the boundary line will continue to be at low water mark of the pond in its natural state, and the land which was subsequently left bare by the removal of the obstructions, would be the property of the adjoining riparian owner.⁸³ The conversion of a fresh water pond into a salt one by an artificial trench or channel from the sea will not change the boundary. But the boundary changes with the natural and ordinary changes of the low water mark.⁸⁴

§ 601. **Highways.**—Where land is bounded by a highway, the same rules of construction apply, as in the case of non-navigable streams. If the land is described as “bounding on,” “running along,” the highway, and the lake, the boundary line is the thread or center of the way, although the dimensions of the last would exclude the highway. And when there is any doubt as to the intention of the parties, the presumption is always strong in favor of the center of the way being the boundary.⁸⁵ But if the land is described as bounding by the side of the street, or the intention to exclude the

⁸³ *Hathorn v. Stinson*, 12 Me. 183; *Bradley v. Rice*, 13 Me. 200; *Waterman v. Johnson*, 13 Pick. 261. But later decisions in these States have qualified the position assumed in the cases just cited to this extent: that unless there is something in the deed to support the presumption that the grantor had in mind the natural state of the pond, when he was describing the land, the boundary line will be the low water mark of the pond at the time of the conveyance. *Wood v. Kelley*, 30 Me. 47; *Paine v. Woods*, 108 Mass. 170.

⁸⁴ 3 *Washburn on Real Prop.* 417; *Wheeler v. Spinola*, 54 N. Y. 377.

⁸⁵ *Berridge v. Ward*, 10 C. B. (N. S.) 400; *Johnson v. Anderson*, 18 Me. 76; *Cottle v. Young*, 59 Me. 105; *O'Linda v. Lathrop*, 21 Pick. 298; *Parker v. Framingham*, 8 Metc. 267; *Fisher v. Smith*, 9 Gray 441; *Harris v. Elliott*, 10 Pet. 53; *Banks v. Ogden*, 2 Wall. 57; *White v. Godfrey*, 97 Mass. 47; *Wallace v. Fee*, 50 N. Y. 694; *Jackson v. Hathaway*, 15 Johns. 454; *Sherman v. McKeon*, 38 N. Y. 271; *Child v. Starr*, 4 Hill 369; *Winter v. Peterson*, 24 N. J. L. 527; *Cox v. Freedley*, 33 Pa. St. 124; *Witter v. Harvey*, 1 McCord 67; *Trustees v. Louder*, 8 Bush 680; *Weisbrod v. C. & N. W. R. R.*, 18 Wis. 43; *Dubuque v. Maloney*, 8 Iowa 458. “A conveyance of a lot bounded by a road vests the grantee with the fee to the center of the road.” Judgment (1904) 86 N. Y. S. 759, 42 Misc. Rep. 358, reversed. *Mitchell v. Einstein*, 94 N. Y. S. 210.

street is clearly manifested in some other manner, then the boundary line will be the nearest line of the street or highway.⁸⁶ The boundary will not extend to the center of the highway, if the grantor only owns to the line of the way.⁸⁷ And likewise, if a proprietor lays out several lots, all fronting on a proposed park, the grantees of the several lots will only own to the exterior line of the park, and not to the center.⁸⁸ If the land is described as bounding on a public street or highway or park, the right to have it kept open passes to the grantee as an appurtenant easement.⁸⁹ But if it is a private way, a right of way will be acquired by the grantee only upon the adjoining lands of the grantor.⁹⁰ If the grantor does not own the land, no covenant will be implied from the reference to a street for the purpose of description.⁹¹ Where a highway or street is referred to as the boundary line, the actual line, as it is laid down, is to be taken as the line of the street.⁹² And although encroachments upon the highway by the adjoining owners are not legalized by the lapse of time, yet if a fence has been standing for twenty years

⁸⁶ *Salisbury v. G. N. Railway Co.*, 5 C. B. (N. S.) 174; *Sibley v. Holden*, 10 Pick. 249; *Smith v. Slocomb*, 9 Gray 36; *Brainard v. Boston, etc., R. R.*, 12 Gray 410; *Morrow v. Willard*, 30 Vt. 118; *Hoboken Land Co. v. Kerrigan*, 30 N. J. L. 16; *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51.

⁸⁷ *Brainard v. Boston, etc., R. R.*, 12 Gray 410; *Church v. Meeker*, 34 Conn. 426; *Dunham v. Williams*, 37 N. Y. 251; *Vail v. Long Island R. Co.* (N. Y.), 12 N. E. Rep. 607.

⁸⁸ *Perrin v. N. Y. Cent. R. R.*, 40 Barb. 65; *Hanson v. Campbell*, 20 Md. 223. See, *Mitchell v. Einstein*, 94 N. Y. S. 210.

⁸⁹ *Cox v. James*, 59 Barb. 144; 3 Washburn on Real Prop. 422, 423; *Lennig v. Ocean City Assn.*, 41 N. J. Eq. 606; *Re Pearl St.*, 111 Pa. St. 565; *Presbyterian Church v. Kellar*, 39 Mo. App. 441.

⁹⁰ *Smith v. Howdon*, 14 C. B. (N. S.) 398; *Fisher v. Smith*, 9 Gray 444; *Winslow v. King*, 14 Gray 323; *White v. Godfrey*, 97 Mass. 472; *Stark v. Coffin*, 105 Mass. 330; *Lewis v. Beattie*, 105 Mass. 410; *Falls v. Reis*, 74 Pa. St. 439.

⁹¹ *Roberts v. Karr*, 1 Taunt. 495; *Howe v. Alger*, 4 Allen 200; *Brainard v. Boston, etc., R. R.*, 12 Gray 410; *Hanson v. Campbell*, 20 Md. 232.

⁹² *Bradstreet v. Dunham*, 65 Iowa 248.

upon the highway as it was originally laid out, the fence will be considered the true line, if the real boundary cannot be ascertained by record.⁹³ And if the road or street is subsequently abandoned, the adjoining owners will then hold the land over which the highway extended, free from the public easement.⁹⁴

§ 602. *Walls, fences, trees, etc.*—When walls, fences, trees, and the like, are referred to as monuments, if they are of considerable thickness or width, the boundary line is always in the center of the monument, as has been seen to be the case with streams and highways.⁹⁵

§ 603. *Courses and distances.*—The next element of description in the order of preference is the admeasurement of distances and the given courses of the boundary lines. Where courses and distances are given in a deed, conveying a city lot of comparatively small dimensions, they are greatly relied upon in determining the boundaries. And where there are no monuments, parol evidence will not be permitted to vary them. Nothing but monuments can control courses and distances.⁹⁶ The courses and distances will be the absolutely

⁹³ *Hallenbeck v. Rowley*, 8 Allen 475; *Fisher v. Smith*, 9 Gray 441; *Lozier v. N. Y. Cent. R. R.*, 42 Barb. 468; *Bissell v. N. Y. Cent. R. R.*, 23 N. Y. 61; *Cross v. Morristown*, 18 N. J. Eq. 305.

⁹⁴ *Banks v. Ogden*, 2 Wall. 57; *People v. Laws*, 22 How. Pr. 115; *Wallace v. Fee*, 50 N. Y. 694; *Weisbrod & C. N. W. R. R.*, 18 Wis. 43; *Presbyterian Church v. Kellar*, 39 Mo. App. 441; *Matt v. Eno*, 90 N. Y. S. 608, 97 App. Div. 580. See, *Mitchell v. Einstein*, 94 N. Y. S. 210.

⁹⁵ *Bradford v. Cressey*, 45 Me. 9; *Boston v. Richardson*, 13 Allen 154; *Child v. Starr*, 4 Hill 369. "A spreading hedge, not trimmed every year, is a poor boundary line." *Bright v. New Orleans Ry. Co.* (La. 1905), 38 So. Rep. 494.

⁹⁶ *Drew v. Swift*, 46 N. Y. 209; *Chadbourn v. Mason*, 48 Me. 391; *Bagley v. Morrill*, 46 Vt. 94; *Friend v. Friend*, 64 Md. 321; *Breneiser v. Davis* (Pa.), 19 Atl. Rep. 433. "Where calls for boundary lines are irreconcilably inconsistent, they are to be given effect in the following order: (1) Natural objects; (2) artificial marks; (3) courses and distances." *Kleven v. Gunderson* (Minn. 1905), 104 N. W. Rep. 4.

determining element in the absence of monuments, although the admeasurements are given as so many feet, "more or less."⁹⁷ But a survey is so liable to be erroneous through some defect in the instrument, or the carelessness of the surveyor, that whenever monuments are given, the monuments control the courses and distances, although the monuments would take in more land than what is called for by the survey.⁹⁸ And where the land is described by another's land, the latter tract of land is a monument of description, and the true line of his land will control the courses and distances given in the deed.⁹⁹ But the thing or object referred to must, in order to serve as a monument of description, be referred to in the deed as such. The reservation of the use of a well which is described as being "on the west line of the land," does not make the well a monument for locating the boundary.¹ When the course is described as "northerly," "southerly," etc., the line is always understood as "due" north, or south. But reference is always made to the magnetic meridian in determining the direction of the boundary lines.²

§ 604. *Quantity*.—The quantity of land conveyed is sometimes given; but where there is no covenant as to quantity

⁹⁷ *Flagg v. Thurston*, 13 Pick. 145; *Blaney v. Rice*, 20 Pick. 62; *Block v. Pfaff*, 101 Mass. 538; *Cherry v. Slade*, 3 Murph. 82; *Welch v. Phillips*, 1 McCord 215.

⁹⁸ *White v. Williams*, 48 N. Y. 344; *Drew v. Swift*, 46 N. Y. 207; *Cronin v. Richardson*, 8 Allen 423; *Brown v. Huger*, 21 How. 305; *Haynes v. Jackson*, 59 Me. 386; *Lodge v. Barnett*, 46 Pa. St. 484; *Colton v. Seavey*, 22 Cal. 496; *Miller v. Cherry*, 3 Jones 29; *Frost v. Spaulding*, 19 Pick. 445; *Evansville v. Page*, 23 Ind. 527. But see *contra*, *Danzien v. Boyd*, 53 N. Y. Super. Ct. 398. See, also, *Mays v. Hinchman* (W. Va. 1905), 50 S. E. Rep. 823.

⁹⁹ *Peaslee v. Gee*, 19 N. Y. 273; *Bailey v. White*, 41 N. H. 343; *Park v. Pratt*, 38 Vt. 552. See, *Mays v. Hinchman* (W. Va.), 50 S. E. Rep. 823.

¹ *Maguire v. Sturtevant*, 140 Mass. 258.

² *Brandt v. Ogden*, 1 Johns. Cas. 158; *Gordon v. Jackson*, 5 Johns. 473; *Jackson v. Reeves*, 3 Caines 295; *Wells v. Company*, 47 N. H. 235; *Rosworth v. Danzien*, 25 Cal. 296.

this element of description is seldom resorted to in determining the boundaries, and is under no circumstances permitted to control the courses and distances or the monuments,³ unless these other elements of description lose in any case their superior value through ambiguities and uncertainties, when the quantity is referred to in order to give certainty to the description.⁴ One-half a certain tract of land, means one-half of a quantity of land and cannot be considered as a description by courses and distances.⁵

§ 605. Reference to other deeds, maps, etc., for description.—If, instead of containing the description of the land conveyed, the deed refers to other deeds, the description of the latter deed will by such reference become a part of the former, and has the same effect as if it had been inserted in the subsequent deed.⁶ It is not necessary that the deed referred to be recorded, although if the deed referred to is described as being recorded, no unrecorded deed will answer to supply the description of the premises.⁷ But the reference to another deed will not be permitted to control the descrip-

³ *Mann v. Pearson*, 2 Johns. 37; *Jackson v. Defendorff*, 1 Caines 493; *Snow v. Chapman*, 1 Root 528; *Commrs. v. Thompson*, 4 McCord 434; *Miller v. Bentley*, 5 Sneed 671; *Wright v. Wright*, 34 Ala. 194; *Dutton v. Rust*, 22 Texas, 133; *Ufford v. Wilkins*, 33 Iowa 113; *Ward v. Crotty*, 4 Metc. (Ky.) 103; *Llewellyn v. Jersey*, 11 Mees. & W. 183; *Hodges v. Kowing*, 58 Conn. 12, 18 Atl. Rep. 979; *Clute v. N. Y.*, etc., R. R. Co., 120 N. Y. 267, 24 N. E. Rep. 317.

⁴ *Moran v. Lezotte*, 54 Mich. 83; *Hall v. Shotwell*, 66 Cal. 379; *Jones v. Pashby*, 62 Mich. 614, 29 N. W. Rep. 374; *Jones v. Motley* (Ky.), 13 S. W. Rep. 432; *Davis v. Hess* (Mo.), 15 S. W. Rep. 324. See, *Whittaker v. Whittaker* (Mo. 1903), 74 S. W. Rep. 1029.

⁵ *Hartford Iron Mine Co. v. Cambria Min. Co.* (Mich.), 45 N. W. Rep. 351. See, *Costello v. Graham* (Ariz.), 80 Pac. Rep. 336.

⁶ *Knight v. Dyer*, 57 Me. 176; *Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121; *Allen v. Taft*, 6 Gray 552; *Perry v. Binney*, 103 Mass. 158; *Lippitt v. Kelly*, 46 Vt. 523; *Rodriguez v. Hayes*, 76 Texas 225; *O'Herrin v. Brooks* (Miss.), 6 So. Rep. 844; *Miller v. Topeka Land Co.* (Kan.), 24 Pac. Rep. 420; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 441.

⁷ *Simmons v. Johnson*, 14 Wis. 526; *Caldwell v. Center*, 30 Cal. 543,

tion actually contained in the subsequent deed, so as to exclude a lot or parcel of land described as a part of the subject of conveyance, and not mentioned in the deed referred to.⁸ In the same manner, where a reference in the deed is made to plans, maps, and the like, for the monuments, courses and distances, the maps and plans become a part of the deed of conveyance, and supply the description omitted in the deed.⁹ And one map may be supplemented by a reference to some prior map, to which the latter map constitutes an addition. In determining the location of the land, both maps may be resorted to.¹⁰ But if the boundaries can be ascertained without reference to the maps or plans, they need not be produced in evidence. The boundary may be established by any other competent evidence.¹¹

§ 606. Appurtenants.—Whatsoever belongs to the thing granted as a parcel thereof will pass with it, though it is not specifically referred to. Thus, houses, window-blinds, doors, mines, crops, and whatever else constitutes a part of the realty, will pass with the grant of the land, unless expressly reserved.¹² It is also the general rule, with very little qualifi-

⁸ *Whitney v. Dewey*, 15 Pick. 434; *Needham v. Judson*, 101 Mass. 161.

⁹ *Kennebec Purchase v. Tiffany*, 1 Me. 219; *Shirras v. Caig*, 7 Cranch 48; *Farnsworth v. Taylor*, 9 Gray 162; *Stetson v. Daw*, 16 Gray 374; *Chamberlain v. Bradley*, 101 Mass. 191; *Fox v. Union Sugar Co.*, 109 Mass. 292; *McCausland v. Fleming*, 63 Pa. St. 36; *Spiller v. Scribner*, 36 Vt. 247; *Heffernan v. Otsego Water Power Co. (Mich.)*, 43 N. W. Rep. 1096; *s. c.* 44 N. W. Rep. 1151; *O'Herrin v. Brooks (Miss.)*, 6 So. Rep. 844; *Cullen v. Sprigg (Cal.)*, 23 Pac. Rep. 222; *Marvin v. Elliot*, 99 Mo. 616, 12 S. W. Rep. 899; *Chapman v. Polack*, 70 Cal. 487; *Redd v. Murry (Cal.)*, 24 Pac. Rep. 841; *Bohier v. Lange*, 44 Minn. 281. See, *Neumeister v. Goddard (Wis. 1905)*, 103 N. W. Rep. 241; *Snooks v. Merryfield*, 44 S. E. Rep. 277.

¹⁰ *Slate v. Schwin*, 65 Wis. 207.

¹¹ *Deery v. Cray*, 10 Wall. 263.

¹² *Farrar v. Stackpole*, 6 Me. 154; *Bracket v. Goddard*, 54 Me. 313; *Goodrich v. Jones*, 2 Hill 142; *Powell v. Rich*, 41 Ill. 466; *Noble v. Bosworth*, 19 Pick. 314; *Daniels v. Pond*, 31 Pick. 367; *Foote v. Colvin*, 3 Johns. 216; *Austin v. Sawyer*, 9 Cow. 40; *Bond v. Coke*, 71 N. C. 97;

cation, that whatever is appendant or appurtenant to the thing granted will pass with it to the grantee as an appurtenant. All easements attached to the land granted as the dominant estate are appurtenant.¹³ And whether a certain right is appurtenant depends upon the condition of the property at the time of the conveyance, and how far the right is necessary to the complete enjoyment of the property. If, therefore, certain easements or servitudes are enjoyed by the grantor in connection with the use of the land, those easements will pass to the grantee. And even where the servient estate is also his property, the equitable easement arising from the subservience of one piece of land to the other will pass to the grantee of the latter, if it is essential to his full enjoyment of the land granted.¹⁴ Although land cannot be said to pass as appurtenant to land, if the land, expressly granted, does not admit of a reasonable enjoyment without some adjacent land, which has been used constantly with the land granted, it will pass as parcel.¹⁵ But where an easement over the adjacent land

Ring v. Billings, 51 Ill. 475; *Lewis v. Lyman*, 22 Pick. 436; *Fay v. Muzzey*, 13 Gray 53; *Brookhaver v. Smith*, 118 N. Y. 564; 23 N. E. Rep. 1002; *Patterson v. Harlan*, 124 Pa. St. 67.

¹³ *Plant v. James*, 5 B. & Ad. 791; *Harris v. Elliott*, 10 Pet. 25; *Philbrick v. Ewing*, 97 Mass. 133; *Kent v. Wait*, 10 Pick. 138; *Pope v. O'Hara*, 48 N. Y. 455; *Jackson v. Hathaway*, 15 Johns. 447; *Pickering v. Stapler*, 5 Serg. & R. 107; *Whalley v. Tompson*, 1 Bos. & P. 371; *Grubb v. Grubb*, 101 Pa. St. 11.

¹⁴ *Brigham v. Smith*, 4 Gray 297; *Richardson v. Bigelow*, 15 Gray 156; *James v. Plant*, 5 A. & E. 749; *Prestcott v. Whit*, 21 Pick. 343; *Hapgood v. Brown*, 102 Mass. 453; *Woodman v. Smith*, 53 Me. 81; *Thompson v. Banks*, 43 N. H. 540; *Voorhies v. Burshard*, 55 N. Y. 102; *Bliss v. Kennedy*, 43 Ill. 71; *White v. Barlow*, 72 Ga. 887. See *ante*, Sec. 432.

¹⁵ *Woodman v. Smith*, 53 Me. 81; *Allen v. Scott*, 21 Pick. 25; *Esty v. Currier*, 98 Mass. 501; *Webster v. Potter*, 105 Mass. 414; *Whitney v. Olney*, 3 Mason 282; *Davis v. Handy*, 37 N. H. 65; *Thompson v. Banks*, 43 N. H. 540; *Voorhies v. Burshard*, 55 N. Y. 102; *Avon Co. v. Andrews*, 30 Conn. 476; *Bacon v. Bowdoin*, 22 Pick. 401; *Jackson v. Hathaway*, 15 Johns. 447; *Riddle v. Littlefield*, 53 N. H. 508; *Kimbell v. Rodgers* (Ala.), 7 So. Rep. 241. See *contra*, *Hodgens v. Powell* (Ark.), 11 S. W. Rep. 574.

would provide for the grantee a reasonably satisfactory enjoyment of the land granted, the freehold in the soil will not pass. The grantee would only acquire an easement therein.¹⁶ But a claim for damages for the closing of a road does not pass as appurtenant to the grantee, simply because the claim was not awarded before the transfer of the property.¹⁷

§ 607. Necessity of use controls grant of easements, as appurtenant.—Somewhat at variance with the doctrine of the preceding section, as to the conveyance of easements, as “appurtenant” to a conveyance of the realty, without an express reservation thereof, is the well considered case of *Ogden v. Jennings*,¹⁸ where the Court of Appeals, of New York, observed:

“Easements exist as appurtenant to a grant of lands, and as arising by implication, *only* by reason of a necessity to the full enjoyment of the property granted. Nothing passes by implication or as incident appurtenant to the lands granted, except such rights, privileges and easements as are directly necessary to the proper enjoyment of the granted estate. A mere convenience is not sufficient to create or convey a right or easement, or impose burdens on lands other than those granted, as incident to the grant. In all cases, the question of necessity controls.”

This language is adopted with approval, by the Supreme Court of Missouri, in a well considered case,¹⁹ where water pipes and mains, laid under a license from a city, into and under lots adjoining the water main, in a street were held

¹⁶ *Stetson v. Daw*, 16 Gray 373; *Munn v. Worrall*, 53 N. Y. 46; *Jamaica Pond v. Chandler*, 9 Allen 164; *Graves v. Amoskeag Co.*, 44 N. H. 464; *Owen v. Field*, 102 Mass. 104; *Curtis v. Norton*, 58 Mich. 411; *Cluett v. Sheppard* (Ill.), 23 N. E. Rep. 589.

¹⁷ *King v. St. Patrick's Cathedral*, 50 N. Y. Supr. 406.

¹⁸ 62 N. Y. 526; cited and approved in *Barrett v. Bell*, 82 Mo. 114.

¹⁹ *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. Rep. 1019. See, also, *Dodge City Water & Light Co. v. Alfafa Irr. & Land Co.* (Kan. 1902), 67 Pac. Rep. 462.

not to pass, as appurtenant to a conveyance of the realty, by the vendor, in a sale of the property, but were the subject of a separate transfer, under bill of sale by the owner to a third person.

§ 608. **Exception and reservation.**—An exception to a grant withdraws from the operation of the conveyance some part or parcel of a thing which is granted, and which but for the exception would have passed to the grantee under the general description. The part excepted is already in existence, and is said to *remain* in the grantor. The grant has no effect upon it. A reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted, usually an incorporeal hereditament, something which did not exist, as an independent right, before the grant.²⁰ Sometimes the terms *exception* and *reservation* are used synonymously, but the distinction above given is proper and essential. A reservation is in the nature of a grant to the grantor, and therefore requires the same words of limitation as in the direct grant to the grantee. But an exception requires no words of limitation.²¹ Both reservations and exceptions

²⁰ *Greenleaf v. Birth*, 6 Pet. 302; *Pettee v. Hawes*, 13 Pick. 323; *Dyer v. Santford*, 9 Metc. 395; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 321; *Dennis v. Wilson*, 107 Mass. 591; *Emerson v. Mooney*, 50 N. H. 316; *Munn v. Worrall*, 53 N. Y. 46; *Whitaker v. Brown*, 46 Pa. St. 197; *Bray v. Hussey*, 83 Me. 329; *Behymer v. Odell*, 31 Ill. App. 350; *Wood v. Boyd* (Mass.), 13 N. E. Rep. 476; *Weekland v. Cunningham* (Pa.), 7 Atl. Rep. 148; *Kincaid v. McGowan* (Ky.), 4 S. W. Rep. 802; *King v. Wells*, 94 N. C. 344; *Coal Creek Mining Co. v. Heck*, 15 Lea 497; *Jones v. Delassus*, 84 Mo. 541; *Truett v. Adams*, 66 Cal. 218; *Bradley v. Tittabawassee Boom Co.* (Mich.), 46 N. W. Rep. 24; *Mayo v. Newhoff* (N. J.), 19 Atl. Rep. 837; *Gould v. Howe* (Ill.), 23 N. E. Rep. 602; *Atkinson v. Sinnott* (Miss.), 7 So. Rep. 289; *Grand Tower, etc., Co. v. Gill*, 11 Ill. 541; *City of New York v. Law*, 125 N. Y. 380; *Culter v. Tuft*, 3 Pick. 272, 278; *Doe v. Lock*, 4 Nev. & M. 807; *Pettee v. Hawes*, 13 Pick. 323, 326; *Hurd v. Curtis*, 7 Met. 110; 3 Washburn on Real Prop. (4 ed.) 440; *Shep. Touch.* 80; *Moulton v. Trafton*, 64 Me. 218. For reservation of homestead in granted premises, see, *Helm v. Kaddetz*, 107 Ill. App. 413.

²¹ *Seymour v. Courtenay*, 5 Burr. 2814; *Jamaica Pond v. Chandler*, 9

are to be distinguished from conditions, which limit the grantee's use of the land. Such a condition does not give to the grantor any right which he may assign to another.²² A reservation can only be made to the grantor, and must issue out of the land granted. It cannot be reserved to a stranger or out of another estate, although an attempted reservation out of another's estate may operate as an independent grant to the grantor in a deed of indenture executed by both parties.²³ The reservation properly appears in the *reddendum* clause of the deed, while the exception is properly incorporated in the premises, and constitutes a part of the description. But this is a mere matter of form, and is not essential or important in determining whether a clause creates an exception or a reservation.²⁴ If an exception is repugnant to the original grant, it is void. Thus, if there be a specific grant of twenty acres of land, the exception of one acre will be repugnant and

Allen 170; Putnam v. Tuttle, 10 Gray 48; Curtis v. Gardner, 13 Metc. 461; White v. Foster, 102 Mass. 378; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 321; Keeler v. Wood, 30 Vt. 242; Emerson v. Mooney, 50 N. H. 316; Hornbeck v. Westbrook, 9 Johns. 73; Wheeler v. Brown, 47 Pa. St. 197; Smith v. Ladd, 41 Me. 314; Randall v. Randall, 59 Me. 339; Bean v. French, 140 Mass. 229.

²² Westmoreland, etc., Nat. Gas Co. v. De Witt, 130 Pa. St. 235. See Bray v. Hussey, 83 Me. 329; Stillwell v. St. L., etc., Ry. Co., 39 Mo. App. 221.

²³ Dand v. Kingscote, 6 Mees. & W. 174; Pettie v. Hawes, 13 Pick. 322; Dyer v. Sanford, 9 Metc. 395; Bridger v. Pierson, 45 N. Y. 601; Hill v. Lord, 48 Me. 95; Hall v. Hall (Miss.), 5 So. Rep. 523; Wetmore v. Fiske, 15 R. I. 354, 5 Atl. Rep. 375; Herbert v. Pue (Md.), 20 Atl. Rep. 182; Fisher v. Laack (Wis.), 45 N. W. Rep. 104; Dyer v. Sanford, 9 Met. 395; Hornbeck v. Westbrook, 9 Johns. 74; Petition of Young, 11 R. I. 636; Bridger v. Pierson, 1 Lans. 481; Illinois R. R. Co. v. Indiana R. R. Co., 85 Ill. 211; West Point Iron Co. v. Reymert, 45 N. Y. 703. And see Bridger v. Pierson, 45 N. Y. 601; Brossart v. Corlett, 27 Iowa 288.

²⁴ Gage v. Barnes (N. H.), 9 Atl. Rep. 545. "The words of a deed, 'The grantor hereby reserves the ownership of the well on or near the east line of the lot hereby conveyed,' will be treated as an exception." Elsea v. Adkins (Ind. 1905), 74 N. E. Rep. 242.

therefore void. But if the grant is of a tract of land and the quantity is mentioned only incidentally, an exception of one or two acres is not repugnant, since the two elements of the description can be reconciled so that both can take effect.²⁵ And where a part or parcel of the land granted is excepted from the grant or right reserved to the grantor, not only that specific right or estate remains in the grantor, but every other right which is appurtenant thereto, and which is necessary to the reasonable enjoyment of the same.²⁶ But where it is shown that the grantor in excepting a part of the land only intended to except an easement, such as a right of way over the excepted parcel, the title to the soil of the excepted parcel is held to pass to the grantee, subject only to the easement.²⁷ And if the grantor's estate in the land excepted is a reversion or remainder, such reversion or remainder will be excluded from the grant, to the same extent as if it had been an estate in possession.²⁸ It is also possible to except different interests in the same property from the operation of the grant, when such intention is made plain.²⁹

§ 609. *Habendum*.—The *habendum* is the clause which in a deed follows the words “to have and to hold,” and which defines the quantity of interest or the estate which the grantee is to have in the property granted. What are the words of limitation usually employed in limiting estates, have been already given in the preceding chapters on the different estates, and need not be repeated here. The *habendum*, al-

²⁵ *Shep. Touch.* 79; *Cutler v. Tufts*, 3 Pick. 272; *Sprague v. Snow*, 4 Pick. 54; *McAfee v. Arline*, 83 Ga. 645, 10 S. E. Rep. 602; *Koenigheim v. Miles*, 67 Texas 113, 2 S. W. Rep. 81; *Brown v. Rickard*, 107 N. C. 639.

²⁶ *Dand v. Kingscote*, 6 Mees. & W. 174; *Sanborn v. Hoyt*, 24 Me. 118; *Pettee v. Hawes*, 13 Pick. 322; *Allen v. Scott*, 21 Pick. 25; *Noble v. Ill. Cent. R. R. Co.*, 111 Ill. 437; *McBrown v. Dalton*, 70 Cal. 89, 11 Pac. Rep. 583.

²⁷ *Winston v. Johnson*, 42 Minn. 398, 45 N. W. Rep. 958.

²⁸ *Kimball v. Withington*, 141 Mass. 376.

²⁹ *Burwell v. Snow*, 107 N. C. 82; *Price v. King*, 44 Kan. 639.

though properly constituting an independent clause in a deed, is not absolutely necessary. The estate granted may be limited in the premises, and the *habendum* altogether omitted.³⁰ And so unimportant is the *habendum*, that if it is repugnant to the limitations appearing in the premises it will have no effect; an absolutely repugnant *habendum* always yields to the terms of the premises.³¹ But if by any fair and reasonable construction the *premises* and *habendum* may be reconciled so that both can stand, then effect will be given to both. If, therefore, the limitation in the premises is in general terms, as to A. and his heirs generally, and the *habendum* limits the estate to A. and the heirs of his body, since the *habendum* is not necessarily contradictory of the premises, it will have its proper effect, and the estate granted will be an estate-tail.³² But if the premises contain a specific limitation, and is followed by a more general limitation in the *habendum*, the latter limitation cannot enlarge the estate granted by the premises.³³ It has however been held that a fee simple has been conveyed, where the premises granted the land to A. and her children and assigns forever, and the *habendum* read "to A.

³⁰ 3 Washburn on Real Prop. 366; 367, 436; Co. Lit. 6 a; Kenworthy v. Tullis, 3 Ind. 96.

³¹ Flagg v. Eames, 40 Vt. 23; Nightingale v. Hidden, 7 R. I. 118; Tyler v. Moore, 42 Pa. St. 376; Walters v. Breden, 70 Pa. St. 237; Ratcliffe v. Marrs, 87 Ky. 26; Smith v. Smith (Mich.), 40 N. W. Rep. 21; Nightingale v. Hidden, 7 R. I. 118; Walters v. Breden, 70 Pa. St. 237; 4 Cruise, 272; Riggin v. Love, 72 Ill. 553; Carson v. McCaslin, 60 Ind. 337.

³² Berry v. Billings, 44 Me. 423; Jamaica Pond v. Chandler, 9 Allen 168; Ford v. Flint, 40 Vt. 382; Moss v. Sheldon, 3 Watts & S. 162; Montgomery v. Sturdivant, 41 Cal. 290; Jamaica Pond v. Chandler, 9 Allen 168; Co. Lit. 6 a; 1 Wood on Conveyancing, 224; Lee v. Tucker, 55 Ga. 9; Riggin v. Love, 72 Ill. 553; 3 Prest. Abst. Tit. 43. See Carson v. McCaslin, 60 Ind. 334; Jackson v. Ireland, 3 Wend. 99; Corbin v. Healey, 20 Pick. 514. See Utter v. Sidman, 172 Mo. 229.

³³ Shep. Touch. 76; Nightingale v. Hidden, 7 R. I. 118; Walters v. Breden, 70 Pa. St. 237; 3 Washburn on Real Prop. 439; Whitby v. Duffy (Pa.), 19 Atl. Rep. 1065. See, Hall v. Wright (Ky.), 87 S. W. Rep. 1129.

and her heirs and assigns forever.”³⁴ The *habendum* cannot serve to pass any other parcels of land than those which are described in the premises, nor to change the grantees, or their interests, so as to make them tenants in severalty, where by the premises they were tenants in common,³⁵ although it is probable that the *habendum* may serve to change the character of a joint estate from a joint-tenancy to a tenancy in common, and to name the grantees, where their names were omitted from the premises.³⁶ The *habendum* may also be made to qualify and limit the operation of the premises to the intended operation of the *habendum*.³⁷ The *habendum* also contains generally the declarations of the uses and trusts, subject to which the grantee is to hold the estate conveyed. But the declaration may appear in any other part of the deed and be equally effective.³⁸

§ 610. *Reddendum*.—This is the clause which contains the reservations and follows the *habendum*. The subject of reservations, and their points of difference from exceptions, have already been discussed. The reservation may be of rent, or of any other easement, or other interest, or estate in land.³⁹

³⁴ *Rines v. Mansfield*, 96 Mo. 399.

³⁵ 4 Cruise Dig. 265; Co. Lit. 26 b, Butler's note, 154; *Greenwood v. Tyler*, Cro. Jac. 564; *Hafner v. Irwin*, 3 Dev. & B. 434. See *Den v. Helmes*, 3 N. J. L. 1050; *Swazey v. Brooks*, 34 Vt. 451; *McCurdy v. Alpha Mining Co.*, 3 Nev. 27. “Where the granting clause and the *habendum* of a deed are irreconcilable, and it is not apparent from the other parts of the deed which the grantee intended should control, the granting clause will prevail.” *Hall v. Wright* (Ky. 1905), 87 S. W. Rep. 1129, 27 Ky. Law Rep. 1185.

³⁶ *Tyler v. Moore*, 42 Pa. St. 388; *Irwin v. Longworth*, 20 Ohio 581; *Spyve v. Tonham*, 3 East 115; 1 Wood on Conveyancing, 206, 212; 3 Washburn on Real Prop. (4 ed.) 438. *Contra*, *Bustard v. Coulter*, Cro. Eliz. 902, 903; *Berry v. Billings*, 44 Me. 424; *Sumner v. Williams*, 8 Mast. 174.

³⁷ *Moss v. Sheldon*, 3 Watts & S. 162; *Tyler v. Moore*, 42 Pa. St. 374. But it can never extend the subject-matter beyond the limitation in the premises. *Manning v. Smith*, 6 Conn. 232.

³⁸ *Nightingale v. Hidden*, 7 R. I. 118; 3 Washburn on Real Prop. 440.

³⁹ See *ante*, Sec. 606.

§ 611. *Conditions.*—The *reddendum* in an orderly deed is followed by the condition, if one is annexed to the estate granted. What are valid conditions, and what is their legitimate effect upon the estates, to which they are attached, have been already explained.⁴⁰ It needs only to be added, that mere recitals of the object of the grant do not constitute conditions.⁴¹

⁴⁰ See *ante*, Secs. 200, 209.

⁴¹ *Kelley v. McBlain*, 42 Kan. 764, 22 Pac. Rep. 994; *Miller v. Board of Supervisors* (Miss.), 7 So. Rep. 429.

SECTION III.

COVENANTS IN DEEDS.

SECTION 612. General statement.

- 613. Covenant enlarging the estate.
- 614. Covenant of seisin and right to convey.
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- 618. Covenant for quiet enjoyment.
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- 621. The feudal warranty.
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- 624. Who may maintain actions on covenants of warranty.
- 625. Damages, what may be recovered.
- 626. What covenants run with the land.
- 627. When breach of covenant works a forfeiture of estate.

§ 612. General statement.— After the parts of a deed, already explained, are usually inserted the covenants, including covenants of title.⁴² As a general proposition, subject to the qualification to be hereafter mentioned, if the deed contained no express covenants of title there is no implied warranty of title, and the grantee is without remedy against the grantor if the title should fail.⁴³ Covenants of title are, therefore, generally used, and a warranty deed is generally demanded. In order that a covenant may be valid, the deed in which it is contained must be valid.⁴⁴ There are five principal cove-

⁴² See *post*, Sec. 623.

⁴³ 3 Washburn on Real Prop. 447; Williams on Real Prop. 443, 447.

⁴⁴ Co. Lit. 386 a; 3 Washburn on Real Prop. 447; *Scott v. Scott*, 70 Pa. St. 248.

nants, usually found in modern conveyances, viz.: covenants of seisin, right to convey, against incumbrances, for quiet enjoyment, and warranty. In the Western and Southern States the last covenant is generally the only one employed. But the others are recognized in all the States, and in the Northern and Middle States, except Pennsylvania, it is customary to employ most, if not all, of the covenants above enumerated.⁴⁵ Covenants of seisin and the right to convey are held to be practically synonymous, and may be discussed together.⁴⁶

§ 613. **Covenant enlarging the estate.**—Where the deed shows specifically what is the quantity of estate granted, the covenants cannot, by variation in the description of the estate, enlarge it. But if there is a general grant without special words of limitation, a general covenant of warranty to the grantee and his heirs may act as an estoppel in passing the inheritance to the grantee, although words of limitation are required in the creation of a fee, and there are none in the premises or the *habendum*.⁴⁷

§ 614. **Covenants of seisin and right to convey.**—This is a general covenant that the grantor is lawfully seised, and had a right to convey at the time of the conveyance. If the grantor is not then possessed of the legal title, and is not in possession of the premises, the covenant is broken as soon as made, and the grantee, and *no one else*, may at once bring an

⁴⁵ Williams on Real Prop. 447, Rawle's note; Colby v. Osgood, 29 Barb. 339; Foote v. Burnett, 10 Ohio 317; Van Wagner v. Van Nostrand, 19 Iowa 462; Armstrong v. Darby, 26 Mo. 517.

⁴⁶ Slater v. Rawson, 1 Metc. 455; Raymond v. Raymond, 10 Cush. 134; Brandt v. Foster, 5 Iowa 294. *Contra*, Richardson v. Dorr, 5 Vt. 21. See, for covenants under N. Y. Statute, Cassada v. Stable, 90 N. Y. S. 533.

⁴⁷ Ferrett v. Taylor, 9 Cranch 53; Blanchard v. Brooks, 12 Pick. 67; Mills v. Catlin, 22 Vt. 104; Adams v. Ross, 30 N. J. L. 509; Winborne v. Downing, 105 N. C. 20; Ricks v. Pulliam, 94 N. C. 225. But see, Carrouh v. Hamell (Mo. App. 1904), 84 S. W. Rep. 96.

action for the breach.⁴⁸ If the grantor has possession at the time, but holds adversely to the owner of the paramount title, it has generally been held that the mere existence of an outstanding title does not constitute a breach of the covenant. But whether such adverse possession and defeasible seisin are a sufficient compliance with the obligation of the covenant, has met with a different construction by the different courts. It has been held in some, perhaps most of the States, that the covenant of lawful seisin is satisfied by the possession of actual seisin though it is tortiously acquired, and that a subsequent eviction of the tenant constitutes no breach of the covenant of seisin.⁴⁹ If this be the proper construction, then a covenant of seisin, or of *lawful* seisin, is broken, if at all, as soon as it is made, and, in conformity with the general common-law rule in respect to the non-assignability of broken covenants, cannot pass to the assignees of the grantee. If the covenant is broken, the grantee has nothing which he can convey.⁵⁰ But it is maintained by the courts of England, and some of the United States, that a covenant of *lawful* seisin is both present and future in its operation; that if the grantor has the actual seisin it is not immediately broken, but is subsequently broken if the grantee or his assigns are evicted by the assertion of the paramount title. Being future in its

⁴⁸ Pollard v. Dwight, 4 Cranch 430; Bartholomew v. Candee, 14 Pick. 170; Greenby v. Wilcocks, 2 Johns. 1; Dickinson v. Hoomes, 8 Gratt. 397; Devore v. Sunderland, 17 Ohio 60.

⁴⁹ Greenby v. Wilcox, 2 Johns. 1; Withy v. Munford, 5 Cow. 137; Beddoe v. Wadsworth, 21 Wend. 124; Raymond v. Raymond, 10 Cush. 134; Wilson v. Widenham, 51 Me. 567; Wilson v. Cochrane, 46 Pa. St. 229; Birney v. Hann, 3 A. K. Marsh. 324; Wheaton v. East, 5 Yerg. 41; Richard v. Brent, 59 Ill. 45, 14 Am. Rep. 1; Salmon v. Vallejo, 41 Cal. 481; Wait v. Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Griffin v. Fairbrother, 1 Fairf. 59; Wheeler v. Hatch, 3 Fairf. 389; Boothby v. Hathaway, 20 Me. 255; Cushman v. Blanchard, 2 Greenl. 268, 11 Am. Dec. 76; Wilson v. Widenham, 51 Me. 567; Ballard v. Child, 34 Me. 355; Backus v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Kirkendall v. Mitchell, 3 McLean, 145.

⁵⁰ Redwine v. Brown, 10 Ga. 311; Ross v. Turner, 7 Ark. 132.

operation, it is held in those States to pass to the assignee with a grant of the estate.⁵¹ The failure to distinguish between a covenant of *lawful* seisin and of *indefeasible* seisin in the earlier cases no doubt gave rise to this variance of judicial opinion. The better, and what is deemed to be the American, doctrine is that the covenant of *lawful* seisin does not covenant for the conveyance of an indefeasible estate, and is, therefore, not broken by a subsequent eviction of the grantee. To hold that the covenant of seisin means an indefeasible seisin would give to that covenant the same extensive operation as the covenant of warranty. Everywhere in the United States, if the grantor expressly or impliedly covenants that he is seised of an *indefeasible* estate, it is a future covenant and runs with the land. Any one who holds under the covenant may sue on the covenant, whenever he has been evicted by the paramount title.⁵²

⁵¹ *Kingdon v. Nottle*, 1 Maule & S. 355; *Martin v. Baker*, 5 Blackf. 232; *Coleman v. Lyman*, 42 Ind. 289; *Great Western, etc., Co., v. Saas*, 24 Ohio St. 542; *Schofield v. Homestead Co.*, 32 Iowa 317, 7 Am. Rep. 197; *Mills v. Catlin*, 22 Vt. 106; *Kincaid v. Brittain*, 5 Sneed 119; *Polard v. Dwight*, 4 Cranch 430; *McCarty v. Leggett*, 3 Hill 134; *Greenby v. Wilcocks*, 2 Johns. 1, 3 Am. Dec. 379; *Brandt v. Foster*, 5 Clarke 287; *Abbott v. Allen*, 14 Johns. 248; *Fitch v. Baldwin*, 17 Johns. 161; *Fitzhugh v. Cogan*, 2 Marsh. J. J. 430, 19 Am. Dec. 140; *Coit v. McReynolds*, 2 Rob. (N. Y.) 655; *Martin v. Baker*, 5 Blackf. 232; *Thomas v. Perry*, 1 Peters C. C. 57; *Woods v. North*, 6 Humph. 409, 44 Am. Dec. 312. See *Lindsey v. Veasy*, 62 Ala. 421; *Matteson v. Vaughn*, 38 Mich. 373. "At common law an assignee of the covenantee could not maintain an action of covenant, as privity of contract does not exist, and privity of estate alone is not sufficient to sustain the action. This rule was changed in England by St. 32 Henry VIII, c. 10, and in Ohio, while the statute of Henry VIII has not been adopted, yet the same object is accomplished by the Code of Civil Procedure, which authorizes suit by the party beneficially interested, and hence empowers the assignee of a covenant to sue in his own name." *Broadwell v. Banks* (U. S. C. C., Mo., 1905), 134 Fed. Rep. 470.

⁵² *Garfield v. Williams*, 2 Vt. 328; *Smith v. Strong*, 14 Pick. 123; *Raymond v. Raymond*, 10 Cush. 134; *Abbott v. Allen*, 14 Johns. 248; *Stanard v. Eldridge*, 16 Johns. 254; *Wilson v. Forbes*, 2 Dev. 30; *Kincaid v. Brittain*, 5 Sneed 123; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142. See, also, *Broadwell v. Banks*, 134 Fed. Rep. 470.

§ 615. **What facts constitute a breach.**—The covenant of seisin is defined to be an assurance that he has the very estate, both in quantity and quality, which he professes to convey.⁵³ So if the grantor expressly conveys only the lands, “whereof he was seised on” a certain day, the covenant of seisin is not broken if other lands fall under the general description, of which he did not have the seisin.⁵⁴ Therefore, any outstanding right or title which diminishes the quality or quantity of the technical seisin will be a breach of the covenant. It will be broken if the estate is less in duration or quantity than what is described.⁵⁵ So, also, if the estate described is not, to any extent, the property of the grantor.⁵⁶ The covenant is also broken where the land conveyed has upon it fences, buildings, and other erections belonging to other persons, if there is no restraining clause in the deed.⁵⁷ But, on the other hand, easements, the exercise of which do not affect the technical seisin of the grantee, such as a right of way, a public highway, or railroad, will not constitute a breach of the covenant.⁵⁸ An outstanding judgment, mortgage, or right of

⁵³ *Howell v. Richards*, 11 East 641; *Pecare v. Chouteau*, 13 Mo. 527.

⁵⁴ *Thomas v. Perry*, Pet C. Ct. 49.

⁵⁵ *Downer v. Smith*, 38 Vt. 468; *Lindley v. Dakin*, 13 Ind. 388; *Phipps v. Tarpley*, 24 Miss. 597; *Kellogg v. Malin*, 50 Mo. 496; *Wilson v. Forbes*, 2 Dev. 35; *Wilder v. Ireland*, 8 Jones L. 90; *Sedgwick v. Hollenback*, 7 Johns. 376; *Wheeler v. Hatch*, 12 Me. 389; *Comstock v. Comstock*, 23 Conn. 352. See, *Chenault v. Thomas* (Ky. 1904), 83 S. W. Rep. 109.

⁵⁶ *Wheelcock v. Thayer*, 16 Pick. 68; *Basford v. Pearson*, 9 Allen 389; *Bacon v. Lincoln*, 4 Cush. 210; *Morrison v. McArthur*, 43 Me. 567; *Koepke v. Winterfield* (Wis. 1902), 92 N. W. Rep. 437.

⁵⁷ *Mott v. Palmer*, 1 N. Y. 564; *Tift v. Horton*, 53 N. Y. 377; *Powers v. Dennison*, 30 Vt. 752; *Van Wagner v. Van Nostrand*, 19 Iowa 427. See, *Righter v. Winters* (N. J. Ch. 1905), 59 Atl. Rep. 770.

⁵⁸ *Whitbeck v. Cook*, 15 Johns. 483; *Mills v. Catlin*, 22 Vt. 98; *Lewis v. Jones*, 1 Pa. St. 336; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426. But it has been held to be broken by an outstanding right to use the water of a spring. *Lamb v. Danforth*, 59 Me. 324; *Clark v. Sonroe*, 38 Vt. 469. And by a right to restrain the damming of water. *Traster v. Nelson*, 29 Ind. 96; *Hall v. Gale*, 14 Wis. 55.

dower, does not constitute a breach of the covenant, and in the case of a mortgage,⁵⁹ it does not matter whether the mortgage is construed to be a conveyance or only a lien.⁶⁰ But if the grantee is himself seised, he will be estopped from setting up his seisin in an action for the breach of the covenant of seisin.⁶⁰

§ 616. **Covenants against incumbrances.**—This covenant is intended to provide security against the assertion of “every right to, or interest in the land, which may subsist in third persons, not consistent with the passing of the fee by the conveyance.”⁶¹ The same contrariety of opinion exists as to the character of covenants against incumbrances as was discovered in regard to the character of covenants of seisin, viz.: whether the covenant is one *in præsenti*, broken, if at all, as soon as it is made, and, therefore, does not pass to the grantee’s assigns; or whether it is a future covenant, and, therefore, enforceable by whoever is injured by the incumbrance. The generally prevailing doctrine in this country is, that it is a covenant *in præsenti*, and does not run with the land.⁶² But in some of the States of this country it is held to be a cove-

⁵⁹ *Sedgwick v. Hollenback*, 7 Johns. 376; *Stanard v. Eldridge*, 16 Johns. 254; *Lewis v. Lewis*, 5 Rich. L. 12; *Massey v. Craine*, 1 McCord 489; *Reasoner v. Edmundson*, 5 Ind. 394. But see *Voorhis v. Forsythe*, 4 Biss. 409.

⁶⁰ *Fitch v. Baldwin*, 17 Johns. 161; *Furness v. Williams*, 11 Ill. 229.

⁶¹ 2 Greenl. on Ev., Sec. 242; *Cary v. Daniels*, 8 Metc. 482; *Bronson v. Coffin*, 108 Mass. 175; *Mitchell v. Warner*, 5 Conn. 527. “A covenant against incumbrances is broken when made, if incumbrances exist when the deed is delivered.” *Dahl v. Stakke* (N. D. 1903), 96 N. W. Rep. 353.

⁶² *Clark v. Swift*, 3 Metc. 392; *Thayer v. Clemence*, 22 Pick. 490; *Whitney v. Dinmore*, 6 Cush. 127; *Runnels v. Webster*, 59 Me. 488; *Russ v. Perry*, 49 N. H. 547; *Garrison v. Sanford*, 12 N. J. L. 261; *Funk v. Voneida*, 11 Serg. & R. 109; *Frink v. Bellis*, 33 Ind. 135; *Guerin v. Smith*, 62 Mich. 369, 28 N. W. Rep. 906. See *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1. “A covenant against incumbrances in a deed does not run with the land.” *Brass v. Vandecar* (Neb. 1903), 96 N. W. Rep. 1035. See, *Dahl v. Stakke* (N. D.), 96 N. W. Rep. 353.

nant *in futuro*, and, therefore, one running with the land. The covenant is broken when the outstanding right is enforced.⁶³ Probably this variance of opinion, as in the case of covenants of seisin, originated in a failure to note carefully the distinction between a covenant that the estate is *free* from incumbrances, and a covenant that the grantee shall *enjoy* the estate free from incumbrances. The latter is practically a covenant for quiet enjoyment, and being future in character, passes with the land to the grantee's assigns.⁶⁴ The grantee or his assignee may recover whatever loss he may have sustained by the enforcement of the incumbrance, and where the covenant takes the form of an obligation to *discharge* incumbrances, the right of action accrues immediately upon the covenantor's failure to perform.⁶⁵ If it be an ordinary covenant against incumbrances, the grantee can only obtain nominal damages, unless he can show that he has suffered an actual loss. If the incumbrance be a mortgage or other future claim, the damages will be nominal, unless the mortgage or other lien is enforced before the action on the covenant is instituted. But if the incumbrance is a pre-existing easement, substantial damages may be recovered at any time.⁶⁶

⁶³ Foote v. Burnett, 10 Ohio 317. See Sprague v. Baker, 17 Mass. 586; McCrady v. Brisbane, 1 Nott. & M. 104. In some of the States, although the courts take the position that the covenant against incumbrance is a covenant *in presenti*, they hold that it runs with the land, and will support an action by the second or third grantee under the covenantee. Kradler v. Sharp, 36 Ill. 236; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Winningham v. Pennock, 36 Mo. App. 688.

⁶⁴ Rawle Cov. 92; Lethbridge v. Mytton, 2 B. & Ad. 772; Hall v. Deane, 13 Johns. 105; Greene v. Creighton, 7 R. I. 1; Hutchins v. Moody, 30 Vt. 658; Carter v. Denman, 23 N. J. L. 273; Grice v. Scarborough, 2 Spears 649; Anderson v. Knox, 20 Ala. 156. See, Sibley v. Hutchinson (N. H. 1903), 55 Atl. Rep. 547.

⁶⁵ 3 Washburn on Real Prop. 464; Gardner v. Niles, 16 Me. 280; Jennings v. Morton, 35 Me. 309; Booth v. Starr, 1 Conn. 249; Lathrop v. Atwood, 21 Conn. 123; Hogan's Exrs. v. Calvert, 21 Ala. 199.

⁶⁶ Whitney v. Dinsmore, 6 Cush. 124; Churchill v. Hunt, 3 Denio 321; Ardesco Oil Co. v. N. A. Mining Co., 66 Pa. St. 375; Richard v. Bent,

§ 617. What circumstances constitute a breach of covenant against incumbrances.—The following may be mentioned as the more prominent examples of incumbrances, the existence of which will constitute a breach of the covenant, supplementing them by the statement that there are others, and that every outstanding right which comes under the definition of an incumbrance above given would be a breach of the covenant: An inchoate right of dower;⁶⁷ a judgment lien;⁶⁸ an outstanding mortgage;⁶⁹ taxes and assessments, when ascertained and determined;⁷⁰ an outstanding lease in possession;⁷¹ conditions and covenants, restricting the use of premises.⁷² And

59 Ill. 38, 14 Am. Rep. 1. "A purchaser of property cannot recover as for breach of warranty as to the amount due on a mortgage thereon, foreclosure not having been attempted, and he not having been disturbed in his possession." *Inderlied v. Honeywell*, 84 N. Y. S. 333.

⁶⁷ *Shearer v. Ranger*, 22 Pick. 447; *Jenks v. Ward*, 4 Metc. 412; *Fletcher v. State Bank*, 37 N. H. 397; *McAlpine v. Woodruff*, 11 Ohio St. 120. But see *Bigelow v. Hubbard*, 97 Mass. 198; *Bostwick v. Williams*, 36 Ill. 69.

⁶⁸ *Jenkins v. Hopkins*, 8 Pick. 346; *Hall v. Dean*, 13 Johns. 105. See, *Revenel v. Ingram* (N. C. 1902), 42 S. E. Rep. 967.

⁶⁹ *Bean v. Mayo*, 5 Me. 94; *Freeman v. Foster*, 55 Me. 508; *Brooks v. Moody*, 25 Ark. 452; *Lively v. Rice*, 150 Mass. 171, 22 N. E. Rep. 888; *Gow v. Allen* (Mo. 1905), 87 S. W. Rep. 590. See, also, *Harr v. Shafer* (W. Va. 1903), 43 S. E. Rep. 89.

⁷⁰ *Rundell v. Lakey*, 40 N. Y. 514; *Barlow v. St. Nicholas Bank*, 63 N. Y. 399; *Cochrane v. Guild*, 106 Mass. 29; *Hill v. Bacon*, 110 Mass. 388; *Pierce v. Brew*, 43 Vt. 292; *Long v. Moler*, 5 Ohio St. 271; *Almy v. Hunt*, 48 Ill. 45; *Cadmus v. Fagan*, 47 N. J. L. 549; *People v. Gilon*, 24 Abb. N. C. 125; 9 N. Y. S. 563; *Hartshorn v. Cleveland* (N. J.), 9 Atl. Rep. 974; *Harper v. Dowdney*, 47 Hun 227. But see *Hartshorn v. Cleveland*, *supra*; *Cemowsky v. Fitch* (Iowa 1903), 96 N. W. Rep. 754; *Patterson v. Cappan* (Wis. 1905), 102 N. W. Rep. 1083; *Cain v. Fisher* (W. Va.), 50 S. E. Rep. 752.

⁷¹ *Gale v. Edwards*, 52 Me. 360; *Batchelder v. Sturgis*, 3 Cush. 201; *Weld v. Traip*, 14 Gray 330; *Porter v. Bradley*, 7 R. I. 538; *Cross v. Noble*, 67 Pa. St. 77; *Grice v. Scarborough*, 2 Spears 649. "An unexpired term or lease, which prevents the grantee in a deed from recovering possession of the land described therein, is an incumbrance." *Brass v. Vandecar* (Neb. 1903), 96 N. W. Rep. 1035.

⁷² *Plymouth v. Carver*, 16 Pick. 183; *Parish v. Whitney*, 3 Gray 516;

it may be stated that pre-existing easements upon the land will constitute breaches of the covenant against incumbrances. Among them may be mentioned railroads, private rights of way, rights to artificial water-courses, to cut trees, to mine, to maintain dams and aqueducts, etc.⁷³ Although it has been denied in New York, Pennsylvania and Wisconsin,⁷⁴ the prevailing doctrine is that the existence of a public highway over the land is a breach of the covenant, even though the grantee knew of its existence.⁷⁵ Any one of these circumstances will constitute a breach of the covenant, even though the grantee is aware of its existence when he took the deed and paid the consideration.⁷⁶

§ 618. Covenant for quiet enjoyment.—This covenant is “an assurance against the consequences of a defective title, and of any disturbances thereupon.”⁷⁷ The covenant for quiet enjoyment is in common use in England, and in the United States it is commonly met with in leases. But in the ordinary conveyance of freeholds it is almost altogether super-

Bronson v. Coffin, 108 Mass. 175; *Burbank v. Pillsbury*, 48 N. H. 475; *Foster v. Foster*, 62 N. H. 46.

⁷³ *Spurr v. Andrews*, 6 Allen 420; *Prescott v. White*, 21 Pick. 341; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Brooks v. Curtis*, 50 N. Y. 639, 10 Am. Rep. 545; *Smith v. Sprague*, 40 Vt. 310; *Wilson v. Cochrane*, 46 Pa. St. 233; *Kutz v. McCune*, 22 Wis. 628; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Barlow v. McKinley*, 24 Iowa 70; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

⁷⁴ *Whitbeck v. Cook*, 15 Johns. 483; *Patterson v. Arthur*, 9 Watts 152; *Wilson v. Cochrane*, 46 Pa. St. 229; *Kutz v. McCune*, 22 Wis. 628.

⁷⁵ *Haynes v. Young*, 36 Me. 557; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Parish v. Whitney*, 3 Gray 516; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

⁷⁶ *Hoovey v. Newton*, 7 Pick. 29; *Harlow v. Thomas*, 15 Pick. 68; *Funk v. Voneida*, 11 Serg. & R. 112; *Snyder v. Lane*, 10 Ind. 424; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Kincaid v. Brittain*, 5 Sneed 119. *Contra*, *Hutz v. McCune*, 22 Wis. 628. See, *Allen v. Taylor* (Ga. 1905), 49 S. E. Rep. 799.

⁷⁷ *Howells v. Richards*, 11 East 633.

ceded by the covenant of warranty, from which it cannot be materially distinguished.⁷⁸ The operation of the two covenants being almost identical, an exhaustive statement will not be needed here. It suffices to say, that nothing but actual or constructive eviction, by the assertion of the paramount title, will constitute a breach of this covenant.⁷⁹

§ 619. *Covenant of warranty.*—As has been stated in the preceding paragraph, covenants for quiet enjoyment and of warranty are practically identical in their operation. An attempt has been made to distinguish them by the statement that the former relates to the possession and the covenant is broken by an eviction of *lawful right*; while the covenant of warranty relates to the title, and requires the eviction to be by *paramount* title as well as by lawful right, in order to constitute a breach.⁸⁰ But since an eviction can be lawful only under a paramount title, it is difficult to see in what this supposed difference lies. The same acts which will constitute a breach of one covenant will be a breach of the other also. In order that the covenants may be broken, there must be an *actual* or *constructive* eviction of the whole or a part of the premises.⁸¹ But the grantee need not resist the claim of the

⁷⁸ Rawle Cov. 125.

⁷⁹ *Smith v. Shepard*, 15 Pick. 147; *Russ v. Steele*, 40 Vt. 315; *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690; *Ross v. Dysart*, 33 Pa. St. 452; *Hand v. Armstrong*, 34 Ga. 232; *Murphy v. Price*, 48 Mo. 250; *Johnson v. Nyce*, 17 Ohio 66; *Clark v. Lineberger*, 44 Ind. 223; *Pence v. Duval*, 9 B. Mon. 49; *Thomas v. Stickle*, 32 Iowa 76; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Scrivner v. Smith*, 100 N. Y. 471; 53 Am. Rep. 224; *Hayes v. Ferguson*, 15 Lea 1; *Morgan v. Henderson*, 2 Wash. 367; *McAlester v. Landers*, 70 Cal. 79, 11 Pac. Rep. 505. See *ante*, Secs. 144, 152, 153.

⁸⁰ *Fowler v. Poling*, 6 Barb. 165; *Wheeler v. Wayne Co.* (Ill.), 24 N. E. Rep. 625. "A judgment against a grantee of land for possession thereof is not sufficient to constitute a breach of a covenant of warranty; an actual ouster, or a disturbance of possession equivalent to an ouster, being necessary." *Ravenel v. Ingram* (N. C. 1902), 42 S. E. Rep. 967.

⁸¹ *West v. Stewart*, 7 Pa. St. 122; *Bostwick v. Williams*, 36 Ill. 69; *Bayer v. Schultze*, 54 N. Y. Super. Ct. 212; *Barry v. Guild*, 28 Ill. App.

contestant until he has been evicted by process of law. He may voluntarily yield the possession upon demand of the owner of the paramount title,⁸² or purchase the outstanding title from the adverse claimant.⁸³ But he does this at his peril, and the burden of proof in a subsequent action on the covenant lies on him to show, that the title to which he yielded possession was really the paramount title.⁸⁴ A judgment in ejectment is a breach of the covenant, and the grantee need not wait to be actually evicted.⁸⁵ But in all these cases the covenant is not broken by eviction, unless under a lawful and paramount title.⁸⁶ And there will be no breach of the covenant, if land is confiscated in the exercise of the right of eminent domain.⁸⁷ It matters not what may be the nature of the paramount claim. If it is paramount, and the enforcement

39. In South Carolina and elsewhere the existence of a paramount title in a third person is sufficient, without eviction, to constitute a breach of the covenant. *Biggus v. Bradley*, 1 McCord 500; *Mackey v. Collins*, 2 Nott & M. 186; *Clapp v. Herdman*, 25 Ill. App. 509.

⁸² *Knepper v. Kurtz*, 58 Pa. St. 484; *Clarke v. McAnulty*, 3 Serg. & R. 364; *Gilman v. Haven*, 11 Cush. 330; *Greenvault v. Davis*, 4 Hill 643; *Kellogg v. Platt*, 33 N. J. 828; *Claycomb v. Munger*, 51 Ill. 376; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284; *Holliday v. Menifee*, 30 Mo. App. 207. *Contra*, *Ferris v. Harshea*, Mart. & Y. 52.

⁸³ *Eversole v. Early* (Iowa), 44 N. W. Rep. 897; *Petrie v. Folz*, 54 N. Y. Super. 223.

⁸⁴ *Stone v. Hooker*, 9 Cow. 154; *Smith v. Shepard*, 15 Pick. 147; *Clark v. McAnulty*, 3 Serg. & R. 364; *Crance v. Collenbaugh*, 47 Ind. 256; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284.

⁸⁵ *Loughran v. Ross*, 45 N. Y. 792; *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690; *Noonan v. Lee*, 2 Black 499; *Gleason v. Smith*, 41 Vt. 293; *Kincaid v. Brittain*, 5 Sneed 124; *Hale v. New Orleans*, 13 La. An. 499; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702; *Brown v. Allen*, 10 N. Y. S. 714. "A judgment establishing a paramount title is the legal equivalent of an eviction, and a satisfaction thereof perfects the cause of action against the warrantor of the title." *McCrillis v. Thomas* (Mo. App. 1905), 85 S. W. Rep. 673.

⁸⁶ *Gleason v. Smith*, 41 Vt. 296. See *Memmert v. McKean*, 112 Pa. St. 315.

⁸⁷ *Brown v. Jackson*, 3 Wheat. 452; *Blanchard v. Brooks*, 12 Pick. 47; *Sweet v. Brown*, 12 Metc. 175; *Raymond v. Raymond*, 10 Cush. 132;

of it will take a portion, or the whole of the land conveyed, or will diminish the value of it by restricting the enjoyment of it, the assertion of the claim will be a breach of the covenant. Therefore, an outstanding right to an easement, conditions restraining the use of the land, a mortgage or other lien, a wife's or widow's dower, and the like, will constitute a breach of the covenant of warranty, when they are enforced.⁸⁸ But if the covenant is signed by two or three joint tenants or tenants in common, it is not broken by the assertion of a paramount title to an undivided third by the purchaser from the third co-tenant, where the third co-tenant had been expected to join in the conveyance but had refused.⁸⁹ The covenant of each covenantor is held in such case to be several.

§ 620. The character of the covenant of warranty.—The covenant of warranty in its present character is a modern covenant of title, and is an adaptation of an old English covenant to American wants. It is now the most common covenant of title, and the only one in general use. This is a personal obligation, binding the warrantor and his personal representatives, to warrant and defend the title of the covenantee against adverse claims, and binds his heirs and devisees only when they are expressly mentioned, and then only to the

Peck v. Jones, 70 Pa. St. 83; *Adams v. Ross*, 30 N. J. L. 510; *Doe v. Dowdall*, 3 Houst. 380; *Kimball v. Temple*, 25 Cal. 452.

⁸⁸ *Lamb v. Danforth*, 59 Me. 324, 8 Am. Rep. 426; *Haynes v. Young*, 36 Me. 561; *Day v. Adams*, 42 Vt. 510; *Harlow v. Thomas*, 15 Pick. 66; *White v. Whitney*, 3 Metc. 81; *Estabrook v. Smith*, 6 Gray 572; *Cowdry v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690. But see *Hendricks v. Stark*, 37 N. Y. 106; *Janes v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Hill v. Bacon*, 110 Mass. 388; *Flynn v. Williams*, 1 Ired. L. 509; *Southerland v. Stout*, 68 N. C. 446; *Moore v. Vail*, 17 Ill. 185. But see *Memmert v. McKeen*, 112 Pa. St. 315. But an incumbrance, which the grantee undertakes to pay, will not work a breach of the covenant. *Stebbins v. Hall*, 29 Barb. 524; *Belmont v. Coman*, 2 N. Y. 438; *Gage v. Brewster*, 31 N. Y. 221; *Trotter v. Hughes*, 2 Vt. 74; *Allen v. Lee*, 1 Ind. 58; *Pitman v. Conner*, 27 Ind. 337. See *Sears v. Broody* (Neb. 1902), 92 N. W. Rep. 214.

⁸⁹ *Redding v. Lamb* (Mich.), 45 N. W. Rep. 997.

extent of the assets received by them from the warrantor. And as a personal covenant, it may be barred by the Statute of Limitations.⁹⁰ The right of action is not affected by a failure to record the conveyance and covenant.⁹¹ If the covenant is broken, as will be more fully explained in a subsequent paragraph, the covenantee is entitled to an action for damages against the covenantor.⁹² But a different remedy was provided in the case of

§ 621. **The feudal warranty.**—Of which the modern warranty is a descendant. The feudal warranty grew out of the relation of lord and vassal. Upon receiving the homage of the vassal the lord pledged himself to warrant and defend the title to the vassal's lands, and provide him with others of equal value if he were ousted of his lands by a paramount title. If the vassal or tenant was evicted he could call upon the lord for some more lands, as compensation for those which he had lost. But there was no action for damages.⁹³ The ancient feudal warranty has long since become obsolete, and has been replaced by the personal covenant above described.⁹⁴ In only one respect does the modern covenant bear any very close and striking resemblance to the feudal warranty; and that is, in its operation as an estoppel, to bind an after-acquired title in the hands of the warrantor and privies, and prevent its enforcement against the grantee. Wherever a grantor undertakes to convey an estate to which he has no title, if the deed contains a covenant of warranty, he is estopped from setting up an adverse title which he has subse-

⁹⁰ *Cole v. Raymond*, 9 Gray 17; *Holden v. Fletcher*, 6 Curtis 235; *Townsend v. Morris*, 6 Cow. 126; *Athens v. Nale*, 25 Ill. 198; *Bostwick v. Williams*, 36 Ill. 70; *Wheeler v. Wayne Co. (Ill.)*, 24 N. E. Rep. 625; *Sine v. Fox*, 33 W. Va. 521, 11 S. E. Rep. 218.

⁹¹ *Boyer v. Amet*, 41 L. An. 721, 6 So. Rep. 734.

⁹² See *post*, Sec. 625.

⁹³ 3 Washburn on Real Prop. 468.

⁹⁴ Co. Lit. 384 a, Butler's note 332; *Townsend v. Morris*, 6 Cow. 126; *Caldwell v. Kirkpatrick*, 6 Ala. 60; 4 Kent's Com. 472; 3 Washburn on Real Prop. 468, 469.

quently acquired. And this is the case, even though the grantee has by his deed acquired neither title nor possession. The grantee may maintain ejectment against the grantor so soon as he has acquired the title and possession. Or, if the grantor has only acquired the title and the land is in possession of a third person, he may maintain an equitable suit for a conveyance of the newly acquired title.⁹⁵ The heirs are bound by the covenant of warranty as an estoppel, in respect to the lands acquired by descent from the ancestor who warranted, but are not estopped from setting up an adverse title acquired by purchase, although they will be liable in an action on the covenant to the extent of the property received by them from the ancestor.⁹⁶

§ 622. Special and limited covenants of title — Exceptions to operation of covenant.— So far only general covenants of warranty have been referred to; that is, covenants in which the grantor covenants to warrant and defend the title against the lawful adverse claims of all persons whomsoever. But the covenant need not always be general. It may be *special* limited to the actions and claims of certain persons. Thus, a covenant against all persons claiming by, through, or under the grantor is a special covenant, and a paramount title against the grantor, not created by himself, is no breach of the covenant. And if the grantor, after conveying with special warranty, in which he only covenants against any defects in the title resulting from his *past* transactions, acquires the paramount title, he may set it up against his grantees and assigns. He is not estopped by this special warranty.⁹⁷ In

⁹⁵ *Terrett v. Taylor*, 9 Cranch 53; *White v. Patten*, 24 Pick. 324; *Jackson v. Murray*, 12 Johns. 201; *Jackson v. Stevens*, 13 Johns. 316; *Baxter v. Bradbury*, 20 Me. 260; *Cotton v. Ward*, 3 B. Mon. 304; *King v. Gilson*, 32 Ill. 353; *Hope v. Stone*, 10 Minn. 141. See, also, *ante*, Secs. 511, 515.

⁹⁶ *Oliver v. Piatt*, 3 How. 412; *Bates v. Norcross*, 17 Pick. 14; *Cole v. Raymond*, 9 Gray 217; *Torrey v. Minor*, 1 Smed. & M. Ch. 489.

⁹⁷ *Davenport v. Lamb*, 13 Wall. 418; *Jackson v. Peck*, 4 Wend. 300;

the same manner the operation of the covenant of warranty may be limited by the description of the subject-matter of the conveyance. Thus, if a deed purports to convey in terms the right, title and interest of the grantor to the land described, instead of conveying in terms the land itself, a general covenant of warranty will be limited to that right or interest, and will not be broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance.⁹⁸ But this position is assailed, and not without good grounds, by other authorities.⁹⁹ Mr. Washburn says: "Nor is it easy to see what the office or purpose of a covenant of warranty can be when whatever is granted infallibly passes, and can never be lawfully diverted by any future lawful act or right of any one. The grantor cannot reclaim or disturb what he has expressly granted; nor could any one acquire any right to disturb his grantee by any deed which the grantor might subsequently make."¹ Exceptions can be and are often made to the operation of the other covenants, of seisin and against incumbrances.² Another important question connected with the present subject, and one involving at times considerable doubt, is whether an exception in the operation of one of two or more covenants in a deed will be extended to

Jackson v. Winslow, 9 Cow. 13; *Comstock v. Smith*, 13 Pick. 116; *Trull v. Eastman*, 3 Metc. 124.

⁹⁸ *Brown v. Jackson*, 3 Wheat. 452; *Van Rensselaer v. Kearney*, 11 How. 325; *Sweet v. Brown*, 12 Metc. 175; *Raymond v. Raymond*, 10 Cush. 132; *Hoxie v. Finney*, 16 Gray 332; *Blodgett v. Hildreth*, 103 Mass. 488; *Bates v. Foster*, 59 Me. 155; *Freeman v. Foster*, 55 Me. 508; *Williamson v. Test*, 24 Iowa, 139; *White v. Brocaw*, 14 Ohio St. 344; *Adams v. Ross*, 30 N. J. L. 510.

⁹⁹ *Loomis v. Bedel*, 11 N. H. 74; *Mills v. Catlin*, 22 Vt. 104; *Rowe v. Heath*, 23 Texas 614. The statutory general covenant arising from the use of the words "grant, bargain and sell," is held to be limited, in Missouri, by the special covenant "against the lawful claims and demands of the grantor and those under whom he claims." *Miller v. Bayless*, 74 S. W. Rep. 648.

¹ Washburn on Real Prop. 477.

² *Lively v. Rice*, 150 Mass. 171, 22 N. E. 888; *Keller v. Ashford*, 133 U. S. 610; *King v. Kilbride*, 58 Conn. 109, 19 Atl. Rep. 519.

others, so as to restrict their operation. Thus, if a deed contains a covenant against incumbrances, except as to a certain mortgage, followed by a general covenant of warranty, will that exception apply to the warranty, so that foreclosure under that mortgage will not constitute a breach of the covenant of warranty? This question is always determined by ascertaining the declared or implied intention of the grantor. If the two covenants are given in the same connection, and from that close connection it can be implied that the parties intended the exception to apply to both covenants, both will be treated as special covenants. While, on the contrary, the latter covenant will be general and unaffected by the exception, if there does not appear in the deed to be any intimate connection between the two covenants and the exception. In *Howells v. Richards* the court say: "He (the grantor) might from motives of prudence, be unwilling to subject himself to a suit for the existence of an incumbrance, which he is willing to covenant shall never be suffered to disturb his grantee." Where the exception expressly refers to the covenant of seisin or against incumbrances, the presumption is very strong that it does not apply to the covenants for quiet enjoyment or of warranty.³

§ 623. *Implied covenants.*—At common law the operative word "give" in a deed of feoffment raised by implication of law a covenant of warranty during the life of the grantor.⁴ And so also there is an implied warranty in the old technical conveyance of *exchange*.⁵ So also are there implied covenants

³ *Howells v. Richards*, 11 East 634; *Smith v. Compton*, 3 B. & Ad. 198; *Estabrook v. Smith*, 6 Gray 572; *Cornell v. Jackson*, 3 Cush. 506; *Funk v. Voneida*, 11 Serg. & R. 109; *Rowe v. Heath*, 23 Texas 614; *King v. Kilbride*, 58 Conn. 109, 19 Atl. Rep. 519.

⁴ *Kent v. Welch*, 7 Johns. 258; *Frost v. Raymond*, 2 Caines 188.

⁵ *Dean v. Shelly*, 57 Pa. St. 427; *Bixler v. Saylor*, 68 Pa. St. 148. But this was the case only with the technical conveyance, called *exchange*. There was no implied covenant of title, if the exchange was effected by means of mutual deeds of bargain and sale. *Gamble v. McClure*, 69 Pa. St. 284.

in leases.⁶ But, as a general rule, in the conveyance of freehold estates in this country there are no implied covenants, since the deeds in common use are those which operate under the Statute of Uses, and they do not raise covenants by implication.⁷ But in a number of the States, notably Alabama, Arkansas, California, Delaware, Illinois, Iowa, Mississippi, Missouri, Pennsylvania and Texas, statutes have been enacted whereby the "operative words," "grant, bargain and sell," imply general covenants of seisin, against incumbrances, and of warranty or quiet enjoyment. The statutes vary somewhat as to details, but are similar in general effect.⁸ Whether these statutory covenants are restrained in their operation by the assertion of a special express covenant, is not clearly determined. There can, of course, be in a deed both express and implied covenants, and both can stand if they are consistent. But if they are inconsistent, the natural rule would be that the implied covenant would yield to the express covenant.⁹ And although this rule seems to be supported by the authorities in the abstract, it is difficult at times to reconcile their decisions in the particular case with the rule above stated.¹⁰ The safest course, in making a conveyance with

⁶ See *ante*, Secs. 144, 147.

⁷ *Allen v. Sayward*, 5 Me. 227; *Bates v. Foster*, 59 Me. 157; *Sanford v. Travers*, 40 N. Y. 140; *Ricket v. Dickens*, 1 Murph. 343; *De Wolf v. Hayden*, 24 Ill. 529; *Walk. Am. Law*, 381; 3 *Washburn on Real Prop.* 489.

⁸ 4 *Kent's Com.* 473; 3 *Washburn on Real Prop.* 489, 490; *Gratz v. Ewalt*, 2 Binn. 95; *Funk v. Voneida*, 11 Serg. & R. 109; *Latnam v. Morgan*, 1 Smed. & M. Ch. 611; *Chambers v. Smith*, 23 Mo. 174; *Brown v. Tomlinson*, 2 *Greene (Iowa)* 527; *King v. Gilson*, 32 Ill. 353. See, *Miller v. Bayless (Mo. 1903)*, 74 S. W. Rep. 648; *Bullitt v. Caryell (Texas 1905)*, 85 S. W. Rep. 482.

⁹ *Frontin v. Small*, 2 *Ld. Raym.* 419; *Merrill v. Frame*, 4 *Taunt.* 329; *Line v. Stevenson*, 5 *Bing. N. C.* 183; *Schlencker v. Moxsy*, 3 *B. & C.* 792; *Dennett v. Atherton*, *L. R.* 7 *Q. B.* 316. See, *Miller v. Bayless*, 74 S. W. Rep. 648.

¹⁰ See, *Hawk v. McCullough*, 21 *Ill.* 221; *Alexander v. Schreiber*, 10 *Mo.* 480; *Funk v. Voneida*, 11 *Serg. & R.* 109; *Brown v. Tomlinson*, 2 *Greene (Iowa)*, which seems to oppose the doctrine that the express

special covenants, is to use different operative words from those which by statute imply covenants of title. Thus, it has been held under the Missouri statute that covenants are not implied in a deed where the grantor "bargains, sells, releases, quitclaims, and conveys."¹¹

§ 624. Who may maintain actions on covenants of warranty.—Like covenants of quiet enjoyment, until a breach has been committed, a covenant of warranty runs with the land into the hands of the assignee and heirs, and may be sued upon by the assignee or heir who is in possession when the breach occurs, whether the alienation is voluntary or involuntary. After a breach there can be no assignment at common law, and it is still universally true that the covenant then ceases to run with the land.¹² But in order that a covenant may run with the land to assignees, the grantee must by the conveyance acquire the actual or constructive seisin. If at the time of the conveyance the grantor had neither title nor seisin, nothing passes by the deed, and the covenant remains in the grantee, and cannot be enforced by an assignee.¹³

covenant will exclude the implied covenant, while *Weems v. McCaughan*, 7 Smed. & M. 422, supports the rule.

¹¹ *Gibson v. Chouteau*, 39 Mo. 566; *Valle v. Clemens*, 18 Mo. 486.

¹² *Hurd v. Curtis*, 19 Pick. 459; *Slater v. Rawson*, 1 Metc. 450; *White v. Whitney*, Metc. 81; *Withy v. Mumford*, 5 Cow. 137; *Ford v. Walsworth*, 19 Wend. 334; *Moore v. Merrill*, 17 N. H. 81; *Dickinson v. Hoomes*, 8 Gratt. 353; *Lawrence v. Senter*, 4 Sneed 52; *Brown v. Metz*, 33 Ill. 339; *Devin v. Hendershott*, 32 Iowa 192; *Preiss v. LePoidevin*, 19 Abb. N. C. 123; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142. "A covenant in a deed 'that they are free from all incumbrances' does not run with the land, so as to invest a remote grantee thereof with a right of action against the assignor." *Waters' Estate v. Bagley* (Neb. 1902), 92 N. W. Rep. 637.

¹³ *Slater v. Rawson*, 1 Metc. 450; *Bartholomew v. Candee*, 14 Pick. 167; *Beddoe v. Wadsworth*, 21 Wend. 120; *Overfield v. Christie*, 7 Serg. & R. 177; *Dickinson v. Hoomes*, 8 Gratt. 353; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429. But see *Wead v. Larkin*, 54 Ill. 489; *Van Court v. Moore*, 26 Mo. 92; *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. Rep. 142. See, *Miller v. Bayless* (Mo. 1903), 74 S. W. Rep. 648.

For actual adverse possession under a paramount title at the time of conveyance is itself a breach of the covenant.¹⁴ This lack of seisin does not prevent the covenant from operating as an estoppel upon the subsequently acquired title.¹⁵ The covenant of warranty can be and is impliedly apportioned between the assignees by a conveyance of parts or portions of the land, to which the covenant is attached, to different grantees. They each have a several and independent action upon the covenant in respect to their portion of the land.¹⁶ The assignee in possession at the time of the breach is generally the only person who can maintain an action upon the covenant.¹⁷ When his immediate grantor also warranted the land to him, the assignee may bring suit on either or both of the covenants, but of course can have but one recovery.¹⁸ But where there are successive covenants of warranty, given by successive grantors, under certain circumstances an exception arises to the general rule just stated, that the assignee in possession is the only person who can maintain an action for the breach of the covenant. Thus, if the assignee brings suit, as he may, against any one of the covenantors but the first or earliest, and recovers of him, this covenantor is remitted to his right to be indemnified by the prior covenantors, and may maintain action upon their covenants. But such covenantor can only establish his right to institute the suit by showing that the claims of the subsequent assignees have been satisfied in full.¹⁹ And in order that the prior cove-

¹⁴ *Moore v. Vail*, 17 Ill. 185.

¹⁵ *McCasker v. McEvery*, 9 R. I. 528; *Wead v. Larkin*, 54 Ill. 489; *Van Court v. Moore*, 26 Mo. 92.

¹⁶ 3 *Washburn on Real Prop.* 470; *Kane v. Sanger*, 14 Johns. 89; *Dickinson v. Hoomes*, 8 Gratt. 353.

¹⁷ *Bickford v. Page*, 2 Mass. 455; *Wheeler v. Sohler*, 3 Cush. 219; *Kane v. Sanger*, 4 Johns. 89; *Ford v. Walsworth*, 19 Wend. 334; *Thompson v. Sanders*, 5 B. Mon. 357; *Libby v. Hutchinson* (N. H. 1903), 56 Atl. Rep. 547.

¹⁸ *Withy v. Mumford*, 5 Cow. 137; *Markland v. Crump*, 1 Dev. & B. 95.

¹⁹ *Withy v. Mumford*, 5 Cow. 137; *Suydam v. Jones*, 10 Wend. 185;

nantor may be bound by the judgment against the intermediate covenantor, it is now generally recognized that the latter may vouch in his prior covenantors, and if they fail to defend the title and eviction follows, they cannot in the subsequent suit against themselves set up the defense that the eviction was not under a paramount title.²⁰ The notice of the pendency of the suit, in order to be effectual in binding the prior covenantors, must be certain and unequivocal. But it need not be made a matter of record. A verbal or written notice *dehors* the court, or the voluntary appearance of the prior covenantor in the suit will be sufficient.²¹

§ 625. **Damages, what, may be recovered.**—If the action is on the covenant of seisin, and the covenant is satisfied by the transfer of the actual, though tortious, seisin, and broken, if at all, by the want of seisin at the time of conveyance, the measure of damages is the consideration paid, if the consideration can be ascertained, and if not, the value of the land at the time of conveyance. And in determining the consideration, parol evidence is admissible to contradict and control the statement of consideration in the deed.²² If the grantor

Thompson v. Shattuck, 2 Metc. 618; *Wheeler v. Sohler*, 3 Cush. 222; *Markland v. Crump*, 1 Dev. & B. 94; *Thompson v. Sanders*, 5 B. Mon. 357.

²⁰ *Chamberlain v. Preble*, 11 Allen 373; *Boston v. Worthington*, 10 Gray 498; *Merritt v. Morse*, 108 Mass. 276; *Andrews v. Gillespie*, 47 N. Y. 487; *Cooper v. Watson*, 10 Wend. 205; *Littleton v. Richardson*, 34 N. H. 187; *Smith v. Sprague*, 40 Vt. 43; *Hines v. Allen*, 34 Conn. 195; *Chapman v. Holmes*, 10 N. J. L. 20; *Paul v. Witman*, 3 Watts & S. 409; *Martin v. Cowles*, 2 Dev. & B. 101; *Gregg v. Richardson*, 25 Ga. 570; *St. Louis v. Bissell*, 46 Mo. 157; *McConnell v. Downs*, 48 Ill. 271; *Claycomb v. Munger*, 51 Ill. 377; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191.

²¹ *Chamberlain v. Preble*, 11 Allen 373; *Littleton v. Richardson*, 34 N. H. 187; *Miner v. Clark*, 15 Wend. 427; *Andrews v. Gillespie*, 47 N. Y. 487; *Paul v. Witman*, 3 Watts & S. 410; *Crisfield v. Storr*, 36 Md. 129; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191.

²² *Bingham v. Weiderwax*, 1 N. Y. 514; *Morris v. Phelps*, 5 Johns. 49; *Tucker v. Clarke*, 2 Sandf. Ch. 96; *Smith v. Strong*, 14 Pick. 128;

subsequently acquires the paramount title before his grantee has been evicted by the adverse holder of the title, inasmuch as the grantee acquires in certain cases the benefit of that title under the doctrine of estoppel, the grantee can then obtain only nominal damages. But full damages are recoverable, if eviction has taken place before the grantor's acquisition of the superior title.²³ And so also, if the covenant of seisin be construed as covenanting for an *indefeasible* seisin, and the grantor at the time of the conveyance has a tortious seisin, only nominal damages may be recovered, unless the grantee has been actually evicted, or has incurred expense in purchasing the paramount title, when in one case the consideration, and in the second case the expenses, will be the measure of damages, as in suits on the covenant against incumbrances.²⁴ In the action on the covenant against incumbrances the measure of damages varies with circumstances. If the covenant is merely broken by the existence of the incumbrances, and the grantee remains undisturbed in his possession, as would be the case with an outstanding mortgage, nominal damages can alone be recovered.²⁵ But if the incumbrance is of a permanent nature, as an existing easement, and the enjoyment of the land is diminished by the exercise of the easement, the measure of damages will be the loss in *Hodges v. Thayer*, 110 Mass. 286; *Cornell v. Jackson*, 3 Cush. 506; *Lee v. Dean*, 3 Whart. 331; *Farmers' Bank v. Glenn*, 68 N. C. 35; *Cox v. Strode*, 2 Bibb 277; *Lacey v. Marnan*, 37 Ind. 168; *Kincaid v. Brittain*, 5 Sneed 123; *Rich v. Johnson*, 2 Pinney 88; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284.

²³ *Baxter v. Bradbury*, 20 Me. 260; *Blanchard v. Ellis*, 1 Gray 195; *King v. Gilson*, 32 Ill. 356. "The measure of damages for a breach of a covenant of warranty of title is the consideration money lost to the buyer, and not the value of the property, less any unpaid consideration." *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.* (Wash. 1903), 72 Pac. Rep. 455.

²⁴ *Whiting v. Dewey*, 15 Pick. 428; *Norman v. Winch*, 65 Iowa 263; *Conrad v. Druids Grand Grove*, 60 Wis. 258; *Holladay v. Menefee*, 30 Mo. App. 207. See, *Newbury v. Lucas* (Iowa), 101 N. W. Rep. 730.

²⁵ *Wyman v. Ballard*, 12 Mass. 304; *Tufts v. Adams*, 8 Pick. 547; *Funk v. Voneida*, 11 Serg. & R. 112.

the value of the property, which is occasioned by the enforcement and exercise of the easement.²⁶ If the incumbrance be an outstanding mortgage, or an attachment or execution or municipal assessment, the purchaser need not wait for the enforcement of these liens; he may proceed at once to satisfy them, and then recover of the grantor on his covenant against incumbrances the expenses incurred in extinguishing the mortgage or removing the attachment,²⁷ provided the sum so paid does not exceed the purchase price of the land: or if he is evicted before suit is brought on the covenant, he may recover the consideration paid with interest.²⁸ And where damages are recovered in satisfaction of the breach of the covenant of seisin, or against incumbrances, by an actual eviction, the grantor is remitted to his title to the land, and the grantee is estopped from claiming any rights in the same under his deed.²⁹ The courts, although uniform in their decisions as to the measure of damages in actions upon the covenants of seisin and against incumbrances, are divided as to the proper rule to be applied to the covenants for quiet enjoyment and of warranty. The majority of the courts, following the principle of the ancient feudal warranty, hold that the true measure of damages is the consideration paid, and interest to date of eviction or of the judgment. Such is the rule in

²⁶ *Haynes v. Young*, 36 Me. 557; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Harlow v. Thomas*, 15 Pick. 66; *Batchelder v. Sturgis*, 3 Cush. 301; *Foster v. Foster*, 62 N. H. 46; *Smith v. Davis* (Kan.), 24 Pac. Rep. 428. See, *McBride v. Burns* (Texas), 88 S. W. Rep. 394.

²⁷ *Delavergne v. Morris*, 7 Johns. 358; *Estabrook v. Smith*, 6 Gray 572; *Johnson v. Collins*, 115 Mass. 892; *Funk v. Voneida*, 11 Serg. & R. 113; *Stambaugh v. Smith*, 23 Ohio St. 584; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Eaton v. Lyman*, 30 Wis. 41; *Petrie v. Folz*, 54 N. Y. Super. 223; *Hartshorn v. Cleveland* (N. J.), 19 Atl. Rep. 974; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702; *Bradshaw v. Crosby* (Mass.), 24 N. E. Rep. 47. See *McCrillis v. Thomas* (Mo. 1905), 85 S. W. Rep. 673.

²⁸ *Chapel v. Bull*, 17 Mass. 213; *Blanchard v. Ellis*, 1 Gray 195; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284.

²⁹ *Porter v. Hill*, 9 Mass. 34; *Blanchard v. Ellis*, 1 Gray 195; *Kincaid v. Brittain*, 5 Sneed 124.

England, the United States courts, and in Arkansas, California, Georgia, Indiana, Iowa, Kentucky, Missouri, Maryland, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia and Wisconsin.³⁰ But in Connecticut, Vermont, Maine and Massachusetts the covenant is treated as one of indemnity, and the measure of damages is taken to be the value of the land at the time of eviction.³¹ If the outstanding title is bought in, the price paid for the same is the true measure of damages for the breach of the warranty.³² In the case of breach of any one of the covenants of title, the covenantee can recover as damages all costs which are assessed against the covenantee as defendant of the title to the land.³³ But he cannot recover the costs of a suit which resulted in his favor.³⁴

§ 626. **What covenants run with the land.**—In order that a covenant may run with the land, and bind the assignees, it must bear an intimate relation with and concern the estates or lands conveyed. It runs with the land, so as to bind the covenantor's assignees, when the performance of it is expressly

³⁰ *Foster v. Thompson*, 41 N. H. 379; *Lewis v. Campbell*, 8 Taunt. 715; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *McGarry v. Hastings*, 39 Cal. 360; *Crisfield v. Storr*, 36 Md. 150; *Terry v. Diabensatt*, 68 Pa. St. 400; *Hopkins v. Lee*, 4 Wheat. 118; *Williams v. Beekman*, 2 Dev. 483; *Pence v. Duval*, 9 B. Mon. 49; *Lambert v. Estes*, 99 Mo. 604, 13 S. W. Rep. 284; *Boyer v. Amet*, 41 La. An. 721, 6 So. Rep. 734; *Collier v. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702; *McGuffey v. Humes*, 85 Tenn. 26, 1 S. W. Rep. 506. Interest is not recoverable if a judgment for mesne profits has not been recovered of the covenantee. *Collier v. Cowgill*, 52 Ark. 322, 12 S. W. Rep. 702.

³¹ *Lamb v. Danforth*, 50 Me. 322, 8 Am. Rep. 426; *Downer v. Smith*, 38 Vt. 464; *Horsford v. Wright*, Kirby 3; *Smith v. Strong*, 14 Pick. 128; *Bledsoe v. Beiler*, 66 Texas 437, 1 S. W. Rep. 164.

³² *Petrie v. Folz*, 544 N. Y. Super. Ct. 223; *Clapp v. Herdman*, 25 Ill. App. 509.

³³ *McAlester v. Landers*, 79 Cal. 79, 11 Pac. Rep. 505.

³⁴ *Smith v. Parsons*, 33 W. Va. 644, 11 S. E. Rep. 68. "Attorney's fees paid in defense of the title cannot be recovered as a part of the damages in an action for breach of warranty." *Cates v. Field* (Tex. Civ. App. 1905), 85 S. W. Rep. 52.

or by implication made a charge upon the land.³⁵ On the other hand, the covenants will run with the land so as to be enforceable by the successive assignees of the land, when the performance of the covenant affects the value of the land. Thus, covenants for quiet enjoyment, and of warranty, run with the land.³⁶ So also a covenant that the grantor shall not erect and maintain structures upon an adjoining lot, or erect another mill-site on some stream.³⁷ In order that a covenant may run with the land there must be a privity of

³⁵ Thus, for example, covenants of rent, or for the payment of any other sum which is made a charge upon the land. *Hurst v. Rodney*, 1 Wash. 375; *Sandwith v. De Silver*, 1 Browne (Pa.) 221; *Astor v. Miller*, 2 Paige 68; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Worthington v. Hewes*, 19 Ohio St. 67; *Thomas v. Von Kapff*, 6 Gill & J. 372; *Conduit v. Ross*, 102 Ind. 166; *Martin v. Martin* (Kan.), 24 Pac. Rep. 418. See *ante*, Sec. 147. Covenants, not to use the land, or only to use it, in the specified manner. *Barron v. Richards*, 3 Edw. Ch. 96; *s. c.* 8 Paige 351; *St. Andrews Church Appeal*, 67 Pa. St. 512; *Winfield v. Henning*, 21 N. J. L. 188; *Jeter v. Glenn*, 9 Rich. L. 374; *Thomas v. Poole*, 7 Gray 83; *Clement v. Burtis* (N. Y.), 24 N. E. Rep. 1013; *Graves v. Deterling*, 120 N. Y. 447, 24 N. E. 655. See *ante*, Sec. 433. A covenant to maintain fences, or other structures, or to permit the enjoyment of any other easement. *Bronson v. Coffin*, 108 Mass. 175; *Duffy v. N. Y.*, etc., R. R., 2 Hill 496; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Norfleet v. Cromwell*, 64 N. C. 1; *Walsh v. Barton*, 24 Ohio St. 28; *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. Rep. 1; *Pittsburg, etc., R. R. Co. v. Reno*, 22 Ill. App. 470; *s. c.* 123 Ill. 273, 14 N. E. Rep. 195; *Midland Ry. Co. v. Fisher* (Ind.), 24 N. E. Rep. 756, 758; *Avery v. N. Y. Cent.*, etc., R. R. Co. (N. Y.), 24 N. E. Rep. 20, 24. Covenant for improvements. *Bailey v. Richardson*, 66 Cal. 416. But an executory covenant to erect a party-wall will not run with the land, so as to bind the assignees of the covenantor. *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611. See *Miller v. Noonan*, 83 Mo. 343.

³⁶ *Wilder v. Davenport*, 58 Vt. 642. But see, *Cemousky v. Fitch* (Iowa 1903), 96 N. W. Rep. 754.

³⁷ *Trustees of Watertown v. Cowen*, 4 Paige 510; *Norman v. Wells*, 17 Wend. 136; *Dailey v. Beck*, Bright 107; *Brew v. Van Denman*, 6 Heisk. 433. To the same effect see *Norcross v. James*, 140 Mass. 188; *Maxon v. Lane*, 102 Ind. 364; *Lewis v. Ely*, 92 N. Y. S. 705, 100 App. Div. 252.

estate between the covenantor and covenantee.³⁸ And it can only be assigned with the land.³⁹ Where the land consists of several parcels, or the land is divided up into parcels, and they are conveyed to different grantees, the covenant is divided up among them, and each may sue or be sued on his portion of the covenant.⁴⁰

§ 627. When breach of covenant works a forfeiture of estate.

— The breach of a covenant running with the land will not of itself work a forfeiture of the estate, to which it is annexed. The breach only gives rise to a personal action for damages on the covenant, or an equitable action for its enforcement. But it may by express limitation be made to operate as a condition as well as a covenant. In such a case, the breach of the covenant is a breach of a condition subsequent, and the grantor may re-enter. Where the forms of expression usual in the creation of a condition, such as “on condition,” “provided always,” and the like, are employed, nothing further is needed to give the covenant the character and force of a condition. But generally, if other words are used, it is necessary that the covenant should contain a clause of forfeiture, or the reservation of a right of entry upon the breach of the covenant, in order that the breach may work a forfeiture of the estate.⁴¹

³⁸ *Morse v. Aldrich*, 19 Pick. 449; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206.

³⁹ *Wilson v. Wiedenhams*, 51 Me. 566; *Randolph v. Kinney*, 3 Rand. 394; *Nesbit v. Brown*, 1 Dev. Eq. 30; *Martin v. Gordon*, 24 Ga. 533.

⁴⁰ *Astor v. Miller*, 2 Paige 68; *Johnson v. Blydenburg*, 31 N. Y. 427.

⁴¹ *Rawson v. Uxbridge*, 7 Allen 125; *Chapin v. Harris*, 8 Allen 594; *Ayer v. Emery*, 14 Allen 69; *Packard v. Ames*, 10 Gray 325; *Moore v. Pitts*, 53 N. Y. 85; *Walters v. Breden*, 70 Pa. St. 235; *Supervisors, etc., v. Patterson*, 56 Ill. 119; *Board, etc., v. Trustees, etc.*, 63 Ill. 204. See *Parsons v. Miller*, 18 Wend. 564; *Emerson v. Simpson*, 43 N. H. 475; *Sharon Iron Co. v. Erie*, 41 Pa. St. 341; *Gadberry v. Sheppard*, 27 Miss. 203. See, also, *ante*, Sec. 201, n. For conditional grant of public lands, by Congress for railroad purposes, see, *Oregon R. R. v. Quigley* (Idaho 1905), 80 Pac. Rep. 401.

CHAPTER XXIV.

TITLE BY DEVISE.

- SECTION 628.** Definition and historical outline.
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651. Contingent wills.
652. Probate of will.
653. Agreements as to testamentary disposition of property.

§ 628. **Definition and historical outline.**— A title by devise is that title to lands which is created by will. The term “devise” is properly applicable only to real estate. The transfer by will of personal property, or of chattel interests in real property, is called a bequest. A will is an instrument of conveyance, by which the testator undertakes to direct

the disposition of his property after his death.¹ It has always been possible at common law to make a testamentary disposition of personal property. Under the Saxon laws lands were devisable as freely as they were alienable; but upon the Conquest of England by the Normans, the same policy which dictated the deprivation of the right of alienation called for the abolition of the right to dispose of lands by will. Accordingly, lands could not, after the Norman Conquest, be devised. But upon the introduction of the doctrine of uses means were discovered, whereby such a disposition could be made. It will be remembered that, in formulating the law of uses, courts of equity only adopted those rules governing legal estates which were conformable to the policy of the court in respect to uses. Hence they declared that uses were devisable, although the legal estates which supported them were not. When the Statute of Uses was passed, the use became united to the legal estate, and this mode of devising lands was taken away. But in connection with uses there had been developed the doctrine of powers, whereby one could convey lands to the use of whomever the grantor should appoint by will. The appointee would take, not by force of the will, but under the deed of conveyance.² And after the passage of the Statute of Uses, as soon as he was appointed by the will of the grantor, the use thereby created and vesting in him was immediately executed by the statute, and he acquired the legal estate as effectually as if the lands could have been devised directly to him. Mr. Washburn states that the effect of the Statute of Uses "was to destroy the power of devising lands by the way of uses; and they accordingly became undevisable, and remained so until the Statute of Wills."³ This is true, so far as the power to devise a vested use is concerned. But a power of appointment by will was

¹ *Bunyan v. Bigelow* (Conn. 1905), 60 Atl. Rep. 266; *In re Davis Will*, 92 N. Y. S. 968, 45 Misc. 554.

² See *ante*, Sec. 403.

³ *Washburn on Real Prop.* 501, 502.

not affected by the statute. The use created by the exercise of the power is contingent until the power is exercised, and hence the statute could not operate upon it, so as to destroy the power to make a devise in this way. At any rate, such a disposition could be made before the Statute of Uses, and it has universally been recognized as an effective mode of disposition since the Statute of Wills, and independent of the latter statute. Furthermore, no reason has been, or can be, assigned why it was not just as effective between the enactments of the Statute of Uses and the Statute of Wills, which was enacted in the 32 and 34 Hen. VIII, which expressly enabled the proprietors of lands to dispose of their legal estates, without resorting to the indirect mode of creating a power of appointment. The effect of the Statute of Wills, and of similar ones passed in the different States of the American Union, constitutes the subject of this chapter.

§ 629. **By what law are devises governed.**—Like all other legal questions arising in respect to the rights in, or issuing out of, lands, the legality and effect of devises are governed by the law of the place where the land is situated, the *lex loci rei sitæ*. In determining, therefore, the validity of a will of real property, the place where the will happens to be made is of no importance. The provisions of the *lex loci rei* alone govern.⁴ And if an invalid will is executed before the enactment of a law which makes such wills valid, and the testator dies subsequent to such enactment, the latest enactment will

⁴ Story Conf. Laws, Sec. 474; 4 Kent's Com. 513; 1 Redf. on Wills 387; Kerr v. Moon, 9 Wheat. 565; U. S. v. Crosby, 7 Cranch 115; Bascom v. Albertson, 34 N. Y. 584; Morrison v. Campbell, 2 Rand. 209; Halman v. Hopkins, 27 Texas 38; Swearingen v. Morris, 14 Ohio St. 424; Johnson v. Copeland, 35 Ala. 521; Richards v. Miller, 62 Ill. 417; Cornelison v. Browning, 10 B. Mon. 425; Morris v. Harris, 15 Cal. 226; Castens v. Murray (Ga. 1905), 50 S. E. Rep. 131; Succession of Haslitz (La.), 38 So. Rep. 174; Coy v. Goze (Tex.), 84 S. W. Rep. 441; Haggart v. Ranney (Ark.), 84 S. W. Rep. 703.

govern the validity of the will.⁵ But in respect to the *interpretation* of a will, since the object of all efforts at interpretation is to ascertain the intention of the testator, it seems to be the established rule that the law of the domicile in force at the making of the will will govern, unless the testator appears to have had the provisions of the *lex loci* in mind.⁶ The *lex loci rei sitæ* governs chattel interests in lands as well as in real estate. Leaseholds are, therefore, governed by that law.⁷

§ 630. **The requisites of a valid will.**—The following may be mentioned as the principal requisites of a will: A sufficient writing, proper attestation, subject-matter, a competent testator, a competent devisee.

§ 631. **A sufficient writing.**—The statute 32 Hen. VIII empowers the holders of lands to dispose of them by their last will and testament *in writing*. No particular form of instrument is prescribed, and none is required, provided the words and forms of expression used sufficiently indicate the intention to make a will, and describe clearly the property upon which the will is to operate and the person to whom it shall go.⁸ A will is valid, if properly signed and attested, although it is written in a language which the testator did not understand.⁹ Words of transfer are of course needed in

⁵ Learned's Estate, 70 Cal. 140, 11 Pac. Rep. 587; Yocum v. Porter, 134 Fed. Rep. 205.

⁶ 2 Greenl. on Ev., Sec. 671; Story on Confl., Sec. 479 h. But see, Brigham v. Bert Hospital (Mass. 1904), 134 Fed Rep. 513.

⁷ Thompson v. Adv.-Gen., 12 Cl. & Fin. (H. L. Cas. 1); Freke v. Carberry, L. R. 16 Eq. 461.

⁸ Knox's Appeal, 131 Pa. St. 220, 18 Atl. Rep. 1021; Fellman's Admr. v. Landis, 131 Pa. St. 573, 18 Atl. Rep. 941. "The form of the attesting clause of a will is not material; the signature of the witnesses being all that is necessary under Burns' Ann. St. Ind. 1901, Sec. 2746." Barricklow v. Stewart (Ind. 1904), 72 N. E. Rep. 128.

⁹ Walter's Will, 64 Wis. 487, 54 Am. Rep. 640. *In re Graham's Will*, 109 N. Y. S. 122. It is not essential that the witnesses should under-

order to indicate the intention of disposing of the property. But while it is proper and customary to employ the verbs "devise," in the case of real property, "bequeath" in the case of personal property, and "give" in the case of either kind of property, yet these words have no technical signification, and any other words of transfer, such as that the property shall "go" or "be divided among," certain persons will be equally effective.¹⁰ And it has been held to be a good devise by implication, in the absence of any words of direct transfer or gift, where the will makes no other disposition of the property, and provides by a codicil for a limitation over, on failure of issue of his children, of the estate "above devised to them."¹¹ Indeed, an instrument in the form of a deed, has been held to operate as a will.¹² The same instrument may be held to be partly a deed and in other respects a will.¹³ The presumption, however, is against an instrument, in form a deed, operating as a will. Where it appears to have been the intention that the instrument shall operate as a deed, it cannot take effect as a will, although it may be absolutely void as a deed. And it is incumbent upon the party claiming under the instrument to show that it was executed *animo testandi*.¹⁴ The intention may be ascertained either,

stand the contents of the will. *Roche v. Nason*, 93 N. Y. S. 565. For will of a German, written in English, see, *Gerbrich v. Freitag*, 213 Ill. 552, 73 N. E. Rep. 338.

¹⁰ *Keaney v. Keaney* (Md.), 18 Atl. Rep. 1105.

¹¹ *Ferguson v. Thomasson* (Ky.), 9 S. W. Rep. 714.

¹² *Manly v. Lakin*, 1 Hagg. 130; *Henderson v. Farbridge*, 1 Russ. 479; *Frederick's Appeal*, 52 Pa. St. 338; *Wagner v. McDonald*, 2 Harr. & J. 346; *Ingram v. Porter*, 4 McCord 198; *Wheeler v. Durant*, 3 Rich. Eq. 452; *Hall v. Bragg*, 28 Ga. 330; *Gillham v. Mustin*, 42 Ala. 365; *Wall v. Wall*, 30 Miss. 91; *Allison v. Allison*, 4 Hawks 141; *Stevenson v. Huddleston*, 13 B. Mon. 299; *Millican v. Millican*, 24 Texas 426; *Burlington University v. Barrett*, 22 Iowa 60; *In re Lantenschloger's Estate* (Mich.), 45 N. W. Rep. 147.

¹³ *Jacks v. Henderson*, 1 Desau. 543; *Watkins v. Dean*, 10 Yerg. 321; *Taylor v. Kelly*, 31 Ala. 59.

¹⁴ *Combs v. Jolly*, 3 N. J. Eq. 625; *Collins v. Townley*, 21 N. J. Eq. 353; *Rohrer v. Stehman*, 1 Watts 442; *Todd's Will*, 2 Watts & S.

when it is expressed on the face of the instrument, from the undertaking to dispose of property, after death, in such a manner that the instrument cannot take effect as a deed, or by parol evidence, where there is no expression of intent, and it is doubtful on the face of the instrument in what manner the donor intended the instrument to operate. The admissibility of parol evidence may be a disputed point; and, certainly where it is possible, the intention must be gathered from the contents of the whole instrument.¹⁵ It is not necessary that the will or any part of it should be actually *written*. Printing, engraving and lithographing are held to be equivalent to writing, and to satisfy the requirement of the Statute of Frauds.¹⁶ It is, likewise, not necessary that the will be written in ink. A valid will may be written in pencil.¹⁷ But where the will is written partly in ink, partly in pencil, and partly printed, and the writing in ink made sense with the printed matter, and appeared to be a complete will

145; *Frew v. Clark*, 80 Pa. St. 170; *Fort v. Fort*, 3 Dev. L. 19; *Luke v. Dyches*, 2 Strobb. Eq. 353; *Brunson v. King*, 2 Hill (S. C.) Ch. 483; *Allison v. Allison*, 4 Hawks 141; *Phipps v. Hope*, 16 Ohio St. 586. See *Beebe v. McKenzie* (Oreg.), 24 Pac. Rep. 236; *White v. Hopkins*, 80 Ga. 154; *Anderson v. Brown*, 72 Ga. 713; *Peake v. Jenkins*, 80 Va. 293; *Seals v. Pierce*, 83 Ga. 787, 10 S. E. Rep. 589; *Diefendorf v. Diefendorf*, 8 N. Y. S. 617; *Chavez v. Chavez* (Texas), 13 S. W. Rep. 1018. "The primary distinction between wills and declarations of trust is that a will takes effect in the future, while the declaration of trust takes effect *in præsentia*, during the life of the settlor." *Robb v. Washington and Jefferson College*, 93 N. Y. S. 92.

¹⁵ See *McGee v. McCants*, 1 McCord 517; *Tappan v. Diblois*, 45 Me. 122; *Wright v. Barrett*, 13 Pick. 41; *Lythe v. Beveridge*, 58 N. Y. 592; *Provost v. Provost*, 27 N. J. Eq. 296; *Barker's Appeal*, 72 Pa. St. 420; *Bowly v. Lamont*, 3 Harr. & J. 4; *Paiker v. Wasley*, 9 Gratt. 477; *Gillis v. Harris*, 6 Jones Eq. 267; *Sorsby v. Vance*, 36 Miss. 564; *Jackson v. Hoover*, 26 Ind. 511; *Johnson v. M. E. Church*, 4 Iowa 180. See *McLain v. Garrison* (Tex. 1905), 88 S. W. Rep. 484.

¹⁶ *Crenshaw v. Foster*, 9 Pick. 312; *Temple v. Mead*, 4 Vt. 535.

¹⁷ *Kell v. Charmer*, 23 Beav. 195; *Lucas v. James*, 7 Hare 419; *Myers v. Vanderbilt*, 84 Pa. St. 510; *Philbrick v. Spangler*, 15 La. An. 46; *Knox's Appeal*, 131 Pa. St. 220, 18 Atl. Rep. 1020.

without the aid of the pencil writing, it was held that the writing in pencil constituted no part of the will.¹⁸

§ 632. **What signing is necessary.**—The English Statute of Wills only required that the will should be in writing, and did not make it necessary for the testator to sign or to seal the instrument. And, although it may be customary in some localities to seal a will, it has never been considered a requisite to the validity of the will, and is not necessary except in Vermont and New Hampshire.¹⁹ But the Statute of Frauds of Chas. II, and the American Statutes of Wills generally, provide that the will shall be *signed* or *subscribed* by the testator. If the statute requires it to be *signed*, the signature of the testator in any part of the instrument will be a sufficient signing. But if the statute requires it to be *subscribed*, the testator must sign his name at the bottom or end of the will.²⁰ If the testator is unable to write he may make his mark, and this mark alone will be a proper signing of the will, although it is customary for some one, usually an attesting witness, to write his name around or about the mark.²¹ In Missouri, if the name is written by some one, it must be an attesting witness, and the attestation clause must contain a statement that the testator's name was signed at his request.²² In the same manner some one may guide his hand in writing his name

¹⁸ *In re Adams*, L. R. 2 P. & D. 367. See, also, *Bryan v. Bigelow* (Conn.), 60 Atl. Rep. 266.

¹⁹ 3 Washburn on Real Prop. 507. See *Piatt v. McCullough*, 1 McLean 69; *Williams v. Burnett*, Wright 53; *Padfield v. Padfield*, 72 Ill. 322. For abolition of necessity of private seals in Missouri, see *Sess. Laws*, 1891, p. 248.

²⁰ *Warwick v. Warwick* (Va.), 10 S. E. Rep. 843; *In re Dagler's Will*, 47 Hun 127; *Frazier's Estate*, 8 Pa. Co. Ct. 306. See, *In re Seaman's Est.* (Cal. 1905), 80 Pac. Rep. 700; *Irwin v. Jackes* (Ohio), 73 N. E. Rep. 683.

²¹ *Taylor v. Dening*, 3 Nev. & P. 228; *s. o. nom. Baker v. Dening*, 8 Ad. Ell. 94; *Stevens v. Van Cleve*, 4 Wash. C. Ct. 262; *Van Hanswyck v. Wiese*, 44 Barb. 494; *Jackson v. Jackson*, 39 N. Y. 153; *Maine v. Ryder*, 84 Pa. St. 217; *St. Louis Hospital v. Williams*, 19 Mo. 609.

²² *McGee v. Porter*, 14 Mo. 611; *Northcutt v. Northcutt*, 20 Mo. 266.

or making his mark, when he is too weak from disease to write without assistance, and he requests such assistance.²³ The courts go still further and hold that where the testator, through his feebleness, is unable to handle the pen, he may request another to sign his name for him, and such signature will be a good signing of the will, without any mark by the testator.²⁴

§ 633. **Proper attestation, what is.**—The English Statute of Frauds required the execution of the will to be attested and subscribed by three or four competent and credible witnesses. This general provision is adopted in all the States, but the number of witnesses required varies. In Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Mexico, South Carolina and Vermont, three witnesses are required; while two are sufficient in Alabama, Arkansas, California, Colorado, Dakota, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin.²⁵ Witnesses to a will are required to do more than witnesses to a deed. The latter

²³ *Wilson v. Beddard*, 12 Sim. 23; *Sprague v. Luther*, 8 R. I. 252; *Nickerson v. Buck*, 12 Cush. 332; *Jackson v. Van Duysen*, 5 Johns. 144; *Chaffee v. Baptist M. C.*, 10 Paige Ch. 85; *Cozzen's Will*, 61 Pa. St. 196; *Ray v. Hill*, 3 Strobh. 297; *Upchurch v. Upchurch*, 16 B. Mon. 102. "The validity of a will duly signed at its close is not affected by the fact that a codicil thereto is not signed." *Ward v. Putnam* (Ky. 1905), 85 S. W. Rep. 179, 27 Ky. Law Rep. 367.

²⁴ *Assay v. Hoover*, 5 Pa. St. 21; *Main v. Ryder*, 34 Pa. St. 217; *Robins v. Coryell*, 27 Barb. 550; *Rosser v. Franklin*, 6 Gratt. 2; *Armstrong v. Armstrong*, 29 Ala. 538; *Simpson v. Simpson*, 27 Mo. 288; *Will of Jenkins*, 43 Wis. 610; *Poole v. Buffum*, 3 Oreg. 438.

²⁵ 1 Jarm. Wills (5 Am. ed.) 198, Am. note. "A will with only two witnesses is absolutely void as a muniment of title to realty in this State, and a judgment of probate cannot give it any validity." *Janes v. Dougherty* (Ga. 1905), 50 S. E. Rep. 954. See also *McLain v. Garrison*, 88 S. W. Rep. 414.

are only called upon to witness the execution of the deed. But witnesses to a will are made judges of the competency of the testator, and in any subsequent litigation over the will, involving the question of the capacity of the testator, they are in effect *expert* witnesses, and can give their opinion of the testator's mental capacity.²⁶ It is, therefore, generally held that the testator must *publish* his will, *i. e.*, declare to the witnesses that the instrument before them is his last will and testament, and without some such declaration the will will be void.²⁷ To make a valid publication, the will must at the time be complete in all its parts.²⁸ Although the testator need not sign in the presence of the witnesses,²⁹ they must

²⁶ 1 Greenl. on Ev., Sec. 440; Field's Appeal, 36 Conn. 277; White-nack v. Stryker, 2 N. J. Eq. 9; Heyward v. Hazard, 1 Bay 335; Roche v. Nason, 93 N. Y. S. 365; Gessell v. Bougher (Md. 1905), 60 Atl. Rep. 481. "In a will contest on the ground of want of testamentary capacity, opinions as to testator's capacity at a time prior to the execution of the will are competent." *In re Glass' Estate* (Iowa 1905), 103 N. W. Rep. 1013; Glass v. Glass, *Id.*

²⁷ See Cilley v. Cilley, 34 Me. 162; Ela v. Edwards, 16 Gray 91; Brinckerhoff v. Remsen, 26 Wend. 325; Rutherford v. Rutherford, 1 Denio 33; Gilbert v. Knox, 52 N. Y. 125; Transue v. Brown, 31 Pa. St. 92; Compton v. Mitton, 12 N. J. L. 70; Sutton v. Sutton, 5 Harr. 459; Beane v. Yerby, 12 Gratt. 239; Verdier v. Verdier, 8 Rich. 135; Upchurch v. Upchurch, 16 B. Mon. 102; Brown v. McAllister, 34 Ind. 375; Dickie v. Carter, 42 Ill. 376; Buntin v. Johnson, 28 La. An. 796; Porteus v. Holm, 4 Dem. 14; *In re Dale's Will*, 56 Hun 169, 9 N. Y. S. 396; Luper v. Wertz (Or.), 23 Pac. Rep. 850. In Georgia and Pennsylvania there seems to be no necessity of a publication. Webb v. Fleming, 30 Ga. 808; Loy v. Kennedy, 1 Watts & S. 396. But see Transue v. Brown, *supra*.

²⁸ Barnes v. Syester, 14 Md. 507; Waller v. Waller, 1 Gratt. 454; Jones v. Jones, 3 Metc. (Ky.) 266; Chisholm's Heirs v. Ben, 7 B. Mon. 408.

²⁹ Provided he acknowledges his signature and requests them to attest it. Smith v. Codron, 2 Ves. 455; Tilden v. Tilden, 13 Gray 103; Mickerson v. Buck, 12 Cush. 332; Adams v. Field, 21 Vt. 256; Tarrant v. Ware, 25 N. Y. 425; Baskin v. Baskin, 36 N. Y. 416; Will of Alspaugh, 23 N. J. Eq. 507; Rosser v. Franklin, 6 Gratt. 1; Tucker v. Oxner, 12 Rich. L. 141; Thompson v. Davitte, 59 Ga. 472; Upchurch v. Upchurch, 16 B. Mon. 102; Allison v. Allison, 46 Ill. 61; Welch v.

sign in his presence.³⁰ What is a sufficient "presence" is governed largely by the circumstances. In determining this question, there are only two elements to be considered: *First*, were the witnesses at the time of signing so situated that the testator could see them; and *secondly*, was he in a conscious state. It is not necessary that the testator should actually see the signing, if he was in a position to see it if he wanted to.³¹ Not only is this true, but if the testator is blind, the will will be properly attested if the witnesses when signing were in such a position, that the testator could have seen them if he had had his sight.³² And it is not even necessary that the testator should be in the same room with the witnesses. Attestation in a different room, although presumptively bad, will be good if the testator could see the performance of the act of attestation.³³ And in some of the

Adams, 63 N. H. 344; *In re Van Geison's Will*, 47 Hun 5; *In re Simmons' Will*, 7 N. Y. S. 352. The fact that testator does not see the witnesses will not avoid the will. *Healey v. Bartlett* (N. H. 1904), 59 Atl. Rep. 617.

³⁰ *Roberts v. Welch*, 46 Vt. 164; *Tappan v. Davidson*, 27 N. J. Eq. 459; *Parramore v. Taylor*, 11 Gratt. 220; *Watson v. Hipes*, 32 Miss. 451; *Cravens v. Falconer*, 28 Mo. 19. *Contra*, *Lyon v. Smith*, 11 Barb. 124; *Carroll v. Norton*, 3 Bradf. 291; *Abraham v. Wilkins*, 17 Ark. 292. "A paper not attested by two witnesses in the presence of the testatrix is not a will." *Stanley v. Moss*, 114 Ill. App. 612.

³¹ *Boldry v. Parris*, 2 Cush. 433; *Edelen v. Hardy*, 7 Harr. & J. 1; *Nock v. Nock*, 10 Gratt. 106; *Bynum v. Bynum*, 11 Ired. L. 632; *Reynolds v. Reynolds*, 1 Speers 253; *Wright v. Lewis*, 5 Rich. 212; *Lamb v. Girtman*, 33 Ga. 289; *Rucker v. Lambdin*, 12 Smed. & M. 230; *Watson v. Pipes*, 32 Miss. 451; *Howard's Will*, 5 B. Mon. 199; *Ambree v. Weishaas*, 74 Ill. 109; *Walker v. Walker* (Miss.), 7 So. Rep. 491. See *Healey v. Bartlett* (N. H. 1904), 59 Atl. Rep. 617.

³² *In re Piercy*, 1 Robt. 278; *Lewis v. Lewis*, 6 Serg. & R. 489; *Weir v. Fitzgerald*, 2 Bradf. 42; *Reynolds v. Reynolds*, 1 Speers 253.

³³ *Newton v. Clarke*, 3 Curt. 320; *Lamb v. Girtman*, 33 Ga. 289. See also *Sprague v. Luther*, 8 R. I. 252; *Neil v. Neil*, 1 Leigh 6; *Russell v. Falls*, 3 Harr. and McH. 457; *Graham v. Graham*, 10 Ired. L. 219; *Howard's Will*, 5 B. Mon. 199; *Ambree v. Weishaas*, 74 Ill. 109; *Gallagher v. Kilkeary*, 29 Ill. App. 415. In one case attestation in a different house was held to be sufficient, the testator being in a position to

States it is also required that the witnesses shall sign in the presence of each other.³⁴ But the general rule is that they may sign at different times, and not in the presence of each other, provided they all sign in the presence of the testator.³⁵ It is usual for the will to contain an attestation clause, containing a declaration of all the acts done in compliance with the statute, and which are necessary to the valid execution of a will. No particular form, expression or words are necessary to constitute an attestation, and even if the attestation clause is omitted altogether the will will be good, for the meaning of the witnesses' signatures may be established by parol evidence.³⁶ But it is always advisable to insert a full and complete attestation clause, for the declarations in the clause as to the proper execution of the will raise a presumption that the will was properly executed, and throws the burden of proof to the contrary upon the party contesting the will.³⁷ Generally the witnesses must sign below the attestation clause at the end of the will, and in New York and Kentucky this is required by statute.³⁸ But the common law does not require the witnesses to sign in any particular place.³⁹ If the

see the act. *Casson v. Dode*, 1 Bro. C. C. 99. See *Cook v. Winchester* (Mich.), 46 N. W. Rep. 106.

³⁴ *Blanchard v. Blanchard*, 32 Vt. 62.

³⁵ *Gaylor's Appeal*, 43 Conn. 82; *Flinn v. Owen*, 58 Ill. 111; *Hoffman v. Hoffman*, 26 Ala. 535; *Welch v. Adams*, 63 N. H. 344; *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762; *Grubbs v. Marshall* (Ky.), 13 S. W. Rep. 447; *Powtucket v. Ballou*, 15 R. I. 58. See *Roche v. Nason*, 93 N. Y. S. 565; *Standley v. Moss*, 114 Ill. App. 612.

³⁶ *Hands v. James*, Comyn 531; *Brice v. Smith*, Willes 1; *Hitch v. Wells*, 10 Beav. 84; *Fry's Will*, 2 R. I. 88; *Cla v. Edwards*, 16 Gray 91; *Chaffee v. Baptist M. C.*, 10 Paige 85; *Leaycraft v. Simmons*, 3 Bradf. 35. See *contra*, *Griffith v. Griffith*, 5 B. Mon. 511. And see, generally, *Osborn v. Cook*, 11 Cush. 352; *Jackson v. Jackson*, 39 N. Y. 153; *Fatheree v. Lawrence*, 33 Miss. 585. See *Bannicklow v. Stewart* (Ind. 1904), 72 N. E. Rep. 128.

³⁷ *Tappen v. Davidson*, 27 N. J. Eq. 459. See *Roche v. Nason*, 93 N. Y. S. 565.

³⁸ *Coffin v. Coffin*, 23 N. Y. 9; *Peck v. Cary*, 27 N. Y. 9.

³⁹ *In re Chamney*, 1 Robt. 757; *Roberts v. Phillips*, 4 Ell. & Bl.

will has not been properly attested it is, of course, inoperative. But where a codicil is subsequently executed, properly attested, confirming the prior defective will expressly or by implication, it will cure the defect, and make the will operative from the date of the codicil.⁴⁰

§ 634. Who are competent witnesses.—Some of the State statutes require the witnesses to be *credible*, and the others that they shall be *competent*. But the two words in this connection are used synonymously, and the same general rules govern in all the States.⁴¹ The meaning of this requirement is that the witnesses must be circumstanced, that their testimony in a court of justice will be competent to establish the validity of the will. The three principal causes of incompetency are mental imbecility, arising either from insanity or tender age, the commission of crime, and the possession of an interest in the operation of the will. The first two causes are governed by the general rules of evidence, and are explained in all treatises upon the law of evidence, and will need no special elucidation here. The most common cause of incompetency in respect to wills is that of interest. The common-law or old English statutory rule is that if a witness to the will is interested in it as a legatee or devisee, the will is void.⁴² But now in most of the States it is provided by statute that in such cases the will will be good, but the devise or legacy to the witness will be void. In some of the States the devise is declared absolutely void,⁴³ but generally the de-

450; *Murray v. Murphy*, 39 Miss. 214. *Franks v. Chapman*, 64 Texas 159.

⁴⁰ *Anderson v. Anderson*, L. R. 13 Eq. 381; *Mooers v. White*, 6 Johns. Ch. 360; *Van Cortlandt v. Kip*, 1 Hill 590; *Harvey v. Chouteau*, 14 Mo. 587. See *post*, Sec. 649. And see, *Ward v. Putnam* (Ky. 1905), 85 S. W. Rep. 179.

⁴¹ *In re Noble's Estate*, 22 Ill. App. 535; *Standley v. Moss*, 114 Ill. App. 612.

⁴² *Giddings v. Turgeon*, 58 Vt. 706; *Elliott v. Brent*, 6 Mackey 98.

⁴³ Such is the law in Rhode Island, New York, New Jersey, North

vise is void only when there is not a sufficient number of witnesses without the disqualified witness.⁴⁴ In others of the States there is this further qualification, that where the devisee receives no more by the will than he would have been entitled to as heir if the testator had died intestate, he is a competent witness. This rule is either laid down by statute, or is a consequence of the rule that where a devisee is heir at law of the testator, and is not benefited by the will, he takes as heir and not as devisee.⁴⁵ It is held in some of the States that a witness, incompetent on account of interest, may become competent by making an assignment or release of his interest.⁴⁶ Not only is the witness incompetent where he is himself a devisee, but he or she is likewise incompetent where his wife or her husband, respectively, is a devisee.⁴⁷ But, although a different rule is observed in some of the States,⁴⁸ it is generally held that an executor or trustee is not

Carolina, South Carolina, Georgia, Indiana, Ohio and Oregon. 1 Jar. on Wills (5 Am. ed.), 189 Am. note.

⁴⁴ This is the rule in Massachusetts, Michigan, Missouri, Minnesota, New Hampshire, Nebraska, Virginia, Vermont, Wisconsin, Kentucky, Kansas, Iowa, Illinois, Dakota, Connecticut, Colorado, California, West Virginia and Arkansas. 1 Jar. on Wills (5 Am. ed.) 189, Am. note. In New York the same rule has been adopted by the courts. *Cromwell v. Woolly*, 1 Abb. Pr. 442. See *O'Brien v. Banfield*, 213 Ill. 428, 72 N. E. Rep. 1090. A witness to a will is not disqualified merely by reason of the fact that such will appoints him as executor thereof. *Standley v. Moss*, 114 Ill. App. 612.

⁴⁵ *Jackson v. Denniston*, 4 Johns. 311; *Starr v. Starr*, 2 Root 363; *Fortune v. Buck*, 23 Conn. 1; *Ackless v. Seekright*, Breese 76; *Croft v. Croft*, 4 Gratt. 103; *Cannon v. Setzler*, 6 Rich. 471; *Rucker v. Lambdin*, 12 Smed. & M. 230.

⁴⁶ *Kern v. Soxman*, 16 Serg. & R. 315; *Hans v. Palmer*, 21 Pa. St. 296; *Deakin v. Hollis*, 7 Gill & J. 311; *Shaffer v. Corbett*, 3 Harr. & McH. 513; *Mixon v. Armstrong*, 38 Texas 296. *Contra*, *Allison v. Allison*, 4 Hawks. 141.

⁴⁷ *Winslow v. Kimball*, 25 Me. 493; *Sullivan v. Sullivan*, 106 Mass. 474; *Jackson v. Woods*, 1 Johns. 163; *Huie v. Gunter*, 3 Jones L. 441; *Brayfield v. Brayfield*, 3 Harr. & J. 208.

⁴⁸ *Gilbert v. Gilbert*, 23 Ala. 529; *Davis v. Rogers*, 1 Houst. 44. But see *Hawley v. Brown*, 1 Root 494; *Vansant v. Boileau*, 1 Binn. 444; *Gunter v. Gunter*, 3 Jones L. 441; *Filson v. Filson*, 3 Strobb. 288.

thereby incapacitated from acting as a witness to the will which appoints him.⁴⁹ If the witness is competent at the time of the attestation, it will not invalidate the attestation if he subsequently becomes incompetent from any cause. He is only required to be competent when he attests the will.⁵⁰ A codicil, being nothing more than a supplementary will, in order to be valid, requires the same formality of attestation.⁵¹

§ 635. Who may prepare the will — Holographs. — As a general proposition, there is no restriction as to the person who may prepare and write the will, and the same may be written either by the testator or some other person at his request. When the will is in the testator's own handwriting it is called a *holograph*, and in Arkansas, Kentucky, Tennessee, Texas, Virginia, North Carolina, Mississippi and Louisiana it is provided by statute that no witnesses are required to attest such wills.⁵² A will drawn up by the devisee will, nevertheless, be good. But a suspicion is cast upon the validity of the will, and it requires stronger evidence in such cases to rebut the charge of undue influence. If the testator is of feeble mind at the time, and is notoriously under the influence of this devisee, the will would in ordinary

⁴⁹ *Milay v. Wiley*, 46 Me. 230; *Wyman v. Symmes*, 10 Allen 153; *Richardson v. Richardson*, 35 Vt. 238; *Stewart v. Harriman*, 56 N. H. 25; *Frew v. Clark*, 80 Pa. St. 170; *Overton v. Overton*, 4 Dev. & B. 197; *Noble v. Burnett*, 10 Rich. 505; *Kelly v. Miller*, 39 Miss. 17; *Orndoff v. Hummer*, 12 B. Mon. 619. See *Standley v. Moss*, 114 Ill. App. 612.

⁵⁰ *Patten v. Tallman*, 27 Me. 17; *Amory v. Fellowes*, 5 Mass. 219; *McLean v. Barnard*, 1 Root 462; *Higgins v. Carlton*, 28 Md. 115; *Deakins v. Hollis*, 7 Gill & J. 311; *Gill's Will*, 2 Dana 447; *Rucker v. Lambdin*, 12 Smed. & M. 230; *Mixon v. Armstrong*, 38 Texas 296.

⁵¹ *Garcia y Perea v. Barela* (N. M.), 23 Pac. Rep. 766.

⁵² 1 Jar. on Wills (5 Am. ed) 200, Am. note. See *Harrison v. Burgess*, 1 Hawks 384; *Brown v. Beaver*, 3 Jones L. 516; *Succession of Ehrenberg*, 21 La. An. 280; *Hannah v. Peak*, 2 B. Mon. 133; *Hocker v. Hocker*, 4 Gratt. 277; *Crutcher v. Crutcher*, 11 Humph. 377; *Anderson v. Pryor*, 10 Smed. & M. 620; *Brown v. Eaton*, 91 N. C. 26; *Skerrett's Estate*, 67 Cal. 58. See *McLain v. Garrison* (Texas 1905), 88 S. W. Rep. 484.

cases be overthrown, unless the strongest proof of fair dealing was established in support of the will.⁵³

§ 636. What property may be devised.— It may be stated as a general proposition that every interest in lands, except a mere possibility, may be the subject of devise. This would include incorporeal as well as corporeal hereditaments, estates in expectancy, contingent remainders, where the contingency does not rest upon the uncertainty of the remainder-man, and possibilities coupled with an interest, such as a right of entry to defeat an estate upon condition, where it is attached to some reversionary interest.⁵⁴ In Massachusetts a right of entry in an estate upon condition may be devised, whether the grantor has a reversionary interest or not. And the right will sometimes pass to the devisee under a residuary devise without spécial mention.⁵⁵ It was once the English law, and at an early day the law in this country, that the will could only convey the real property owned by the testator at the time when the will was executed. But now in England and in most of the States this rule has been changed by statute, so

⁵³ *Barr v. Buttin*, 1 Curt. 637; *Ingraham v. Wyatt*, 1 Hagg. 388; *Taylor v. Gardiner*, 35 N. Y. 559; *Day v. Day*, 3 N. J. Eq. 549; *Harvey v. Sullens*, 46 Mo. 147; *Sterling v. Sterling*, 64 Md. 138. "An olographic will was merely a memorandum of testator's property, dated at the top, and followed by a clause disposing of the same. *Held*, that it was immaterial whether the date at the top was the date of the will, or the date on which testator was the owner of the specified property." *In re Clisby's Estate* (Cal. 1904), 78 Pac. Rep. 964.

⁵⁴ 2 Washburn on Real Prop. 562; 3 Washburn on Real Prop. 522, 523; 4 Kent's Com. 511, 513; *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215; *Steele v. Cook*, 1 Mete. 281; *Den v. Manners*, 20 N. J. L. 142; *Southard v. Central R. R. Co.*, 26 N. J. L. 13; *Kean v. Roe*, 2 Harr. 112. For devise of rents not in existence at date of will, as a specific legacy, see *Manlove v. Gant*, 2 Tenn. Ch. App. 410.

⁵⁵ *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 215.

that a residuary or general devise will convey whatever property the testator owned at the time of his death.⁵⁶

§ 637. A competent testator, who is.— All persons are competent to dispose of their property by will who do not come under one of the three classes of persons under disability. The three classes are infants, *femes covert*, and persons of insane mind. These persons are expressly excluded by the old English Statute of Wills, and they are either expressly excluded by the American Statutes, or by implication, unless the statutes expressly direct otherwise. The general rule in regard to infants is that they cannot make a devise of real property until they are twenty-one years of age. But, in some of the States, females of the age of eighteen are by statute declared to be competent to make a will.⁵⁷ Although, under the English Statute of Wills and the earlier American statutes, a married woman was not allowed to make a will of her property, yet her property could be settled to her use and to the use of her appointee by will. Her appointee would take the legal estate by the operation of the Statute of Uses upon her appointment. In England, and in all the States, she could make a will of equitable estates if the power was expressly reserved to her, and in some of the States, as well as in England, it was not necessary to reserve the power. She possessed it as a natural incident of her separate estate.⁵⁸ In the United States the later tendency of legislation is to free married women from all disability in respect to the management of their property. In some States there is the broad

⁵⁶ 3 Washburn on Real Prop. 509. This is the statute law in Alabama, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia and Wisconsin. 1 Jar. on Wills (5 Am. ed.) 602, 603, Am. note. Hopper's Estate, 66 Cal. 80.

⁵⁷ Washburn on Real Prop. 510; Wells, v. Seely, 47 Hun. 109.

⁵⁸ See *ante*, Sec. 348, note.

rule of law established, that a married woman shall have in respect to her property all the powers of disposition and management of a single woman. Of course, in those States, she can make a will of her legal as well as her equitable estates, and bar whatever contingent interests her husband may have in her property, including his tenancy by the curtesy.⁵⁹ But in some of those States where she has not an absolute estate in her real property she cannot make a will which will bar her husband's curtesy, but in every other way her will will convey a good title to the devisee.⁶⁰ In respect to what degree of sanity is necessary to make a competent testator, it is difficult to make any concise and comprehensive statement which will apply to every case which may arise; and a detailed presentation of the law would require more space than could be given on the subject in an elementary treatise on real property. The inquiry in all such cases, is: Had the testator at the time of the execution of the will sufficient mental capacity to make a will, not whether he was sane or insane.⁶¹ "He must, undoubtedly, retain sufficient *active* memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their more obvious relations to each other, and to be able to form some rational judgment in relation to these."⁶² If a man

⁵⁹ Washburn on Real Prop. 510. See *Van Wert v. Benedict*, 1 Bradf. 114; *Dickinson v. Dickinson*, 61 Pa. St. 401; *Johnson v. Sharp*, 4 Coldw. 45; *Mosser v. Mosser's Exrs.*, 32 Ala. 551; *In re Fuller*, 79 Ill. 99. But see *Cooke's Appeal*, 132 Pa. St. 533, 19 Atl. Rep. 274. See *Patrick v. Morrow* (Colo. 1905), 81 Pac. Rep. 242; *Dunn v. Stoners* (W. Va.), 51 S. E. Rep. 386; *McWhorter v. O'Neal* (Ga. 1905), 49 S. E. Rep. 592.

⁶⁰ *Silsby v. Bullock*, 10 Allen 94; *Burroughs v. Nutting*, 105 Mass. 228; *Vreeland v. Ryno*, 26 N. J. Eq. 160; *Beals v. Storm*, 26 N. J. Eq. 372.

⁶¹ *Forman's Will*, 54 Barb. 274; *Hopper's Will*, 33 N. Y. 619; *Parish Will Case*, 25 N. Y. 9; *Brown v. Mitchell*, 75 Texas 9, 12 S. W. Rep. 606; *In re Voorhis*, 9 N. Y. S. 201.

⁶² Ch. J. Redfield in *Converse v. Converse*, 21 Vt. 176; *Jackson v.*

has sufficient mental capacity to manage his business, he is presumably competent to make a will. But this is not a sure and invariably reliable test. A man may be perfectly sane in every respect except one point; yet if his mental capacity to make *that* particular will is affected by the monomania, the will will be void.⁶³ Or, on the other hand, one may be insane on every other matter, and rational enough to make a will; and although it would be difficult in such cases to establish the sanity of the testator, yet if it was proven, the validity would not be affected by the testator's insanity on other subjects.⁶⁴ And so, if the testator is only suffering from a monomania which has no bearing upon his judgment and capacity to make the will, the validity will not be affected thereby.⁶⁵ Thus, the subsequent suicide of the testator raises

Hardin, 83 Mo. 175; *Rule v. Maupin*, 84 Mo. 587; *Delany v. Salina*, 34 Kan. 532; *Bosley v. McGough*, 115 Ill. 11; *Shaver v. McCarthy*, 110 Pa. St. 339, 5 Atl. Rep. 614; *Prather v. McClelland*, 76 Texas 574, 13 S. W. Rep. 543.

⁶³ 3 Washburn on Real Prop. 512; *Hopper's Will*, 33 N. Y. 619; *Alexander's Will*, 27 N. J. Eq. 463; *Townshend v. Townshend*, 7 Gill 10; *Denson v. Beazley*, 34 Texas 191; *Morse v. Scott*, 4 Dem. 507; *Prather v. McClelland*, 76 Texas 574, 13 S. W. Rep. 543; *In re White's Will* (N. Y.), 24 N. E. Rep. 935; *Williams' Exr. v. William* (Ky.), 13 S. W. Rep. 250. See *Roche v. Nason*, 93 N. Y. S. 565; *In re Clapham's Est.* (Neb. 1905), 103 N. W. Rep. 61; *In re Cowdry's Will* (Vt.), 60 Atl. Rep. 141; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. Rep. 760; *In re Hawley's Will*, 91 N. Y. S. 1097. "A person may have delusions in believing that he has communications with the spirits of deceased persons, but unless such communications control the disposition of his property, the believer in them is not incompetent to make a will." *In re Randall*, 59 Atl. Rep. 552, 99 Me. 396.

⁶⁴ A most remarkable case is that of *Cartwright v. Cartwright*, 1 Phill. 90, where the testatrix, having been violently insane for some time, was permitted to write a will, and her hands were untied for that purpose. The will was so extremely rational in its terms and provisions that the court held it to have been made in a lucid interval. See *Bitner v. Bitner*, 65 Pa. St. 347; *Lamb v. Lamb*, 105 Ind. 456; *In re Voorhis*, 9 N. Y. S. 201; *In re Lockwood*, 8 N. Y. S. 345.

⁶⁵ *Coghlan v. Coghlan*, 1 Phill. 120; *Weir's Will*, 9 Dana 434. "An undue prejudice by testator based on some reason is not an insane de-

no presumption against the validity of the will.⁶⁶ Where the will is properly executed and probated, the burden of proof of the testator's mental condition is on the contestant who must rebut the presumption in favor of the testator's sanity.⁶⁷ Somewhat similar to the effect of insanity of testator on the validity of the will, is that of the exertion of undue influence over the testator in the construction of his will. The influence must be something more than powerful or overruling through the force of argument. In order to invalidate the will, it must either rest upon fraudulent misrepresentations or it must amount to duress.⁶⁸

§ 638. Who may be devisees—What assent necessary.—

Any person may be a devisee, including married women, infants, and corporations, which are not prohibited from taking real estate by devise. Except in Pennsylvania, the Statute of Mortmain has never been recognized in this country as the common law. But in New York, and perhaps in other States, corporations can take by devise only within the limits pre-

lusion." *In re Clapham's Estate* (Neb. 1905), 103 N. W. Rep. 61; *In re Randall*, 99 Me. 396, 59 Atl. Rep. 552.

⁶⁶ *Burrows v. Burrough*, 1 Hagg. 109; *Brooks v. Barrett*, 7 Pick. 94; *Duffield v. Morrrows*, 2 Harr. 375; *Roche v. Nason*, 93 N. Y. S. 565.

⁶⁷ *Fee v. Taylor*, 83 Ky. 259; *Pendlay v. Eaton*, 130 Ill. 69, 22 N. E. Rep. 853. But see *contra*, *Jones v. Roberts*, 37 Mo. App. 163.

⁶⁸ See *Re Pemberton*, 40 N. J. Eq. 520; *Stirling v. Stirling*, 64 Md. 138; *Sunderland v. Hood*, 84 Mo. 293; *Bridwell v. Swank*, 84 Mo. 455; *Bush v. Bush*, 87 Mo. 480; *In re Moon's Will*, 8 N. Y. S. 86; *Bonsee's Will*, 18 Ill. App. 433; *Parsons v. Parsons*, 66 Iowa 754; *Schofield v. Walker*, 58 Mich. 96; *Armstrong v. Armstrong*, 63 Wis. 162; *In re Mitchell's Estate*, 43 Minn. 73, 44 N. W. Rep. 885; *Bledsoe's Exr. v. Bledsoe* (Ky.), 1 S. W. Rep. 10; *Jones v. Roberts*, 37 Mo. App. 163; *Dumont v. Dumont*, 46 N. J. Eq. 223, 19 Atl. Rep. 467; *In re White's Will* (N. Y.), 24 N. E. Rep. 935; *Kaul v. Brown* (R. I.), 20 Atl. Rep. 10; *Grove v. Spiker* (Md.), 20 Atl. Rep. 144; *In re Bishop's Will*, 10 N. Y. S. 217; *Hartman v. Strickler*, 82 Va. 225; *In re De Baun's Est.*, 9 N. Y. S. 807; *Struth v. Decker* (Md.), 59 Atl. Rep. 727; *Succession of Morere* (La.), 38 So. Rep. 436; *In re Owen's Est.* (Neb.), 103 N. W. Rep. 675.

scribed by statute.⁶⁹ A devise *in presenti* takes effect immediately after the death of the testator. It is necessary that the devisee should then be *in esse*, in order that he may take at all.⁷⁰ This is the general rule, but two notable exceptions are now very generally recognized. It is now generally held that a devise to an unborn child *en ventre sa mere* will be good, and the vesting will be postponed until its birth.⁷¹ A devise to an unincorporated society, if for a charitable use, will be good and vest in the society when it is subsequently incorporated.⁷² But no one can be made a devisee against his will. The title only vests in him when he assents to it. The law, however, presumes an acceptance in ordinary cases where the devise is a beneficial one. And it seems doubtful that any disclaimer, short of a deed of renunciation, will be sufficient to vest the title in the heir to the exclusion of a subsequent claim of the devisee.⁷³ But this presumptive acceptance of the devisee will not be sufficient to bind the devisee by the charges and conditions upon the estate. Generally some affirmative act, such as entry into possession, will be re-

⁶⁹ 3 Washburn on Real Prop. 512, 513.

⁷⁰ 2 Washburn on Real Prop. 685; 3 Washburn on Real Prop. 530; *Ex parte Fuller v. Story*, 327; *Ives v. Allen*, 13 Vt. 629; *Lofton v. Murchison* (Ga.), 7 S. E. Rep. 322. But very often a devise to a person not *in esse* will be construed as an executory devise, if such a construction does not appear to be contrary to the intention of the testator. See *ante*, Sec. 388.

⁷¹ *Burdett v. Hopegood*, 1 P. Wm. 486; *Mogg v. Mogg*, 1 Meriv. 654; *Pratt v. Flamer*, 5 Harr. & J. 10. See *Amyat v. Dwarries* (Eng.) 73 Law J. P. C. 40, 90 Law T. 102, 20 L. T. Rep. 268.

⁷² *Bartlett v. King*, 12 Mass. 536; *Zimmerman v. Anders*, 6 Watts & S. 218; *Zeisweiss v. James*, 63 Pa. St. 465; *Am. Tract Soc. v. Atwater*, 30 Ohio St. 77; *Estate of Ticknor*, 13 Mich. 44. *Contra*, *White v. Howard*, 46 N. Y. 144. And see *State v. Warren*, 28 Md. 338; *Craig v. Secrist*, 54 Ind. 419; *White v. Hale*, 2 Coldw. 77; *Tilden v. Green*, 2 N. Y. S. 584. See also *post*, Sec. 641. See *Colbert v. Speer* (D. C. 1904), 24 App. D. C. 187; *Mosher v. Whiltesy*, *Id.*; *Speer v. Speer*, *Id.*

⁷³ Co. Lit. 111 a; 4 Kent's Com. 533; *Doe v. Smyth*, 6 B. & C. 112; *Wilkinson v. Leland*, 2 Pet. 627; *Webster v. Gilman*, 1 Story 499; *Ex parte Fuller*, 2 Story 327; *Tole v. Hardy*, 6 Cow. 340; *Bryan v. Hyre*, 1 Rob. (Va.) 94.

quired to make him liable. But if he enters into possession of the estate, he takes it subject to all the conditions and burdens imposed by the testator.⁷⁴

§ 639. Devisee incapacitated by murder of the testator.— In a late case of the New York Court of Appeals, it has been held that a devisee or legatee will be restrained from participating in the provisions of the will where he is guilty of the murder of the testator. The loss of such legacy or devise is declared to be a penalty or forfeiture imposed by the law by implication for the crime of murder, on the general ground that it could not have been the intention of the law, and it is certainly against good morals, to permit such a beneficiary to profit by his crime. “What could be more unreasonable than to suppose that it was the legislative intention in the general law passed for the orderly, peaceable and just devolution of property that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.”⁷⁵ Whatever may be thought, as a question of morality or as a proposition for future legislation, of the justice of depriving such a beneficiary from all benefit under the will as a punishment for the murder of the testator, it is certainly a very remarkable case of judicial legislation for the court to impose such a penalty, when the criminal law or the law of wills does not contain any express provision to that effect.

§ 640. Devisee and devise must be clearly defined — Parol evidence.— No particular formality is required to be observed in defining the subject-matter of a devise, the only general rule being, that the matter must be stated in language sufficiently clear to enable the courts to ascertain the person and

⁷⁴ *Perry v. Hale*, 44 N. H. 65.

⁷⁵ Opinion by J. Earl, *Rigg v. Palmer*, 115 N. Y. 506.

property intended. The devise will not be void from uncertainty, as long as the property devised and the person of the devisee can be identified by the description in the will.⁷⁶ A devise of the income of certain lands operates as a devise of the land, and vests in the devisee a perfect legal title thereto.⁷⁷ Where a devise is made to the "children" of one, the ordinary construction, in the absence of circumstances pointing to a different intention, is that only the immediate offspring of the person are included in the devise, and that the child of a deceased child cannot take under it.⁷⁸ But where there are statutes which provide that the devise upon the death of the devisee shall not lapse but shall vest in such devisee's children, this rule of construction must give way.⁷⁹ And the same result is reached where the context shows that the word "children" is used in the sense of issue.⁸⁰ The devise may be limited to the survivors of two or more.⁸¹ And

⁷⁶ *Trustees, etc., v. Hart*, 4 Wheat. 1; *Smith v. Smith*, 4 Paige 271; *Hoge v. Hoge*, 1 Watts 214; *Newell's Appeal*, 24 Pa. St. 197; *Baldwin v. Baldwin*, 7 N. J. Eq. 211; *Calhoun v. Furgeson*, 3 Rich. Eq. 160; *Alabama Conference v. Price*, 42 Ala. 39.

⁷⁷ *Ryan v. Allen*, 120 Ill. 648; *Seiber's Appeal* (Pa.) 9 Atl. Rep. 863; *King v. Grat*, 55 Conn. 166; *Bell v. Fowler*, 55 Conn. 364; *Davidson v. Bates*, 111 Ind. 391; *Davidson v. Hutchins* (Ind.), 13 N. E. Rep. 106; *Dodd v. Winship*, 144 Mass. 461; *Davis v. Williams*, 1 Pickle 646; *Post v. Rivers*, 40 N. J. Eq. 21; *Williams v. McKinney*, 34 Kan. 514.

⁷⁸ *In re Goble's Will*, 10 N. Y. S. Rep. 692; *Demill v. Reid*, 71 Md. 175; *Hunt's Appeal*, 25 N. W. C. 450; *Wood's Appeal*, 25 W. N. C. 464; *Hayne v. Irvine*, 25 S. C. 289; *Campbell v. Clark*, 64 N. H. 328; *Pugh v. Pugh*, 105 Ind. 552. So a devise to "heirs at law" is held to mean the heirs living at the time of the authorized distribution. *Hostetter v. State* (Ohio 1904), 26 Ohio Cir. Ct. R. 702.

⁷⁹ *Wooley v. Paxton*, 46 Ohio St. 307; *Pond v. Allen*, 15 R. I. 171; *Stockbridge v. Stockbridge*, 145 Mass. 517; *Patchen v. Patchen*, 49 Hun 270; *Chenault's Guardian v. Chenault's Estate* (Ky.), 9 S. W. Rep. 775; *Outcalt v. Outcalt*, 42 N. J. Eq. 500.

⁸⁰ *Miller v. Carlisle* (Ky.), 14 S. W. Rep. 75; *Cody v. Bunn's Exr.*, 46 N. J. Eq. 131; *Schedel, In re*, 73 Cal. 594; *Hall v. Hall*, 140 Mass. 267.

⁸¹ *Davis v. Davis*, 118 N. Y. 411; *Eldridge v. Eldridge*, 41 N. J. Eq. 414.

while the "children" may be construed to mean "heirs," where such appears to be the intention of the testator giving the first taker an estate in fee, instead of a life estate,⁸² yet the presumption is always against such a construction, and in favor of holding the words to be one of purchase instead of limitation, giving to the children a remainder, and the parent a life estate,⁸³ or permitting them to take jointly with their parents.⁸⁴ The courts always endeavor to ascertain the intention of the testator, if possible, and for that purpose give the widest latitude possible to the construction of wills, so that any misconception of the force and meaning of words will not prevent the will from taking effect or give it a wrong application. Thus, it is often necessary to substitute one word for another in a will, in order to carry out the intention of the testator. It is very common to substitute "and" for "or," and *vice versa*, "all" for "any," and the like. But this can only be done where the intention is clearly shown on the face of the will to be contrary to the ordinary meaning of the words used.⁸⁵ It has also been held proper to construe "heirs" to mean children, when the context shows that the word was used by the testator in that sense.⁸⁶ So, also, it has been held that a devise to S.'s family and M. may be con-

⁸² Lockwood's Appeal, 55 Conn. 157; Smith v. Fox's Admr., 82 Va. 763; Mason v. Ammon, 117 Pa. St. 127. See *ante*, Sec. 322.

⁸³ Foster v. McKenna (Pa.), 11 Atl. Rep. 674; McDonald v. Dunbar (Pa.), 12 Atl. Rep. 553; Jones v. Cable, 114 Pa. St. 586; Affolter v. May, 115 Pa. St. 54.

⁸⁴ Proctor v. Proctor, 141 Mass. 165.

⁸⁵ Story Eq. Jur., Sec. 179; Johnson v. Simcock, 7 H. & Norm. 344; Jackson v. Blanchan, 6 Johns. 54; Jackson v. Topping, 1 Wend. 396; Holcombe v. Luke, 25 N. J. L. 605; Roe v. Vengut, 117 N. Y. 204; Gray v. Missionary Society (N. Y.), 2 N. Y. S. 878; Massay v. Davenport, 23 S. C. 453.

⁸⁶ Barton v. Tuttle, 62 N. H. 558; *In re* Session's Estate, 70 Mich. 297; Wiggins v. Perkins, 64 N. H. 36; Lockwood's Appeal, 55 Conn. 157; Anthony v. Anthony, 55 Conn. 256; Ballentine v. Wood, 42 N. J. Eq. 552; Myrick v. Heard, 31 Fed. Rep. 241; Eldridge v. Eldridge, 41 N. J. Eq. 414. But see Reniston v. Adams, 80 Me. 290; Fabens v. Fabens, 141 Mass. 395; Randolph v. Randolph, 40 N. J. Eq. 75.

strued to give one-half of the property to M. and the residue only to the children of S., instead of making M. share alike with the children of S.⁸⁷ But if the words "share and share alike" had been inserted in the clause of the will, this construction would not have been sustained.⁸⁸ The word "family" is generally construed to mean the children of the person named and his wife, if there be one.⁸⁹ "Personal representatives" can be construed to mean "next of kin."⁹⁰ And many such examples of elastic construction may be referred to.⁹¹ It is the general rule, subject to exceptions to be men-

⁸⁷ *Silsby v. Sawyer*, 64 N. H. 580.

⁸⁸ *In re Swinburne* (R. I.), 14 Atl. Rep. 850.

⁸⁹ *Langmaid v. Hurd*, 64 N. H. 526; *Silsby v. Sawyer*, 64 N. H. 580.

⁹⁰ *Davies v. Davies*, 55 Conn. 319.

⁹¹ *Jenkins v. Jenkins*, 64 N. H. 407, "issue" means legitimate offspring; *Dexter v. Inches* (Mass.), 17 N. E. Rep. 551; "issue" including grandchildren; *Russell v. Russell*, 84 Ala. 48; "my children" does not include a child legally adopted; to same effect, see *Session's Estate* (Mich.), 38 N. W. Rep. 249; *Reinders v. Koppelman*, 94 Mo. 338; *Goddard v. Amory* (Mass.), 16 N. E. Rep. 725, "my nephews and nieces" does not include the wives of the nephews of the testator; *Lockman v. Hobbs*, 98 N. C. 541; "heirs" held to mean children and to exclude grandchildren; *Locke v. Locke* (N. J.), 16 Atl. Rep. 49; "nearest relations" means brothers, to exclusion of nephews and nieces; *Mayer v. Hover* (Ga.), 7 S. E. Rep. 562, "children of H. & M." held to take *per stirpes* and not *per capita*; to same effect, see *Shepard's Heirs v. Shepard's Estate* (Vt.), 14 Atl. Rep. 536; *Eyer v. Beck* (Mich.), 38 N. W. Rep. 20; *Frazer v. Dieton*, 78 Ga. 474; *Lockwood's Appeal*, 55 Conn. 157; *Alston's Appeal* (Pa.), 11 Atl. Rep. 366; *Woodward v. James*, 14 Abb. N. C. 246; *Swinburne, In re* (R. I.), 14 Atl. Rep. 850; *Cumming's Exr. v. Cummings* (Mass.), 16 N. E. Rep. 401. *Contra*, *Campbell v. Clark*, 64 N. H. 328; *Dole v. Keyes*, 143 Mass. 237; *Huggins v. Huggins*, 72 Ga. 825; *Kindro v. Johnston*, 15 Lea 78; *McKelvey v. McKelvey*, 43 Ohio St. 213; *De Laurencel v. De Broom*, 67 Cal. 362; *Avery v. Everett*, 110 N. Y. 317; imprisonment for life does not amount to death, in a limitation over on the death of first taker; *Simon's Will; In re*, 55 Conn. 239; "family" construed to include wife and daughter, but exclude an adult son; *Weeks v. Cornwell*, 104 N. Y. 325; "legatees" construed to mean "devisees;" *Wilcox's Appeal*, 54 Conn. 320; limiting the meaning "the above named devisees;" to the same effect, *Brabham v. Crosland*, 25 S. C. 525; *Wyeth v. Stone*, 144 Mass. 441; devise of one's "farm" held to include outlying tracts of

tioned hereafter, that parol evidence is not admissible to prove the intention of the testator.⁹² The explanatory rule, which has been recognized as the prevailing test since the days of Bacon, is that parol evidence is not admissible to explain away a *patent* ambiguity, while it may control and remove a *latent* ambiguity. The ambiguity may concern the person intended to take or the thing devised. The distinction between *latent* and *patent* ambiguity, in respect to the admissibility of parol evidence, lies in a rule already given, that the intention must be gathered from the will itself. If it is a *patent* ambiguity the will does not express any certain intention, and it is, therefore, void from uncertainty. But if the ambiguity is *latent*, i. e., discovered *dehors* the will, there would be no ambiguity as to the intention of the testator if the investigation was confined to the will itself. The ambiguity, arising from extraneous facts, may in like manner be

land, commonly known as a part of it; *West v. Randle* (Ga.), 3 S. E. Rep. 454, "all the property" limited in its meaning by the context; *Stewart's Estate*, 74 Cal. 98, devise of "one-half of all my estate" to the wife, held to pass to her only the one-half of the community property, which if wife excluded she could claim without a devise. "Grandchildren cannot take under bequest in a will to children as a class, unless there is something in the will to indicate such an intention." *Lyon v. Baker* (Ga. 1905), 50 S. E. Rep. 44. "The use in a will of the word "lawful," qualifying the word "heirs," is not sufficient of itself to show an intention not to use the word "heirs" in its ordinary legal sense, as a word of inheritance or of limitation." *Wool v. Fleetwood* (N. C. 1904), 48 S. E. Rep. 785.

⁹² *Farrar v. Ayres*, 5 Pick. 407; *Barrett v. Wright*, 13 Pick. 405; *Jackson v. Lill*, 11 Johns. 201; *White v. Hicks*, 33 N. Y. 383; *Dey v. Dey*, 19 N. J. Eq. 137; *Kelly v. Kelly*, 25 Pa. St. 460; *Mordecai v. Jones*, 6 Jones Eq. 365; *Coffin v. Elliott*, 9 Rich. Eq. 244; *Willis v. Jenkins*, 30 Ga. 169; *Mitchell v. Walker*, 17 B. Mon. 61; *Fitzpatrick v. Fitzpatrick*, 36 Iowa 674; *Robinson v. Bishop*, 23 Ark. 378; *Love v. Buchanan*, 40 Miss. 758. This holds true as to fatal misdescriptions of the land; parol evidence cannot supply the true description. *Ehrmann v. Hoskins*, 6 So. Rep. 776 (Miss.); *Sturgis v. Work*, 122 Ind. 134; *Morelock v. Barnard* (Tenn.), 2 S. W. Rep. 32; *Whitesides v. Whitesides* (S. C.), 5 S. E. Rep. 816; *Christy v. Badger*, 72 Iowa 581; *Bowen v. Allen*, 113 Ill. 53; s. c. 55 Am. Rep. 398.

explained away without violating the rule of evidence, that parol evidence is not admissible to contradict a writing.⁹³ It is always admissible to show by extraneous evidence that certain rights are appurtenant to the land devised, and hence they too pass to the devisee, although not specially named in the will.⁹⁴

§ 641. **Devises to charitable uses.**—A notable exception to the rule, requiring the devisee to be definitely ascertained, occurs in the case of devises to charitable uses. It will be impossible to do more than give a general outline of this most interesting and difficult subject. The subject has been discussed and treated by many of America's most eminent jurists, and yet it does not seem to be definitely settled in all its details, no uniform rule having been adopted or discovered which would be reliable and applicable in all the States.⁹⁵ It is here laid down that gifts to charitable uses will be sustained, although there are no trustees and no definite beneficiaries, provided the general intent of the testator can be ascertained. It has already been explained⁹⁶ that courts of equity will never suffer a trust to fail for the want of a trustee. But in ordinary trusts the *cestui que trust* must be definite and ascertained. The statute of 43 Eliz. ch. 4, enacted that where a devise was made to a charitable use, and

⁹³ *Miller v. Travers*, 8 Bing. 244; *The Lady Franklin*, 8 Wall. 325; *Shaw v. Shaw*, 50 Me. 94; *Billings v. Billings*, 10 Cush. 178; *Cabot v. Windsor*, 11 Allen, 346; *Pickering v. Pickering*, 50 N. H. 349; *Spencer v. Higgins*, 22 Conn. 521; *Mann v. Mann*, 14 Johns. 1; *Hinneman v. Rosenbeck*, 39 N. Y. 98; *Nicholls v. Williams*, 22 N. J. Eq. 63; *Love v. Buchanan*, 40 Miss. 758; *Stephens v. Walker*, 8 B. Mon. 600; *Grimes v. Harmon*, 35 Ind. 246; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674. See *Smith v. Kimball*, 62 N. H. 606.

⁹⁴ *Nye v. Hoyle*, 120 N. Y. 195.

⁹⁵ The subject constitutes more properly a part of the general subjects of Equity Jurisprudence and Uses and Trusts, and to standard works on these subjects, together with Prof. Theo. W. Dwight's argument in the *Rose Will Case*, published in book form, the reader is referred for a full and comprehensive discussion of it.

⁹⁶ See *ante*, Sec. 375.

no trustee was appointed, the court of chancery shall have the power to appoint trustees, who shall administer the trust in conformity with the testator's wishes, if they could be definitely ascertained and carried out, and if not, then as nearly as possible, the latter provision being known as the *cy pres* doctrine. It has always been a matter of considerable doubt whether the provisions of this statute constituted a part of the American jurisprudence, but the general importance of this question has been dissipated by the almost unanimous conclusion of the courts, that the statute was only remedial and confirmatory of the power which the court of chancery had previously possessed and exercised.⁹⁷ The uncertainty which in private trusts would invalidate the devise, but which could be cured under the doctrine of charitable uses, may refer either to the trustee, to the beneficiary, or to the object of the devise. In all charitable uses the beneficiaries are indefinite and uncertain, usually consisting of a class, the individuals of which are constantly changing. Thus, where a devise is made to a university, or to found one, the beneficiaries are the students who from time to time enter its halls. But it is a general rule that the object of charity, and the class of persons who are to be benefitted by it, should be sufficiently described as to be capable of identifi-

⁹⁷ *Vidal v. Gerard*, 2 How. 127; *Going v. Emery*, 16 Pick. 107; *Baptist Ass. v. Hart*, 4 Wheat. 1; *Witman v. Lex*, 17 Serg. & R. 88; *Jackson v. Phillips*, 14 Allen 577; *Burbank v. Whitney*, 24 Pick. 152; *Potter v. Thornton*, 7 R. I. 263; *Bell Co. v. Alexander*, 22 Texas 362; *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 140. *Contra*, *Bascom v. Albertson*, 34 N. Y. 618. But whether the Court of Chancery had original jurisdiction, or it was conferred upon it by the statute of Elizabeth, the doctrine of Charitable Uses is generally recognized throughout the United States. See *Tappan v. Deblois*, 45 Me. 122; *Drew v. Wakefield*, 54 Me. 295; *Atty.-Gen. v. Moore*, 19 N. J. Eq. 503; *Trustees, etc., v. Zanesville C. & M. Co.*, 9 Ohio 203; *Gals v. Wilhite*, 2 Dana 170; *Griffin v. Graham*, 1 Hawks 96; *Miller v. Chittenden*, 2 Iowa 315. See, also, *Bingham v. Peter Bent Bingham Hospital*, 134 Fed. Rep. 613; *Cadman v. Bingham* (Mass. 1906), 72 N. E. Rep. 1008.

cation.⁹⁸ Where there is a trustee or board of trustees appointed by the will to administer the trust, it seems to be the universal rule, adopted alike in all the States, that such a charitable trust will be sustained if the class of beneficiaries is definitely described. And I apprehend that a greater uncertainty is permissible in such cases than in those in which no trustee has been appointed.⁹⁹ And where the trustees are authorized by the will to *exercise their discretion* in the selection of the beneficiaries, the devise has in many cases been declared definite and valid, while it would probably be invalid, if the trustees were not appointed by the will. *Id certum est, quod certum reddi potest.*¹ It is also the rule, in perhaps all the States except New York, that where the object of the devise is certain and ascertainable, it will be sustained, although there are no ascertained trustees or beneficiaries. The courts of equity have the power in such cases to appoint trustees to carry out the will and administer the trust.² Whether the English doctrine of *cy pres* is applica-

⁹⁸ *Wheeler v. Smith*, 2 How. 55; *Perin v. Carey*, 24 How. 465; *Loring v. Marsh*, 6 Wall. 337; *Atty.-Gen. v. Trinity Church*, 9 Allen 422; *Treat's Appeal*, 30 Conn. 113; *State v. Griffith*, 2 Del. Ch. 392; *Newson v. Clark*, 46 Ga. 88; *Wade v. Am. Col. Soc.*, 7 Smed. & M. 695; *More & Moore*, 4 Dana 354; *Miller v. Teachout*, 24 Ohio St. 525; *DeBruler v. Ferguson*, 54 Ind. 549; *Heuser v. Allen*, 42 Ill. 425; *Elnell v. Universalist Gen. Convention*, 76 Texas 514.

⁹⁹ *Perry on Tr.*, Sec. 732; *Downing v. Marshall*, 23 N. Y. 366; *Going v. Emery*, 16 Pick. 107; *Treat's Appeal*, 30 Conn. 113; *Schultz's Appeal*, 80 Pa. St. 396; *State v. Griffith*, 2 Del. Ch. 392; *Needles v. Martin*, 33 Md. 609; *DeBruler v. Ferguson*, 54 Ind. 549; *Schmucker v. Reel*, 61 Mo. 592; *Miller v. Chittenden*, 2 Iowa 315.

¹ *Treat's Appeal*, 30 Conn. 113; *Witman v. Lex*, 17 Serg. & R. 88; *Atty.-Gen. v. Jolly*, 1 Rich. Eq. 99. But there must be some definite description of the class of persons from which the trustees are to select. *Wheeler v. Smith*, 9 How. 55; *Fontain v. Ravenel*, 17 How. 369; *Levy v. Levy*, 33 N. Y. 97; *Gallego v. Atty.-Gen.*, 3 Leigh 450; *Miller v. Atkinson*, 63 N. C. 537. See, *Cadman v. Bingham* (Mass.), 72 N. E. Rep. 1008; *Jenkins v. Berry* (Ky.), 83 S. W. Rep. 594; *Smith v. Havens Relief Fund Soc.*, 90 N. Y. S. 168; *Worcester City Mission Soc. v. Mem. Ch.*, 186 Mass. 531, 72 N. E. Rep. 71.

² *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Bliss v. Am. Bible Soc.*, 2

ble in this country to a devise to a charitable use, where no trustee is appointed, is a matter of some doubt. It is certain, however, that the courts would not, in following the tendency of the English courts, go so far as to authorize funds, bequeathed to found a *Jews' synagogue*, to be transferred to a foundling hospital, as was done in one case by an English court.³ And if the doctrine is recognized, it is applied in subordination to the general rule, that the courts cannot supply the intention of the testator by conjecture, but must act in strict compliance with a general intent, appearing on the face of the will, and then only when the special intent cannot be carried out.⁴ Finally the doctrine of perpetuity does not apply to charitable uses.⁵

§ 642. Lapsed devises—What becomes of them.—A will speaks from the death of the testator, and all the elements requisite to the validity of the devise must be present and existing then, in order that the devise may take effect. If any one is wanting, as, for example, if the devisee has died before the testator, the devise lapses. And this is the case, although the devise is expressly limited to the devisee and

Allen 334; Sanderson v. White, 18 Pick. 328; McAllister v. McAllister, 46 Vt. 272; Zeisweiss v. James, 63 Pa. St. 465; Dashiell v. Atty.-Gen., 5 Har. & J. 392; Walker v. Walker, 25 Ga. 420; Mason v. M. E. Church, 27 N. J. Eq. 47; Williams v. Pearson, 38 Ala. 299; Griffin v. Graham, 1 Hawks 96. *Contra*, Levy v. Levy, 33 N. Y. 97; Bascom v. Albertson, 34 Iowa 584; Downing v. Marshall, 23 N. Y. 366. But see Tilden v. Green, 2 N. Y. S. 584. See, Smith v. Relief Fund Soc., 90 N. Y. S. 168.

³ 3 Washburn on Real Prop. 521; Story on Eq. Jur., Sec. 1169.

⁴ Fountain v. Ravenel, 17 How. 389; Loring v. Marsh, 6 Wall. 337; Harvard College v. Society, etc., 3 Gray 283; Saunderson v. White, 18 Pick. 333; Brown v. Concord, 33 N. H. 285; Holmes v. Mead, 52 N. Y. 344; Philadelphia v. Girard, etc., 45 Pa. St. 28; Methodist Church v. Remington, 1 Watts 226; Cromie's Heirs v. Louisville Home Soc., 3 Bush. 375. The *cy pres* doctrine was applied in Massachusetts in *Cadman v. Bingham*, 72 N. E. Rep. 1008.

⁵ Jackson v. Phillips, 14 Allen 550; Odell v. Odell, 10 Allen 8; Gass v. Wilhite, 2 Dana 183; Miller v. Chittenden, 2 Iowa 362. *Contra*, Levy v. Levy, 33 N. Y. 130; Bascom v. Albertson, 34 N. Y. 598.

his heirs. The word "heirs" in this connection is construed as a word of limitation, and the heirs cannot take as purchasers, unless it is the plain intent of the testator to give them the devise, as a limitation over in case of the death of their ancestor.⁶ But unless there is an explicit declaration of the person or persons who are to take the devise in the place of the deceased devisee, no declaration that the devise shall not lapse upon the death of the devisee will prevent it lapsing.⁷ A devise to two or more as joint tenants will not lapse upon the death of one, not even as to his share. The survivors will take the entire estate.⁸ But the share of one co-tenant in a devise to several as tenants in common lapses, the difference in the rule arising out of the distinction between the two kinds of joint estates.⁹ If the devise is to a class, the individuals of which are changing, such as, for example, a devise to my "children," not naming them or indicating in any other way that certain definite individuals were intended, those individuals of the class who survive the testator take the entire devise, and there can be no lapse of such a devise unless all the persons, who could be included in the

⁶ *Long v. Watson*, 17 Beav. 471; *Hinchliffe v. Westwood*, 2 De G. & S. 216; *Kimball v. Story*, 108 Mass. 382; *Armstrong v. Moran*, 1 Bradf. 314; *Hawn v. Banks*, 4 Edw. Ch. 664; *Weishaupt v. Brehman*, 5 Binn. 115; *Comfort v. Mather*, 2 Watts & S. 450; *Dickinson v. Parvis*, 8 Serg. & R. 71; *Hand v. Marcy*, 28 N. J. Eq. 59; *Davis v. Taul*, 6 Dana 52. See, *Nelson v. Nelson* (Ind. 1904), 72 N. E. Rep. 482.

⁷ *Williams on Ex.* 1306; 2 Redf. on Wills, 163; *Aspinwall v. Duckworth*, 45 Beav. 307; *Hutchinson's Appeal*, 34 Conn. 300; *Craighead v. Given*, 10 Serg. & R. 351. For lapsed devise, in such a case, under Statute of Kentucky, see, *Schroeder v. Bohlson*, 84 S. W. Rep. 535.

⁸ *Anderson v. Parsons*, 4 Me. 486; *Doyle v. Doyle*, 103 Mass. 489; *De Camp v. Hall*, 42 Vt. 483; *Bolles v. Smith*, 39 Conn. 219; *Putnam v. Putnam*, 4 Bradf. 308; *Stephens v. Miller*, 24 N. J. Eq. 358; *Craycroft v. Craycroft*, 6 Har. & J. 54; *Luke v. Marshall*, 5 J. J. Marsh. 357.

⁹ *Upham v. Emerson*, 119 Mass. 509; *Cummings v. Bramhall*, 120 Mass. 552; *Allison v. Kurtz*, 2 Watts 185; *Mason v. Trustees Methodist Church*, 27 N. J. Eq. 47; *Mebane v. Womack*, 2 Jones Eq. 293; *Gray v. Bailey*, 42 Ind. 349; *Appeal of Ryon*, 124 Pa. St. 528.

class described, have predeceased the testator.¹⁰ And even where the members of the class are given, it has been held that there will be no lapse of the devise, if there is nothing else in the will to rebut the presumption that the persons named are to take as a class.¹¹ It is now also provided in a number of the States that upon the death of the devisee before the testator, if he be a son or other relative of the testator, his lineal heirs will take the estate in his place. The statutes vary in detail, some confining the provisions to the lineal heirs of a deceased son or grandson, others extending the benefit to the general heirs of any relative who is named as a devisee, while others go to the length of declaring the heirs of all devisees capable of taking in their ancestor's place, thus abolishing altogether the doctrine of lapse in case of the death of the devisee.¹² After determining that in a given case a devise has lapsed, there is the further question, in whom does it vest. And it may be stated as a general rule everywhere, in the absence of statutory provisions to the contrary, that although lapsed legacies and bequests go to the residuary legatee, lapsed devises vest in the heir at law.¹³ A distinction is made

¹⁰ 2 Redf. on Wills, 170; 1 Jar. on Wills (5 Am. ed.) 623; *Dimond v. Bostick*, L. R. 10 Ch. 358; *Schaffer v. Kettell*, 14 Allen 528; *Downing v. Marshall*, 23 N. Y. 366; *Young v. Robinson*, 11 Gill & J. 328; *Yeates v. Gill*, 9 B. Mon. 206. See, *Langley v. Trust Co.* (N. Y. 1905), 73 N. E. Rep. 44.

¹¹ *Schaffer v. Kettell*, 14 Allen 528; *Stedman v. Priest*, 103 Mass. 293; *Warner's Appeal*, 39 Conn. 253; *Magaw v. Field*, 48 N. Y. 668; *Hoppock v. Tucker*, 59 N. Y. 202; *Springer v. Congleton*, 30 Ga. 977. *Contra*, *Williams v. Neff*, 52 Pa. St. 333; *Frazier v. Frazier*, 2 Leigh 642. See, also, *Morse v. Morse*, 11 Allen 36; *Todd v. Tott*, 64 N. C. 280; *Starling v. Price*, 16 Ohio St. 32. See, *Fiske v. Fiske's Heirs*, 26 R. I. 509, 59 Atl. Rep. 740; *In re Smith's Estate*, 210 Pa. 604, 60 Atl. Rep. 255.

¹² 3 Washburn on Real Prop. 523; 1 Jar. on Wills (5 Am. ed.) 638, Am. note; *Moore v. Dimond*, 5 R. I. 121; *Sheets v. Grubb*, 4 Metc. (Ky.) 340.

¹³ *Doe v. Underdown*, Willes 293; *Doe v. Scott*, 3 Maule & S. 300; *Hayden v. Stoughton*, 5 Pick. 528; *Austin v. Cambridgeport Parish*, 21 Pick. 224; *Remington v. Am. Bible Soc.*, 44 Conn. 672; *James v. James*, 4 Paige 115; *Van Cortlandt v. Kip*, 7 Hill 346; *Gill v. Brouwer*, 37 N.

in the English law, in this connection, between those devises which lapse from the death of the devisee after the execution of the will, and those which are void *ab initio* for some cause, such as the death of the devisee before the execution of the will. In the latter case it is held, that the lapsed devise goes to the residuary devisee, on the ground that since the testator intends the residuary devisee to take all the property not previously disposed of, the testator intends him to take this void devise, for a void devise does not dispose of the property.¹⁴ But the weight of authority, in fact all the authorities except the case just cited, reject this distinction, holding that the attempt to make a specific devise indicates the intention at the time that the residuary devisee is not to take, and by the common law the residuary devisee only takes what was intended for him at the time of making the will.¹⁵ The existence of the will is not at all affected by the lapse of devises. Even though all the devisees and legatees should die before the testator, the will would nevertheless remain operative outside of the devises and bequests.¹⁶

§ 643. Revocation of wills.—Until the death of the testator the will is ambulatory and can be revoked at the pleasure of the testator. But in order that it may be revoked, something more must be done than a declaration to that effect. Revocation may be express or implied. An express revocation results from an affirmative act of the testator, *animo revocandi*. A revocation is implied from some act of the testator incon-

Y. 549; *Lingan v. Carroll*, 3 Har. & McH. 333; *Starkweather v. Am. Bible Soc.*, 72 Ill. 50; *Wilson v. Odell*, 58 Mich. 533.

¹⁴ *Doe v. Sheffield*, 13 East 526; *Ferguson v. Hedges*, 1 Harr. 524. See, also, *O'Connor v. Murphy* (Cal. 1905), 81 Pac. Rep. 406.

¹⁵ *Van Kleeck v. Dutch Church*, 20 Wend. 427; *Green v. Dennis*, 6 Conn. 292; *State v. Whitbank*, 2 Harr. 18; *Lingan v. Carroll*, 3 Har. & McH. 333. See, also, *Colville v. Kinsman* (N. J. Ch. 1905), 60 Atl. Rep. 959; *Varick v. Smith* (N. J. Ch.), 61 Atl. Rep. 159; *Duckworth v. Jordan* (N. C.), 57 S. E. Rep. 109; *Lacey v. Floyd* (Texas), 87 S. W. Rep. 665.

¹⁶ *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530.

sistent with the continued existence of the will, but not expressly intended to revoke the will, or from some subsequently occurring circumstances which the law has declared incompatible with the will, and which in consequence works a revocation. These various modes of revocation will be discussed in the succeeding paragraphs.

§ 644. **Joint or mutual wills.**—The only exception to the general revocability of wills occurs in the case of joint or mutual wills. Although these wills were at first looked upon as suspicious and doubtful instruments, they are now recognized as valid. Until the death of either party, the will is revocable by either, although such revocation may work a breach of a valid and effective compact.¹⁷ But after the death of one of the testators, the vesting of his part of the will is considered as being so far the part performance of an executory contract, as to prevent the revocation of the will by the survivor.¹⁸

¹⁷ Gould v. Mansfield, 103 Mass. 403; Clayton v. Liverman, 2 Dev. & B. 558; Evans v. Smith, 28 Ga. 98; Schumacher v. Schmidt, 44 Ala. 454. In Breathitt v. Whittaker, 8 B. Mon. 530, it was held that a joint will could not be revoked at all.

¹⁸ Dufour v. Pereira, 1 Dick. 419; *Ex parte* Day, 1 Bradf. 478; Izard v. Middleton, 1 Desau. 115; Schumacher v. Schmidt, 44 Ala. 454. By statute, in Iowa, a will can only be revoked by being cancelled or destroyed, or by the execution of a subsequent will. Richardson v. Bond, 102 N. W. Rep. 128. See, for presentation of a claim due to the devisee, amounting to a revocation, *In re* Stevens' Will, 94 N. Y. S. 588. "Where a husband and wife adopt an instrument as their will which disposes of the separate but not of the joint property, either may revoke it, in the absence of a valuable consideration to support a contract to dispose of the property in the manner set forth in the will." Buchanan v. Anderson (S. C. 1905), 50 S. E. Rep. 12, 70 S. C. 454. "A will devising land in fee is not revoked by a subsequent conveyance of the land to the devisee." Woodward v. Woodward (Colo. 1905), 81 Pac. Rep. 322. "Under Civ. Code Ga. 1895 Secs. 3341, 3342, in order to revoke a will executed in Georgia, the revocation must be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of the will." Castens v. Murray (Ga. 1905), 50 S. E. Rep. 131.

§ 645. **Revocation by destruction of will.**—Any burning, cancellation, or other destruction of the instrument, although such destruction be only partial, will be sufficient to revoke a will. All that is necessary is some act conclusive of an intention to destroy it.¹⁹ But the act of destruction must have been done *animo revocandi*, and it requires just as much capacity of mind to revoke a will as it does to make one.²⁰ Loss or unintentional destruction of the will or its destruction by a third person without the consent or explicit ratification of the testator, will have no effect upon the force and validity of the will. Provision is always made for the proof by competent witnesses of contents of such wills.²¹ Not only is the intention to revoke necessary to give to an act of destruction the effect of a revocation, but the act is also necessary. A mere intention to revoke, without doing some act required by law to evince that intention, will not work a revocation; and this is also true, although the execution of the intention to destroy the will has been frustrated by the fraudulent or other interference of a third person.²² But if the will is proven to have been in the possession of the testator, and there is no evidence to show that he ever gave it into another's

¹⁹ *Goods of Frazer*, L. R. 2 P. & D. 40; *Sweet v. Sweet*, 2 Redf. 451; *Evan's Appeal*, 58 Pa. St. 244; *Johnson v. Brailsford*, 2 Nott & M. 272; *Bohannon v. Wolcot*, 1 How. (Miss.) 336; *Richardson v. Baird* (Iowa), 102 N. W. Rep. 128.

²⁰ *Laughton v. Atkins*, 1 Pick. 535; *Smith v. Wait*, 4 Barb. 23; *Forman's Will*, 54 Barb. 274; *Idley v. Bowen*, 11 Wend. 227; *Burns v. Burns*, 4 Serg. & R. 295; *Smock v. Smock*, 11 N. J. Eq. 156; *Dowler v. Rodes' Admr.* (Ky.), 83 S. W. Rep. 115.

²¹ *Mills v. Millward*, 15 Prob. Div. 20; *Todd v. Rennick*, 13 Colo. 546, 22 Pac. Rep. 898; *De Groot's Will*, 9 N. Y. S. 471.

²² *Clark v. Smith*, 34 Barb. 340; *Delafield v. Parrish*, 25 N. Y. 9; *Clingan v. Mitcheltree*, 31 Pa. St. 25; *Dunlop v. Dunlop*, 10 Watts 153; *Mundy v. Mundy*, 15 N. J. Eq. 290. See *Card v. Grinman*, 5 Conn. 164; *Blanchard v. Blanchard*, 32 Vt. 62; *Runkle v. Gates*, 11 Ind. 95; *Smiley v. Gambill*, 2 Head 164; *Rife's Appeal*, 110 Pa. St. 232, 1 Atl. Rep. 226.

keeping, the fact that it cannot be found raises the presumption that the testator destroyed it.²³

§ 646. **Effect of alterations of will after execution.**— Unless the will is republished and attested again, an alteration in the terms of the will, will not affect the operation of the original provisions; and if the original terms have not been hopelessly obliterated by the attempted change, the will takes effect as if there had been no alteration. Unless the alteration has been made valid by a re-execution of the will, it cannot have the effect of a partial revocation of the original will.²⁴

§ 647. **Revocation by marriage and issue.**— As has already been explained, a single woman could at common law make a will, but a married woman could not. In consequence of this disability upon the married woman, it was held that the will of a single woman was revoked by her subsequent marriage.²⁵ In some of the States married women are permitted to make wills, but in the same States it is generally provided that the husband shall be heir of an intestate wife. It is, therefore, still generally enacted by statute in those States that the subsequent marriage of a testatrix will work an absolute revocation of the will.²⁶ The rule is, however, different in other States, the marriage being held to have no effect on their ante-nuptial wills.²⁷ But the marriage of a man does not at

²³ *Kerrigan v. Hart*, 40 Hun 389; *Bauskett v. Keitt*, 22 S. C. 187.

²⁴ *Gardiner v. Gardiner* (N. H.), 19 Atl. Rep. 651; *Tomlinson's Appeal*, 25 W. M. C. 447 (Pa.), 19 Atl. Rep. 482. See, *In re Hay* (Eng. 1904), 73 Law J. Ch. 33, 1 Ch. 317.

²⁵ 3 Washburn on Real Prop. 539; 4 Kent's Com. 527; *Forse v. Hembling*, 4 Rep. 61; *Cotter v. Laver*, 2 P. Wms. 624; *Morton v. Onion*, 45 Vt. 145; *Blodgett v. Moore*, 141 Mass. 75.

²⁶ Statutes of this character are to be found in Alabama, Arkansas, California, Indiana, Missouri, New York and Oregon. 1 Jar. on Wills (5 Am. ed.) 269, Am. note.

²⁷ *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359. See, *In re Goods of Groos* (Eng. 1904), 73 Law J. Prob. 82, 91 Law T. 322.

"Where a married woman made a will and the husband died and she

common law revoke his prior will, unless he has issue. The wife at common law could not be the heir of her husband, and she was considered amply provided for in her dower. There was, therefore, no change effected in the man's circumstances by his marriage, which would call for a revocation of his will, until issue was born to him.²⁸ But in a great many of the States the widow is now by statute made an heir to the husband, and, although there are statutes in some of these States expressly declaring a man's will revoked by his subsequent marriage, his marriage would revoke the will without any express enactment.²⁹ But the subsequent marriage and having of issue will only work a revocation, as a general rule, where the testator has not provided in his will for the contingency of his marriage. If he has made provisions for his future wife and children, the will will stand.³⁰ If a child has been unintentionally omitted from the provisions of a will, it is generally provided by statute that the will will be revoked *pro tanto*, and the share which this child would have received of his father's estate, had he died intestate, will be given to it.³¹ But a testator may disinherit a child if he wishes, and it may be shown by parol that the omission of his name was intentional.³² But in some of the States it is held that the intention to disinherit cannot be shown by parol evidence. If the testator subsequently remarried, the will was revoked under Civ. Code Ga. 1895, Sec. 3347." *McWhorter v. O'Neal* (Ga. 1904), 49 S. E. Rep. 592.

²⁸ *Warner v. Beach*, 4 Gray 162; *Havens v. Van den Burgh*, 1 Denio 27; *Tomlinson v. Tomlinson*, 1 Ashm. 224; *McCullum v. McKenzie*, 26 Iowa 510; *Carey v. Baughn*, 36 Iowa 542.

²⁹ See *Walker v. Hall*, 34 Pa. St. 483; *Am. Board v. Nelson*, 72 Ill. 564.

³⁰ *Wheeler v. Wheeler*, 1 R. I. 364; *Miller v. Phillips*, 9 R. I. 141; *Warner v. Beach*, 4 Gray 162; *Bush v. Wilkins*, 4 Johns. Ch. 506; *Havens v. Van den Burgh*, 1 Denio 27; *Deupree v. Deupree*, 45 Ga. 415; *Yerby v. Yerby*, 3 Call 334.

³¹ *In re Grider's Estate*, 81 Cal. 571, 22 Pac. Rep. 908.

³² *Doane v. Lake*, 32 Me. 268; *Wilson v. Fosket*, 6 Metc. 400; *Bancroft v. Ives*, 3 Gray 367; *Ramsdill v. Wentworth*, 101 Mass. 122; *Buckley v. Gerard*, 123 Mass. 8; *Conlam v. Doull*, 4 Utah 267, 9 Pac. Rep. 568, 133 U. S. 216.

dence, and that the intention must be gathered from the will.³³ There are similar statutory rules in most of the States, providing for a partial revocation of a will in favor of posthumous children. But if the testator manifests an intention to disinherit posthumous children, as well as others, they cannot make any claim to a revocation of the will under these statutes.³⁴ But in all the cases of revocation by marriage and birth of issue the rule only applies to wills, which dispose of the testator's own property. It does not apply to wills executed under a power of appointment, disposing of property which the wife or children of the testator could under no circumstances inherit.³⁵

§ 648. Revocation by alteration or exchange of property.—

If the testator disposes of the property devised by alienation *inter vivos*, it will, of course, revoke the devise.³⁶ And this is also the rule in equity, where the testator has contracted to sell, but has made no conveyance; that is, if specific performance of the contract is asked for and granted: but subject to the vendee's right to specific performance, the devise will nevertheless take effect.³⁷ But although, under the old Eng-

³³ *Chace v. Chace*, 6 R. I. 407; *Pounds v. Dale*, 48 Mo. 270; *Estate of Garrand*, 34 Cal. 336; *In re Steven's Estate*, 83 Cal. 322, 23 Pac. Rep. 379. See, *Olcott v. Tope*, 115 Ill. App. 121, 213 Ill. 124, 72 N. E. Rep. 750.

³⁴ *Osborn v. Jefferson Bank*, 116 Ill. 130.

³⁵ *Loring v. Marsh*, 6 Wall. 337; *Blagge v. Miles*, 1 Story 426; *Wilder v. Thayer*, 97 Mass. 439; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Havens v. Van den Burgh*, 1 Denio 27; *Burch v. Brown*, 46 Mo. 441; *Schneider v. Koester*, 54 Mo. 500; *Bressee v. Stilas*, 22 Wis. 120; *Estate of Utz*, 43 Cal. 200.

³⁶ *Bosley v. Bosley*, 14 How. 390; *Brown v. Thorndike*, 15 Pick. 388; *In re Van Mickel*, 14 Johns. 324; *McNaughton v. McNaughton*, 34 N. Y. 201; *Brush v. Brush*, 11 Ohio 287; *Floyd v. Floyd*, 7 B. Mon. 290; *Wells v. Wells*, 35 Miss. 638. See *contra*, *Woodward v. Woodward* (Colo. 1905), 81 Pac. Rep. 322.

³⁷ 4 Kent's Com. 527; *Darley v. Darley*, Wils. 36; *Walton v. Walton*, 7 Johns. Ch. 258; *Kean's Case*, 9 Dana 25; *Chadwick v. Tatem* (Mont.), 23 Pac. Rep. 729.

lish rule concerning after-acquired property, the rule might be different, it is now held that the subsequent conveyance of the land to the testator will revive the devise without any formal republication.³⁸ Not only does the actual conveyance of the land revoke a devise, but it has also been held that an unsuccessful or void conveyance will have the same effect as indicating an intention to revoke the devise.³⁹

This rule would hardly be followed at the present day. The revocation by exchange or sale of the property devised is only implied from the act of sale; and implications are never permitted to operate beyond what is made necessary by the act, which gives rise to the implication. If, therefore, an attempted conveyance fails, it should not operate as a revocation of the devise.⁴⁰ But these acts will not in any case constitute a revocation of the will itself; their only effect will be upon the particular devise.⁴¹

§ 649. Revocation by subsequent will or codicil.—A will may also be revoked by a subsequent will or codicil. A codicil is nothing more than a supplementary will, and only revokes the will *pro tanto*. A subsequent will or codicil may revoke the prior will by implication, where the two are inconsistent and cannot stand together; or the testator may in his subsequent will expressly declare the prior will revoked. And in the absence of an express revocation the prior will will be revoked only as to those provisions, which are inconsistent with the dispositions made in the subsequent will or codicil.⁴²

³⁸ Brown v. Brown, 16 Barb. 569; Woolery v. Woolery, 48 Ind. 523.

³⁹ 3 Washburn on Real Prop. 538, 539; 4 Kent's Com. 529.

⁴⁰ Morey v. Sohler, 63 N. H. 507, 56 Am. Rep. 538.

⁴¹ Hoitt v. Hoitt, 63 N. H. 475, 50 Am. Rep. 530.

⁴² Pickering v. Langdon, 22 Me. 413; Brant v. Wilson, 8 Cow. 56; Van Vechten v. Keator, 63 N. Y. 52; Smith v. McChesney, 15 N. J. Eq. 359; Bartholomew's Appeal, 75 Pa. St. 169; Boudinot v. Bradford, 2 Dall. 266; Petters v. Petters, 4 McCord 151; Brownfield v. Wilson, 78 Ill. 467; Bobb's Succession (La.), 7 So. Rep. 60; Sturgis v. Work, 122 Ind. 134, 22 N. E. Rep. 996. See, *In re Stratum's Will*, 94 N. Y. S.

And the burden is upon the one opposing the earlier will to show that the testator intended to revoke it.⁴³ Of course, an instrument which is strictly a codicil, could only revoke expressly or by implication some provision of the will to which it is annexed. There could not be an express revocation of the entire will, for such a provision would make such a "codicil" an independent will.⁴⁴ Where the prior will is only revoked by the subsequent will by implication from the inconsistency of its clauses, revocation by destruction of the second will will revive the prior will without any former republication.⁴⁵ But if the prior will has been cancelled, or is revoked by express declaration, a republication as formal as the original execution is generally necessary to revive it.⁴⁶ But it has been generally held that the execution of a codicil, containing an express reference to the prior will, is a sufficient republication to bring the prior will into active operation again from the time, when the codicil was executed.⁴⁷

§ 650. Defective will confirmed by codicil.—Where the codicil refers to and recognizes the existence of a will which has

588; *Woodward v. Woodward* (Colo.), 81 Pac. Rep. 322; *Castens v. Murray* (Ga.), 50 S. E. Rep. 131.

⁴³ *Richards v. Queen's Proctor*, 18 Jur. 540; *Leslie v. Leslie*, 6 Ired. Eq. 332.

⁴⁴ *Gelbke v. Gelbke*, 88 Ala. 427, 6 So. Rep. 834.

⁴⁵ 4 Kent's Com. 528; 3 Washburn on Real Prop. 540; *Brown v. Brown*, 8 E. & B. 876; *Wood v. Wood*, L. R. I. P. & D. 309; *Bohannon v. Walcot*, 1 How. (Miss.) 336. In New York, Ohio, Indiana, Missouri and Arkansas the prior will can only be revived by republication in any case. 3 Washburn on Real Prop. 542, note.

⁴⁶ *James v. Marvin*, 3 Conn. 576; *Rudisiles v. Rodes*, 29 Gratt. 147; *Bohannon v. Walcot*, 1 How. (Miss.) 336; *Beaumont v. Keim*, 50 Mo. 28. *Contra*, *Lawson v. Morrison*, 2 Dall. 286. See, *Taylor v. Taylor*, 2 Nott & M. 482.

⁴⁷ *Havens v. Foster*, 14 Pick. 534; *Mooers v. White*, 6 Johns. Ch. 375; *Van Cortlandt v. Kip*, 1 Hill 590; *Jones v. Jones*, 1 Gill 395; *Rose v. Drayton*, 4 Rich. Eq. 260; *Jones v. Shewmake*, 35 Ga. 151; *Stover v. Kendall*, 1 Coldw. 557; *Barker v. Bell*, 46 Ala. 216; *Armstrong v. Armstrong*, 14 B. Mon. 333.

been defectively executed, or which has been altered after its execution, it has been held that such adoption of the will by the codicil renders it a valid testament as it stood on the date of the execution of the codicil.⁴⁸

But it has been held that the will must have been signed or acknowledged by the testator in order that it may be validated by a codicil. The mere reference to a written instrument by what purports to be a codicil will not make it a valid will, if it is not signed or acknowledged by the supposed testator or written by him.⁴⁹

§ 651. *Contingent wills.*—In connection with the subject of revocation, it may be well to state something concerning contingent wills. A will can be made to take effect or to fail upon the happening of the contingency. A common case is a will made expressly, to take effect only upon the death of the testator away from home or while on a journey. If the testator survives the contingency, the will cannot be admitted to probate.⁵⁰

§ 652. *Probate of will.*—In the States of this country, different from the old English law, it is provided that wills of real property shall be admitted to general probate, and when they have been admitted, and placed on record, the probated will becomes conclusive evidence of its own proper execution in any case arising collaterally in another court.⁵¹

⁴⁸ *Burge v. Hamilton*, 12 Ga. 568; *Anderson v. Anderson*, L. R. 13 Eq. 381; *Mooers v. White*, 6 Johns. Ch. 360; *Van Cortlandt v. Kip*, 1 Hill 590.

⁴⁹ *Sharp v. Wallace*, 83 Ky. 584.

⁵⁰ *In re Porter*, L. R. 2 P. & D. 22; *Lindsay v. Lindsay*, L. R. 2 P. & D. 459; *Tarver v. Tarver*, 9 Pet. 174; *Ritter's Appeal*, 59 Pa. St. 9; *Wagner v. McDonald*, 2 Har. & J. 346; *Jacks v. Henderson*, 1 Desau. 543; *Maxwell*, 3 Metc. (Ky.) 101. But see *contra*, *Damon v. Damon*, 8 Allen 192.

⁵¹ 3 Washburn on Real Prop. 508; 1 Greenl. on Ev., Sec. 518. See, *In re Goods of Schenley* (Eng. 1904), 20 Law T. R. 127; *Vernon v. Vernon* (N. J. 1905), 61 Atl. Rep. 409. "A proceeding in the probate

It is also provided by the Statutes of Probate that a copy of the will certified by the judge of probate or his clerk is competent evidence of its contents. The old English law only provided for the probate of wills of personal property.

§ 653. Agreements as to testamentary disposition of property.

— Very often agreements are made by the owners of property with others, to the effect that, if the latter perform certain duties or render certain services to them, they will make some testamentary provision in behalf of the person who agrees to render the service. If the services are rendered, the agreement will be enforced by the courts after the testator's death against his estate if he has refused or failed to make the testamentary provision.⁵² But the agreement must be clearly proven, and be a valid contract, in order that it may be enforced by the courts in opposition to the will.⁵³

court to establish a will does not come within the category of a civil action, but is a special proceeding, though the latter is not defined in the statute." *Lanning v. Gay* (Kan. 1904), 78 Pac. Rep. 810.

⁵² *Lee's Appeal*, 53 Conn. 363; *Schutt v. Meth. Epis. Missionary Soc.*, 41 N. J. Eq. 115; *McKeegan v. O'Neill*, 22 S. C. 454; *Whetstone v. Wilson*, 104 N. C. 385, 10 S. E. Rep. 471; *Andrews v. Brewster*, 9 N. Y. S. 114. *In re Lewallen's Est.*, 27 Pa. Sup. Ct. 320.

⁵³ *Davis v. Hendricks*, 99 Mo. 478, 12 S. W. Rep. 887; *Snyder v. Snyder* (Wis.), 45 N. W. Rep. 818. "A man or a woman may enter into a binding contract to dispose by will in a particular manner of the whole or any part of his or her property, real or personal. Such a contract must, of course, be based on sufficient consideration." *In re Lewallen's Estate*, 27 Pa. Super. Ct. 320. "Oral and written statements made by an owner that he intended his farm for his sister, and that he would will the same to her, merely show an intention to make a gift, unenforceable after his death." *Mitchell v. Pirie* (Wash. 1905), 80 Pac. Rep. 774. "A bequest of property in trust is not a substantial compliance with a contract to bequeath it absolutely." *Earnhardt v. Clement* (N. C. 1904), 49 S. E. Rep. 49. "An agreement whereby a father was to convey a farm to his son in consideration of the latter's remaining at home and managing the farm was broken by the conduct of the son in leaving the farm and removing to another locality." *Eastwood v. Crane* (Iowa 1904), 101 N. W. Rep. 481.

CHAPTER XXV.

REGISTRATION OF TITLES.

- SECTION 654.** History of legislation regarding.
- 655. Object of statutes providing for.
 - 656. Constitutionality of statutes concerning.
 - 657. Registrars and examiners provided.
 - 658. How land is brought under statute.
 - 659. Proceedings before examiner.
 - 660. Jurisdiction and power of the court.
 - 661. Effect of registration.
 - 662. Conveyances under the Torrens law.
 - 663. Death of owner — Transmission of land.
 - 664. Judgments, liens and assessments against land.
 - 665. Relief against arbitrary power of registrar.
 - 666. Indemnity and procedure to recover.
 - 667. Advantages and objections to title registration.

§ 654. History of legislation regarding.—The registration of titles to real estate, carried out by legislative acts, providing either for the optional or compulsory examination of the title and recording of the examiner's certificate, or the adjudication as to the title, if same is determined by judicial inquiry, together with all subsequent transfers or claims, effecting the title, has been in vogue, in one form or another, in some of the European countries for several centuries.¹ The system of registration of land titles, in English-speaking countries, is generally known as the "Torrens System," so called from Sir Robert Torrens, who, in 1858, prepared the

¹ "In Austria-Hungary registration dates from the twelfth century. In Baden, the system dates from 1809; in Saxony, from 1843." "Registration of title was made universal in Austria, in 1811; in Hungary, in 1849, and in Prussia, in 1872." Sheldon's Land Registration, p. 112, Report, Fortescue to British Gov. on Land Registration in Germany and Austria-Hungary, 31 Am. Law Review 827.

first law enacted in Australia.² The success of the Torrens System, in Australia, was so pronounced, that in the next succeeding years, up to and including 1885, most of the English colonies adopted similar or dissimilar legislation, providing for the registration of land titles.³ As originally adopted in England, the registration of titles to real estate was optional with the owner,⁴ but this law met with such opposition from the legal profession and the citizens generally that in 1897 the present Land Transfer Act was passed, which, with the successive acts, established compulsory registration of land titles, in England. Illinois was the first of the United States to adopt a title registration law,⁵ but the adoption of such a system was agitated in Massachusetts even before the law was passed in Illinois,⁶ and laws providing for the registration of titles to land have since been adopted in California,⁷ Massachusetts,⁸ Minnesota⁹ and Ohio.¹⁰

§ 655. Object of statutes providing for.— It cannot well be doubted, by any one familiar with the examination of titles, that there are obstacles to be encountered from a perusal of the records of the successive deeds and muniments of title, by the paid examiner of the title to be passed on the occasion of each transfer, not only because of the liability to overlook some record essential to the title, but also because the validity

² 31 Am. Law Rev. 827, Sheldon Land Reg., p. 114.

³ Queensland 1861, New South Wales 1862, New Zealand 1870, West Australia 1874, British Columbia 1870, Manitoba and Ontario 1885, Sheldon Land Reg., p. 114.

⁴ Westbury Act 1862, Cairns Act 1875.

⁵ Originally passed as "An act concerning land titles," June 13, 1895; re-enacted and amended May 1, 1897.

⁶ In his inaugural address and message to the legislature, in 1891, Gov. Russell recommended the law providing for registration of titles, in Massachusetts.

⁷ The law was passed in California in 1897.

⁸ Finally adopted in Massachusetts in 1898.

⁹ Gen. Laws Minn. 1901, p. 348, c. 237.

¹⁰ Adopted in Ohio in 1896, but held invalid by Supreme Court, in *State v. Guilbert*, 56 Ohio St. 575.

of the title so often depends upon facts or proceedings not shown by the records at all. This insecurity to the landowner, resulting from the practical inability of the title examiner, where records of conveyances and facts, not of record, determines the validity of the ownership, to vouchsafe a marketable title, in all cases, and the expense and delay incident to the re-examination of the deeds, records, abstracts or muniments of title, with every recurring conveyance or incumbrance of the land, are some of the reasons which gave rise to the legislation providing for registration of titles, commonly known as the Torrens System. Under this and similar laws for the registration of land titles, the official examination of the title, substituted for the unofficial examination otherwise obtaining, is given conclusive effect, in favor of the owner; his title is given the permanent character of an official determination, equivalent to a decree of court. All known and unknown adverse interests, under proper legal notice, are determined and, as all subsequent proceedings, acts and conveyances effecting the title are noted by the registrar, upon the certificate of record, the condition of the title can be more speedily ascertained and the indefeasible character of the certificate of title issued by the States, guarantees the landowner greater security, at a less cost, than under the system of registering only deeds, and other evidences of title or claim, regardless of other objections that may be urged against a system of title registration.¹¹

§ 656. Constitutionality of Statutes concerning.— Since the determination of the title, on the part of the examining officer, under the Torrens Act, to carry any peculiar benefits as a result of the investigation, must be given the character of indefeasibility, it may well be doubted if such power, in the determination of adverse claims and property rights, under

¹¹ Record of Title to Land, by H. W. Chaplin, 6 Harv. L. Rev. 302; reply to criticism of Torrens' System, 7 Harv. L. Rev. 24; Australian System of Land Transfers, 32 Cent., L. J. 160.

the system of organic law such as obtains generally in the United States, can be legally exercised by other than a regularly constituted court, acting in pursuance of "due process of law." To give such power to other than a judicial officer, clothed with the power of the judgment seat, would seem to be counter to the direct mandate of the United States Constitution and the constitutions of the different States.¹²

This identical question was passed upon by the Supreme Court of Illinois, and the first Title Registration Act of that State was held unconstitutional because it conferred judicial powers upon the registrar.¹³ This difficulty was obviated in the second act, passed the year following, by a provision for the determination of the title by a decree in equity, by a legally constituted court, after legal notice, which decree, instead of the non-judicial finding of the registrar, was made the basis of the initial registration. The act last referred to is the present "Torrens Law" in effect in Illinois, and the Supreme Court of the State has upheld its constitutionality,¹⁴ as did the Supreme Court of Massachusetts, in the consideration of a similar act.¹⁵ As before observed,¹⁶ the power of the

¹² "Chapter 237, Laws Minn. 1901, providing for the Torrens System of registering land titles, is not unconstitutional in that it is special legislation; nor in that it deprives the owner of his interest in land without due process of law; nor in that it violates article 3 of the constitution, vesting the powers of government in three distinct departments; nor in that examiners of title provided for by the act are appointed by the court, and not elected as county officers are required to be by Sec. 4, Art. 11, Const." *State v. Westfall* (1902), 89 N. W. Rep. 175.

¹³ *People v. Chase*, 165 Ill. 526. See, also, for opinion holding Ohio Act invalid, *State v. Guilbert*, 56 Ohio St. 575.

¹⁴ *People v. Simon*, 176 Ill. 165, *Sheldon Land Reg.*, p. 2.

¹⁵ *Tyler v. Judges*, 175 Mass. 71.

¹⁶ *Ante*, Sec. 19. "In the case of *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. Rep. 551, 60 Am. St. Rep. 756, the attempt at transplanting the Torrens System into Ohio soil was rudely nipped in the bud, the court assigning as its principal grounds of objection that the act failed to provide for proper service upon adverse claimants residing within the jurisdiction, and that it attempted to confer judicial power upon a county recorder, a purely ministerial officer. It seems from the view

State to regulate the terms upon which real property within its borders shall be held, as well as the means of acquisition and transfer, is undoubted,¹⁷ and hence it has been argued that no constitutional objection could be urged in the United States against compulsory registration of titles, before permitting a sale or transmission by devise or descent.¹⁸ But any limitation upon the power of alienation would certainly be counter to the settled legislative policy in the United States and the spirit of the age, which brooks no restraint upon the power of the citizen to alienate his property, and although perhaps not opposed to the strict letter of any constitutional provision, it is doubtful if such an enlargement of

which the court takes of the provision for notice, only those parties named by the applicant as adverse were to be served, and these, if they lived without the county, were to be served by mail. The court said on this point: 'One known to claim the title in fee-simple adversely to the applicant need not be named, though his place of residence may be within the county and known. . . . Is this such notice as the law of the land requires to be given to persons claiming interests in property of the pendency of a judicial proceeding, in which such interests are to be the subject of adjudication, and in which, unless they appear, a decree will be entered precluding their further assertion.' The court holds in this connection that the proceeding for initial registration partakes much of a bill to quiet title, but that it is in no sense an action *in rem*, giving the legislature the right to prescribe such notice as is appropriate to such proceedings. After considering the act in these particulars the court launches into a general diatribe of its other provisions. The provision for an assurance fund is handled very gingerly. 'It is not likely,' the court says, 'that the legislature has thought itself authorized to provide for making whole those who have been defeated in judicial proceedings of an adversary character, involving only private rights, and conducted according to the law of the land. The terms of these sections of the act show that the fund is to be raised to indemnify those whose lands have been wrongfully wrested from them without due process of law. When the provisions of the Constitution are applied to this penitential scheme, it at once becomes apparent that it is both inadequate and forbidden.'" 54 Cent. L. J. 294.

¹⁷ This observation is quoted from the text by the Sup. Ct. of Illinois, in *People v. Simon*, 176 Ill. 176.

¹⁸ *Sheldon Land. Reg.*, p. 82.

the title registration law, in the United States, would popularize the legislation.¹⁹

§ 657. **Registrars and examiners provided.**— Under the Illinois and similar title registration acts, the county recorders, or other custodians of the records, are made *ex-officio* registrars of land titles, on account of their free access to the records of conveyances and, generally, such officers are not permitted to sell or otherwise dispose of their official information as to land titles, coming under their observation. They are generally required to give bond for the faithful discharge of their own and their deputies' duties, as registrars of titles and are disqualified from practicing law, or from being directly or indirectly associated with a practicing lawyer, while acting as registrar of land titles.²⁰ The appointment, by the registrar or other authority, of one or more competent lawyers, as title examiners, is provided for, who, like the registrar, is also a bonded officer and, on grounds of public policy, is prevented by law from practicing his profession or profiting in any manner from his official information.²¹

§ 658. **How land is brought under statutes.**— Generally the owner of any estate or interest in land, whether legal or equitable, may apply under the Torrens System for the registration of title to any land situated in the county, where the application is made. The application may be made either in person or by counsel, a corporation applying by its agent and an infant or other person under disability, by his guardian.

¹⁹ Although such an encroachment might run the gamut of the courts, it might condemn an otherwise beneficent law in framing of public opinion. The only legal way to meet the just constitutional objection urged to the Ohio and first Illinois statutes, against conferring judicial functions on non-judicial officers, is to establish a regular court of land registration, such as is provided in the Massachusetts act.

²⁰ Hurd's Rev. St. Ill. Ch. 115, Secs. 21, 25; Gen. Laws Minn. 1901, p. 348, c. 237.

²¹ *Ante, idem.*

Usually, the fee-simple title is first required to be registered. It is no objection to the registration of the fee that a lesser title or estate may be outstanding, if admitted by the owner, but the fact is only noted on the certificate of title. But if there are adverse claims or interests, disputed by the applicant, these are required to be contested and the parties brought in and the claims adjudicated before initial registration is had.²² No title based on a tax deed or similar assessment is admitted to registration without bringing in the holder of the patent title or those claiming under him, and no tax title is entitled to be registered until an adjudication that it is superior to the patent title, by adverse possession for the statutory period, or other facts showing a superior title in the claimant.²³ The

²² Hurd's Rev. St. Ill. Ch. 115, Sec. 9; Sheldon Land Reg., p. 21. "It is not the duty of the court, when making an order for the issuance of summons in proceedings under the Torrens act (Laws Minn. 1901, p. 348, c. 237), to investigate and name defendants, or prescribe who shall be named as defendants." *Dewey v. Kimball*, 95 N. W. Rep. 317, rehearing in part granted. *Id.* (Minn. 1903), 895. "In proceedings under the Torrens act (Laws Minn. 1901, p. 348, c. 237), the applicant cannot, in taking the steps provided for by Sections 18, 19, relating to the issuance of summons and the necessary parties defendant, ignore the report and advice of the examiner as to what parties or persons should be made defendants." *Dewey v. Kimball*, 95 N. W. Rep. 317. "The provision in Torrens act (Laws Minn. 1901, p. 353, c. 237), Sec. 10, in respect to who shall be defendants in the procedure, is mandatory and a failure to follow the advice and report of the examiner amounts to a failure to observe this provision, and renders any judgment thereafter entered invalid and void for want of jurisdiction over the person or party named." *Ante, idem.*

²³ "In a proceeding for the registration of title, the burden is on defendant to show the validity of tax deeds under which defendant claimed an interest in the property." *Glos. v. Talcott* (Ill. 1904), 72 N. E. Rep. 707, 213 Ill. 81. "Evidence that plaintiff went into actual possession of premises, the title to which she sought to register, under claim and color of title, made in good faith, in the year 1891, and continued in possession to the filing of her application on June 3, 1901, with proof of the payment of taxes for each year from 1891 to 1901, in the absence of other evidence, was sufficient proof of title in fee." *Glos v. Mickow* (Ill. 1904), 71 N. E. Rep. 830, 211 Ill. 117. "Where, in a proceeding for the registration of plaintiff's title to certain real estate,

form and contents of the application for registration differs, under the various statutes, which should be consulted in each instance in the preparation of an application for registration. It is essential, however, that the application should contain the names of all parties claiming adverse interests or claims, desired to be extinguished in the initial registration, for all such to be legally effected by the decree effecting their interests, must be duly notified, as in the service of other character of legal process.²⁴

§ 659. Proceedings before examiner.— Upon the filing of the application for registration the same is usually referred to the examiner, who proceeds to examine into the title and to investigate the truth of the facts alleged in the application. If the land is occupied, the nature and right to the possession is inquired into and a full report of his proceeding is transmitted to the court.²⁵ He is usually given power to compel the attendance of witnesses, and to administer oaths and examine witnesses; his duties are similar to those of a referee in chancery and the proceedings before the examiner, in Illinois, are so far held to be under the direction of the court

plaintiff produced evidence establishing title in him, the burden was on a party claiming title under a tax deed to establish the validity of such deed." *Glos v. Hoban*, 72 N. E. Rep. 1, 212 Ill. 222.

²⁴ "Act May 1, 1897, establishing the Torrens System of land titles, at Section 13, prescribes the form in which an application for the registration of a fee simple title shall set out the interest to adverse claimants. Section 15 Provides that the court may quiet titles in such proceedings. *Held*, that an application in the prescribed form was a sufficient pleading to put in issue the validity of an adverse tax title." *Gage v. Consumers' Electric Light Co.*, 64 N. E. Rep. 653, 194 Ill. 30. "In publishing the summons provided for in Laws Minn. 1901, p. 384, c. 237, known as the 'Torrens Act,' a compliance with the provisions of Sec. 20, p. 353, of such act, providing that summons shall be served upon nonresidents and unknown defendants by publication in the newspapers, is sufficient, without following the provisions of Gen. St. 1894, Sec. 5204." *Dewey v. Kimball* (Minn. 1903), 96 N. W. Rep. 704; *Same v. National Bond & Security Co.*, *Id.*

²⁵ *Hurd's Rev. St. Ill. Ch. 115, Sec. 18.*

as to be, in fact, proceedings in chancery.²⁶ The same rules and principles of law that obtain in the trial of civil cases, so far as appropriate, apply to proceedings in determining titles under the Torrens Act.²⁷ The examiner investigates each title independently of the evidence submitted by the applicant, both as to record matters and facts outside the record. If the title is unfit for registration the application is dismissed without prejudice, but if the examiner finds a marketable title in the applicant, his report to the court so states and a decree is accordingly rendered, establishing, for all time, the title of the applicant.²⁸

§ 660. Jurisdiction and power of the court.— To carry out the objects of the law it is essential that the court should have power to inquire into the condition of the title and of any interest in the land, or any lien or incumbrance thereon and to make all such orders and judgments as may be necessary to determine, establish and declare the title or interest, whether legal or equitable, as against all persons, and to consider all liens and incumbrances and to declare the order of same and to remove clouds from title and perform such other chancery powers as are essential to the full consideration and determination of the title submitted to it for adjudication.²⁹ The court is generally authorized to find and decree in whom

²⁶ *People v. Simon*, 176 Ill. 165; *Rogers v. Taylor*, 144 Ill. 652; *Sheldon Lang Reg.*, p. 27.

²⁷ "In proceedings under Torrens act for land transferred, all rules and principles of law applicable to rights in real property and rules of practice with reference to the trial of civil actions in so far as appropriate, or not provided for, should be followed." *Owsley v. Johnson* (Minn. 1905), 103 N. W. Rep. 903. "Objections to the admission of evidence on a hearing before an examiner of titles for registration cannot be reviewed on appeal unless incorporated in exceptions to the master's report and renewed in the trial court." *Glos v. Hoban* (Ill. 1904), 72 N. E. Rep. 1, 212 Ill. 222.

²⁸ *People v. Simon*, 176 Ill. 165; *Sheldon Land Reg.*, pp. 27, 28.

²⁹ See *Hurd's Rev. St. Ill. Ch.* 115, Sec. 15. "Gen. Laws Minn. 1901, p. 348, c. 237, known as the 'Torrens Act,' was intended to provide a

the title to or any interest in the land is vested; to remove clouds from the title and to determine the validity and order of incumbrances; to order the registrar to record such title or interest and the liens or claims to which it is subject and to make such further orders, as may be according to the equities of the parties and the condition of the record shall justify.³⁰ This decree is the basis of the initial registration of title, and all persons holding adverse claims or interests are barred, after a given time, under most statutes, if they fail to give notice or assert their claims.³¹

§ 661. **Effect of registration.**—As a general rule, to give proper force to the registration of a title, under the Torrens Law, the certificate of title relates back to and takes effect as of the date of the decree;³² all subsequent liens are entered subject to the decree and before the expiration of the period for contest of the adverse title the certificate of registration is taken as *prima facie* evidence of a full compliance with the law and that the title of the owner is as certified to and after

speedy method of determining rights in real property, and to authorize the court to determine controversies respecting title, and by decree declare the title, rights, and interests of interested parties." *Reed v. Siddall*, 102 N. W. Rep. 453. "Under Gen. Laws Minn. 1901, p. 348, c. 237, known as the 'Torrens Act,' the court has no power to foreclose mechanics' liens, but only to determine the existence and validity thereof." *Reed v. Siddall* (Minn. 1905), 102 N. W. Rep. 453. "In proceedings under the Torrens act (Gen. Laws. 1901, p. 348, c. 237), to register title, the burden of proof is on the party asserting a mechanics' lien to prove that at the time of the trial the lien was a valid one." *Reed v. Siddall* (Minn. 1905), 102 N. W. Rep. 453.

³⁰ Hurd's Rev. St. Ill. Ch. 115, Sec. 25; *Sheldon Land Reg.*, p. 32; *Reed v. Siddall* (Minn. 1905), 102 N. W. Rep. 453.

³¹ Hurd's Rev. St. Ill. Ch. 115, Secs. 27, 28. "Where the examiner in a petition under the Torrens Law suggests that a certain party named be made a defendant, but the suggestion is not observed, the judgment thereupon entered is invalid and void as against such party, and all persons in privity with him, not defendants in the proceeding." *Judgment*, 95 N. W. Rep. 317, affirmed on rehearing. *Dewey v. Kimball*, 96 N. W. Rep. 704; *Same v. National Bond & Security Co.*, *Id.*

³² Hurd's Rev. St. Ill. Ch. 115, Sec. 38.

the expiration of such period the registrar's certificate is conclusive evidence of these facts.³³

The owner holds his title subject to the liens, estates or incumbrances noted in the certificate of title and subject to other possessions, private and public easements, tax assessments and contests as may be filed within the period limited for such claims,³⁴ but otherwise the certificate of registration is free from other claims.

After registration of a title no possession, for however long a period, unless noted on the certificate of title, can ripen into an adverse claim,³⁵ and all unregistered trusts, claims or liens are absolutely void as against a subsequent purchaser of the land,³⁶ and thus the principle of immunity is afforded the owner and purchaser, perhaps to a fuller extent than by any other method known to the law. The registration implies an agreement or covenant running with the land, that the same shall be subject to the terms of the law, in every respect, and all subsequent dealings with the land are impliedly subject to its terms and thus full effect is given to the inviolability of the title, under the law.

§ 662. Conveyances under the Torrens Law.—Upon the conveyance, in regular form, of any estate, interest or portion of a registered tract of land, by the owner, his duplicate certificate is surrendered to the registrar, who proceeds to cancel it and to issue to the grantee of the tract a new certificate in proper form, with any additions to the title or chain of conveyances or incumbrances noted thereon.³⁷ If only a part of his land is conveyed by the owner, a new certificate is

³³ *Ante, Idem*, Sec. 39.

³⁴ *Idem*, Sec. 40.

³⁵ Hurd's Rev. St. Ill. Ch. 115, Sec. 41.

³⁶ *Ante, Idem*, Sec. 42; Sheldon Land Reg., p. 41; Sheldon Land Reg., p. 42. The registration of the owner's title is, in effect, a summary proceeding to quiet title. 2 Tiffany Real Prop. Sec. 489, p. 1103, 54 Cent. L. J. 293.

³⁷ Hurd's Rev. St. Ill. Ch. 115, Sec. 47.

given him by the registrar for such portion not conveyed.³⁸ The new certificates are but a continuation of the original registration and from the date of delivery to him of his registration certificate, the purchaser has all the muniments of title for the land granted to him that the original registered owner had and hence the same kind of a title.³⁹ The conveyance in common form is generally the only authority of the registrar to make a transfer of a title, or a new certificate to a purchaser; all conveyances affecting the title are noted filed as of the exact time received and same are retained in the office of the registrar together with the address of all persons named therein, for future reference.⁴⁰ Generally, however, no transfer of the title, or of any estate therein will be made until the registrar shall be satisfied that no tax assessment, lien or other claim by the State or municipality exists, and that the dower right or homestead, if the tract is subject to such claims, have been released.⁴¹ And practically the same rules as obtain in the notation of conveyances of the fee are followed in the registration of mortgages

³⁸ *Ante, idem*, Sec. 48.

³⁹ Sheldon's Land Reg., p. 43.

⁴⁰ Hurd's Rev. St. Ill. Ch. 115, Secs. 50, 51, 52, 53, 54.

⁴¹ *Ante, idem*, Sec. 55. "Tax liens held by the State are not interests in and claims upon the land upon which they are a lien, within Minnesota Laws 1903, p. 341, c. 234, Sec. 6, relating to the registration of title under the Torrens act, and providing that whenever the State of Minnesota has any interest, in the opinion of the examiner, he shall state the interest in his report, and where he reports that the State has some interest it shall be joined as a party." *National Bond & Security Co. v. Daskam* (Minn. 1903), 97 N. W. Rep. 458. "Under Rev. Laws Mass., c. 128, Sec. 31, relative to proceedings for the registration of land titles, providing that if the land borders on a river or an arm of the sea, or if it otherwise appears that the commonwealth has a claim adverse to that of the applicant, notice shall be given to the Attorney General, the commonwealth is a proper party in proceedings to register the title to land over which there is claimed to be a public landing place, and, under Section 13 of the act, it may appeal to the superior court from an adverse decision." *McQuesten v. Attorney General* (Mass. 1905), 72 N. E. Rep. 965.

or other charges, except that the grantor's certificate is not cancelled; assignments or releases or satisfactions are also noted by the registrar in the same way and incumbrances are enforced or mortgages foreclosed in all respects upon registered land the same as upon land not brought under the registration law.⁴²

If the conveyance is one in trust, or upon a condition or limitation, this is noted by the registrar and no subsequent conveyance will be noted, unless on the decree of a court, or the opinion of an examiner that the conveyance is, in furtherance of the trust, condition or limitation, a safeguard which it is claimed places *cestui que trusts* in a better position than they occupy under the ordinary systems.⁴³

§ 663. **Death of owner.—Transmission of land.**—Upon the death of the owner of land, registered under the Torrens Law, the land, or any estate or interest therein belonging to the deceased, at his death, goes to his personal representatives, in like manner as personal estate, whether the owner dies intestate or leaves a will. The land is divided in the same manner as may be provided by law for the descent of real estate, or as may be provided by will, but it is otherwise subject to the same rules of administration as if it were personal property.⁴⁴ Proof of heirship is made in the court of probate jurisdiction; the executor or administrator is ordered to make conveyances according to the respective interests of the several heirs; the decedent's certificate is cancelled, all questions concerning the division and descent of the land are speedily settled and new certificates are issued to the parties found to be entitled thereto.⁴⁵ Before distribution of undivided registered land, the administrator is required to file with the registrar a certi-

⁴² Hurd's Rev. St. Ill. Ch. 115, Secs. 63, 64, 65, 66; Sheldon Land Reg. pp. 48, 49.

⁴³ Reg. of Title (British Col.) Blue Book 1881; Prussian Legislation on Reg. of Title, Dr. Fischer, 1892; Sheldon Land Reg. p. 51.

⁴⁴ Hurd's Rev. St. Ill. Ch. 115, Sec. 70, *et sub*.

⁴⁵ Sheldon Land Reg. p. 52.

fied copy of the proof of heirship made in the court exercising probate jurisdiction and this proof is afterwards taken as conclusive evidence that the persons named in the certificate are the only heirs of the deceased owner.⁴⁶ The administrator is subject to the same law in the administration of the estate as may be provided in the administration of personal estates, in the State or county where the deceased resided; the land may be ordered sold before distribution, partitioned in kind, or other division or settlement had, as will best subserve the interests of the estate, under the orders of the court.⁴⁷

§ 664. Judgments, liens and assessments against land.— All judgments, liens, attachments and assessments against registered land, under the Torrens Law, are required to be noted on the certificate, by copies filed with the registrar and until such charges are filed or noted on the certificate, they are held not to affect the title to the land.⁴⁸

All assignees, receivers or masters in chancery, before taking possession of registered land, are required to furnish a certified copy of their authority to the registrar.⁴⁹ Tax assessments and the certificates of foreclosure of the lien, as well as *lis pendens*, judgments, decrees and sheriff's sales are all required to be noted on the certificate of title, in order to affect the land, and all such liens and charges, as well as adverse claims and proceedings, unless so noted, are held not to affect the title.⁵⁰

§ 665. Relief against arbitrary power of registrar.— Under the Torrens Law of Illinois the citizen and landowner is safeguarded against the arbitrary power of the registrar, by a provision that for a failure of the registrar or his deputy to perform any duty enjoined upon him by law, a court of equity

⁴⁶ Hurd's Rev. St. Ill. Ch. 115, Sec. 76.

⁴⁷ *Ante, idem*, Secs. 77, 78, 79.

⁴⁸ Hurd's Rev. St. Ill. Ch. 115, Sec. 84.

⁴⁹ Hurd's Rev. St. Ill. Ch. 115, Sec. 80.

⁵⁰ *Ante, idem*, Secs. 82, 83.

is authorized, by summary proceeding, to investigate and make the proper orders in the premises and on the filing of such order, or a certified copy, with the registrar, he is required to conform the certificate to the order of the court.⁵¹ This is a very important provision, which ought to be incorporated in all land registration acts, for it would prevent an abuse of power or omission of duty by an officer entrusted with important functions and answer the criticisms frequently urged against such legislation.

§ 666. *Indemnity and procedure to recover.*—Under some of the statutes providing for title registration, an indemnity fund, arising from a small per cent. of the value of the land, at the time of initial registration, and again on the entry of a new certificate, on the death of the owner, is provided for, as a protection to the owner, against the acts of the registrars or examiners or for any loss occasioned by bringing his land under the act, in cases where his land is lost to him, without his own fault or neglect.⁵²

Under the Illinois statute, if the loss results from the neglect or wrongful act of the registrar or examiner alone, the custodian of the fund is alone the proper party defendant; but if the loss is occasioned by the act of some third person he must also be joined as defendant and an effort first made to realize the loss sustained from such wrongdoer before recourse to the indemnity fund.⁵³

The time for proceedings to recover for loss sustained to a registered title, however, is limited, under the Illinois statute, and severe penalties are provided for the protection of the indemnity fund from fraudulent claims and for fraudulent acts, under the statute.⁵⁴

⁵¹ Hurd's Rev. St. Ill. Ch. 115, Sec. 93.

⁵² This is the Illinois statute, Hurd's Rev. St. Ill. Ch. 115, Secs. 99, 100.

⁵³ *Ante, idem*, Secs. 101, 102.

⁵⁴ Hurd's Rev. St. Ill. Ch. 115, Secs. 103, 104.

§ 667. **Advantages and objections to title registration.**—As the legislature, in the enactment of laws that are not prohibited by organic law, as an independent branch of Government, in theory at least, is beyond the power of courts or text-writers, it is doubtful if any material advantage can be derived from a discussion of such legislation. However, as the more scientific legislation should be encouraged than the contrary, there is perhaps some benefit to be derived from every discussion of such subjects. Unquestionably the Torrens Law is the most systematic and scientific piece of legislation for the protection of the rights of the landowner that English law has known for many generations. The system, in all its provisions, may not harmonize with American institutions or constitutions, and modifications may be necessary to meet the conditions in this country. Under our constitutions no arbitrary judicial functions could be recognized in any officer qualified to divest rights without "due process of law." It remains to be seen if the spirit of American citizenship would not rebel against compulsory registration, guaranteed, as it is, by organic law, even in the freedom of religious worship.⁵⁵ The disturbance of the settled order of

⁵⁵ The Illinois legislature, in 1905, passed a law making title registration compulsory, on the death of the owner. The constitutionality of this act has not yet been passed upon by the supreme court of the State. "The one apparent defect in American legislation on the Torrens System is the absence of some kind of provision for compulsory registration. Under acts making registration optional a long period necessarily intervenes before the system can be brought well under way. If the system is worth having at all it should be compulsory. Such is the law in England and the German Empire. Under the English act registration of land in any county can be made compulsory, by order in council, in which case no title to land in that county can pass until the buyer is registered as the proprietor of the land. Another method, however, is to require the registration of land by executors or administrators, before land can legally pass from the estate of a deceased person either by devise or descent. It is thought that in populous communities this latter provision is to be preferred for the reason that to compel registration of all land at one time would unreasonably clog the registration office and interfere with alienation. Under the

things, the length of time necessary to perfect the title, by registration, and the invasion of customs long enjoyed as vested rights, are among the objections to the adoption of the Torrens System generally. But as all reforms, when adopted, are revolutionary in their tendency, an otherwise beneficial law should not be alone condemned because it is new. If such policy were generally to prevail all progress would inevitably succumb to such argument. The advantages of the Torrens System have commended it in the States and countries that have tried it, and they are perhaps the best qualified to judge of the relative merits and demerits of the system, of which it was intended to give but a general outline in this chapter.

latter method, however, the land of a county would gradually pass from the old system to the new, with the expense borne by those upon whom the burden would be the lightest." 54 Cent. Law Jour. 296.

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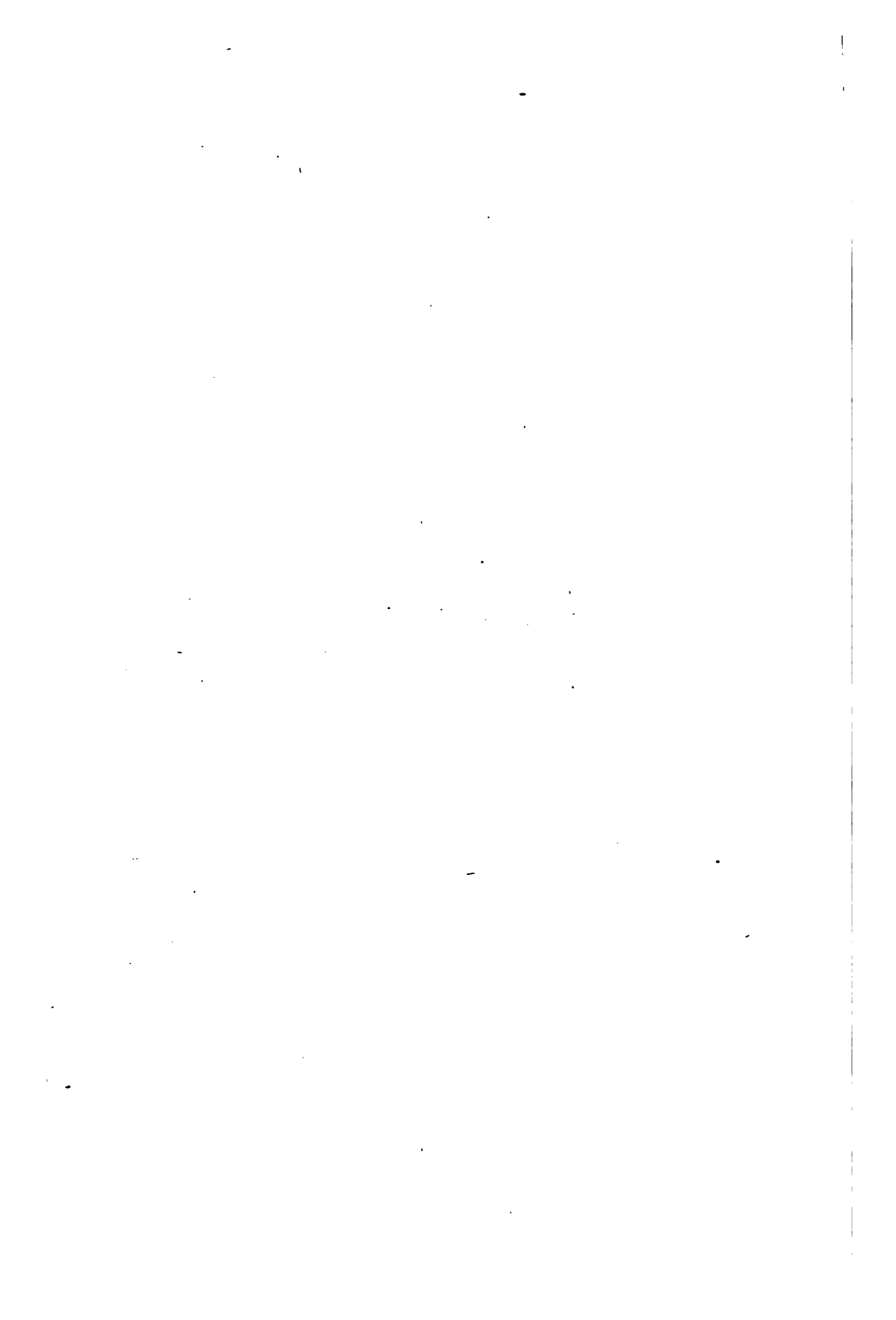
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See ESTATES AT WILL and FROM YEAR TO YEAR.







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